

**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 LAURENTIAN UNIVERSITY OF SUDBURY**

BOOK OF AUTHORITIES OF THORNELOE UNIVERSITY

**(Motion by Thorneloe University for an order that federation agreements are not to
be disclaimed or resiliated)**

April 27, 2021

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TO: SERVICE LIST

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TAB 1

Court of Queen's Bench of Alberta

Citation: Allarco Entertainment Inc. (Re), 2009 ABQB 503

Date: 20090914
Docket: 0903 09146
Registry: Edmonton

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

And in the Matter of Allarco
Entertainment Inc. and Allarco
Entertainment 2008 Inc. and
Alliance Films Inc.

**Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit**

Summary

[1] On June 16, 2009, the Allarco Entertainment companies, which operate Super Channel - a pay-per-view television channel - obtained protection from their creditors pursuant to the provisions of the *Companies' Creditors Arrangement Act*. As part of the initial, *ex parte*, order under the statute, Allarco Entertainment obtained a "pay-per-play" regime in relation to its obligations to Alliance Films Inc., a program supplier. Alliance Films now applies for a variation of the initial order: it argues that the court had no jurisdiction to grant what amounts to a major, unilateral, variation of its contracts with Allarco Entertainment. For an overall fee which was to be paid in instalments, the Alliance contracts allowed Allarco Entertainment to exhibit films and television series, including the right to exhibit through subscription video on demand, for a limited number of times over a specific time period. Alliance asserts that the contract fees are paid for the ongoing right to exhibit the films or series episodes, that there is no "pay-per-play" provision in the contracts, and that the courts should not have imposed such a variation on Alliance.

[2] Alternatively, Alliance argues that if the court does have jurisdiction to approve such contract variations, the court should not have exercised its discretion in favour of this variation because a “pay-per-play” regime constitutes a negative incentive on the debtor, Allarco Entertainment, to use the service provided by Alliance.

[3] Alliance Films Inc. brought this motion in July, 2009. The court adjourned the motion on the condition that Allarco Entertainment negotiate in good faith with Alliance. The resulting negotiations were unsuccessful. On August 17, 2009, Allarco Entertainment terminated its contracts with Alliance Films. In its amended motion, in addition to asking for a variation in relation to the “pay-per-play” term in the initial order, Alliance also now asks the court to invalidate Allarco Entertainment’s terminations.

[4] *In its initial order, even if the court did have jurisdiction to vary the Allarco Entertainment/Alliance Film contracts by establishing a different payment structure than the one set out in the contracts, it should not have done so: a post-protection service provider usually has the right to maintain its contract prices.*

[5] The CCAA states that where, under licence agreements, a contractor provides new services to a debtor who has obtained creditor protection, that service provider is entitled to “immediate payment”; this is compared to the provider who provided services prior to the granting of creditor protection, whose right to enforce payment is stayed. The CCAA does not state the basis on which compensation is to be paid for post-protection services. Allarco Entertainment argues that the basis for compensation should be “what is just and reasonable”; here, the debtor claims that a “pay-per-play” payment scheme is fair because it will get rid of instalment payments to Alliance, the payment of which will hinder Allarco Entertainment’s ability to re-organize. Alliance Films argues that, at this stage of the CCAA proceedings, the court does not have the right to make unilateral contract changes. At this stage of the proceedings, the broad wording of the CCAA, which is remedial legislation, does allow the courts to make some contracts between debtors and creditors: for example, with respect to utilities such as electricity, the court can allow the service provider to be paid not only the usual utility rate but also a security deposit: *Hydro-Québec*. Another example is the court’s decision that some contract provisions relate to past services, and cannot therefore be enforced, and that other contract provisions relate to post-protection services for which the debtor incurs an obligation of immediate payment: *Nortel*. These are examples of the limited way in which the courts have jurisdiction to vary contracts in an initial order under CCAA proceedings. It is not necessary to articulate the principle which applies to the jurisdiction of the court in relation to contracts, s. 11.3(a) of the CCAA, and initial orders, but if that were required, it may be that, in the initial order courts have only a limited jurisdiction to affect contractual rights and that contractual payment terms negotiated between debtors and creditors generally represent the payments which debtors are required to make if they use the services set out in those contracts post-protection as that scale of payment best represents both a fair and reasonable price for the services and business in the ordinary course. This principle arises from the common law’s respect for contractual obligations. Generally, contracts cannot be varied by courts: contracts represent, in effect, a law which private parties have agreed applies to them. Court can interpret or rectify, but not vary, contracts. Even courts of equity generally limited themselves to deciding

which contracts, or portions of contracts, would not be enforced by the justice system. Legislation could, of course, give to the courts the jurisdiction to vary or create contracts; however, given the clear state of the common law on this issue, explicit statutory provisions would be required to give courts a general jurisdiction to vary contracts. Such explicit authority is not given to courts in the CCAA at this stage of proceedings. The court's only authority in the situation here was to distinguish between those portions of the Alliance contracts which represent services that have already been performed, the enforcement of which is stayed, and those portions which deal with the provision of ongoing services, the payment for which Allarco Entertainment was required to make according to the contract if it wished to continue using Alliance's services.

[6] *Allarco Entertainment is, however, entitled to terminate its contracts with Alliance Films.*

[7] After the issuance of the initial order, Allarco Entertainment negotiated with Alliance in good faith. The granting of protection from creditors is designed to promote such negotiations. Alliance is not required to continue to provide services to Allarco Entertainment post-protection; on the other hand, Allarco Entertainment is entitled to terminate contracts. The court does have a general oversight jurisdiction to determine if the termination of a contract by a debtor is just and reasonable. On this motion, Allarco Entertainment has satisfied that test: among other important aspects of the statutory test, the evidence establishes that, during the negotiations, Alliance Films was attempting to obtain a security status for its contracts which did not exist in its original contracts. Granting new security to Alliance post-protection would have given Alliance an advantage over other Allarco Entertainment creditors. Allarco Entertainment was in fact prevented from acceding to these attempts by Alliance Films.

Cases and authority cited

[8] **By Alliance Film: *Thomson Knitting Inc., Re*** (1925), 1925 CarswellOnt 5 (Ont. S.C. in Bankruptcy, App. Div.) citing *William Hamilton Mfg. Co. v. Hamilton Steel and Iron Co.* (1911), 23 O.L.R. 270; ***Doman Industries Ltd., Re*** (2003), 2003 CarswellBC 538 (B.C.S.C.); ***Skeena Cellulose Inc., Re*** (2003), 2003 CarswellBC 1399 (B.C.C.A.); ***Doman Industries Ltd., Re***, 2004 CarswellBC 1545 (B.C.C.A. In Chambers); ***T. Eaton Co., Re*** (1999), 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) citing ***Keddy Motor Inns Ltd., Re*** (1992), 13 C.B.R. (3d) 245 (N.S.C.A.); ***Doman Industries Ltd., Re*** 2004 CarswellBC 1262 (B.C.S.C.); ***Companies Creditors' Arrangement Act***, R.S.C. 1985, c. C-36, as amended, s. 11.3; ***Stelco Inc., (Re)*** 2005 CarswellOnt 1537 (C.A.); ***In Re Enron Corp.*** 279 B.R. 695 (N.Y. Bankr. Gonzalez 2002); ***In Re Kmart Corporation*** 293 B.R. 905; ***In Re Thatcher Glass Corporation*** 59 B.R. 797 at 6 (Banker D. Conn. 1986).

[9] **By the Allarco Entertainment corporations: *Lehndorff General Partner Ltd., Re***, 9 B.L.R. (2d) 275 (Ont. Ct. J. (Gen. Div.)); ***T. Eaton Co., Re***, (1997) 46 C.B.R. (3d) 293 (Ont. Ct. J. (Gen. Div.)); ***Nortel Networks Corp., Re***, 2009 WL 1763447 (Ont. Sup. Ct.); ***In Re Kmart Corporation, et al., Debtors***, 293 B.R. 905 (Ill. Bankr. Sonderby 2003); ***In Re Enron Corp. et al. Debtors***, 279 B.R. 695 (N.Y. Bankr. Gonzalez 2002); ***Skeena Cellulose Inc., Re***, (2002), 43

C.B.R. (4th) 187 (B.C.S.C.); *Blue Range Resource Corp., Re*, (2000), 192 D.R.R. (4th) 281 (Alta. C.A.); *T. Eaton Co., Re*, (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J.); *Doman Industries Ltd., Re* (2004), 29 B.C.L.R. (4th) 178 (S.C.); *Blue Range Resource Corp., Re*, (1999), 245 A.R. 154 (Q.B.); *New Skeena Forest Products Inc., Re*, 2005 BCCA 192; *Woodward's Ltd., Re*, (1993), 100 D.L.R. (4th) 133 (B.C.S.C.); *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Ct. J. Gen. Div.); *Air Canada (Re)* 66 O.R. (3d) 257, [2003] O.J. No. 2976 (C.A.); *Sagecrest Dixon Inc. (Re)* [2009] O.J. No. 1127 (Comm.List); *Air Canada (Re)* [2003] O.J. No. 6239 (Comm.List).

[10] By the court: *Smith Brothers Contracting Ltd. (Re)* [1998] B.C.J. No. 728 (B.C. Sup. Ct.); *West Bay SonShip Yachts v Esau* 2009 BCCA 31, [2009] B.C.J. No. 120; *Smoky River Coal (Re)* 2001 ABCA 209, [2001] A.J. No. 1006; *Hydro-Québec c Fonderie Poitras ltée* 2009 QCCA 1416, [2009 J.Q. no 7438; *Les Boutiques San Francisco Incorporées* [2004] Q.J. No. 2886.

[11] Appendix A: The payment scheme in the initial order

1. Background

[12] The following information is uncontested, or if contested, the court is able to come to a conclusion on the existence of a fact without ordering a trial of that issue.

a) Factual

[13] The Allarco Entertainment companies operate Super Channel, an English language general interest pay television channel, one of only 3 pay-per-view television channels in Canada. The business of the companies is licensed and regulated by the Canadian Radio-Television and Telecommunications Commission, CRTC. One of the licensing requirements is the delivery of a certain proportion of Canadian content programming, which requirement ensures greater value for programming packages which satisfy that requirement.

[14] The Allarco Entertainment companies rely on broadcasting distribution undertakings, BDUs, such as Rogers, Shaw and Bell TV, to sell Super Channel as a programming option. By law, the BDUs are obligated to treat all program networks equally, and not to unfairly encourage their customers to purchase the services of one program network in preference to others. Allarco Entertainment has an ongoing complaint about one of the BDUs, alleging that that distributor has not dealt fairly with Super Channel; this complaint is now the subject of a lawsuit, which is being case managed in Ontario. In a parallel mode, Allarco Entertainment has also laid its complaints against that BDU with the CRTC; there has not yet been a resolution of those complaints by the Commission.

[15] When they applied for an initial order under the CCAA, the Allarco Entertainment companies had approximately 425 outstanding program license agreements, PLAs, with various entertainment program suppliers. Although the Allarco Entertainment companies had their own form of PLA which it used whenever possible, some of the more well known program licensors

required the Allarco Entertainment companies to enter into the licensors' standard form of PLA. Approximately \$64,000,000.00 of programming has been delivered to the Allarco Entertainment companies, for which payment had not been made when those companies applied for protection from their creditors.

[16] Allarco Entertainment's PLAs with Twentieth Century Fox are the most significant component of the Super Channel programming cost.

[17] Alberta Treasury Branch is the first secured creditor of the Allarco Entertainment companies; it holds general security agreements containing a charge over Allarco Entertainment's present and after acquired personal property. The ATB facility is currently fully drawn. ATB has agreed, on certain conditions, to reestablish the MasterCard facility for Allarco Entertainment. ATB has also indicated to Allarco Entertainment that it is prepared, on certain conditions, to forbear in pursuing recovery under the guarantee of the ATB facility.

[18] Alliance has 5 PLAs with Allarco Entertainment. The PLAs typically give to Allarco Entertainment the right to play the programs offered in a package on an exclusive basis. Moreover, the first time an individual program is broadcast, Allarco Entertainment can advertise the play as a premiere, which has added value over and above the rights of exclusive broadcast.

[19] When Alliance first brought this motion, it was concerned mainly with two of its program licence agreements with Allarco Entertainment, the January 15, 2008 PLA - Super Channel Q1 08 package - and the February 25th 2008 PLA - Super Channel Q2 08 package. Those agreements are similarly structured. However, there are at least two important terms which are found in the latter agreement which are not found in the former.

[20] The first of these terms is:

Security Interest

Licensee shall grant Licensor a security interest in respect of Licensee's payment obligations and Licensee shall execute and deliver documentation necessary to effect the foregoing.

Although Q2 2008 was agreed to and accepted by the parties on March 31st, 2008, by June 16, 2009, no security documents had been prepared by either Allarco Entertainment or Alliance Films. Alliance characterizes this contractual term as an equitable charge which has all the validity of a legal charge.

[21] The second of the terms is:

Termination Rights

In the event of default by Licensee (including failure to pay amounts when due and/or if assignment for the benefit of creditors, seeks relief under any bankruptcy law or similar

law for the protection of debtors, or allows a petition of bankruptcy to be filed against it, or a receiver or trustee to be appointed for substantially all of its assets that is not removed with 30 days), Licensor shall be entitled to terminate or suspend Licensee's rights with respect to programming (i) licensed hereunder; and/or (ii) licensed to Licensee by Licensor pursuant to any other agreement. In the event Licensor decides to terminate Licensee's rights to programming, all rights will automatically revert to Licensor, free and clear of any and all encumbrances and Licensor shall be entitled to immediate possession of all related materials.

In its PLAs which contained termination rights, Alliance did not terminate its contracts with Allarco Entertainment once it knew that Allarco Entertainment had obtained an initial order under the CCAA.

[22] Alliance has 3 other PLAs with Allarco Entertainment. Alliance did not focus on these 3 PLAs because no payments are due at this time in relation to those agreements. Of those additional agreements: PLA 2007/2008 Allarco Package does not contain any security or termination clauses; PLA Super Channel Q4- 08 package does not contain a security clause but does contain a termination clause; and, PLA Super Channel Q3-08 Package contains both a security clause and a termination clause.

[23] In their applications before the Court, Allarco Entertainment has provided the court with this broad stroke explanation of what its Plan of Arrangement might entail:

- sale to a third party investor of a portion or all of the equity in the business, having in mind the value of the existing CRTC license;
- ongoing active involvement in the business by entities related to Charles R. Allard, the sole director of Allarco Entertainment Inc.;
- significant reduction in both the cost of programming and general overhead expense would allow a viable business at a much lower level of subscriber involvement;
- success in the claim against the BDU would increase the number of subscribers;
- injection of funding into the business either by way of equity or further loans.

[24] The Allarco Entertainment companies proposed, and in the initial order the court approved, PricewaterhouseCoopers Inc. as the Monitor under these proceedings. The Monitor has not, of course, taken a position on this application; however, the Monitor reports that, to date, it has not uncovered any abusive conduct by the Allarco Entertainment companies.

[25] Paragraph 16 of the initial order provided that payment under the PLAs between Allarco Entertainment and various program licensors was to be made in accordance with the terms set out in para. 43 of the affidavit of the President and Chief Operating Officer of the Allarco Entertainment companies. Those terms are set out in appendix A hereto.

[26] Since the granting of the initial order, Allarco Entertainment has continued to advertise access to Alliance programming, including subscription on demand, SVOD, rights.

[27] The initial order has been extended by court order to September 30, 2009.

[28] There is a dispute between the parties about the proportion of the contract payments which Alliance Films has received, and would receive, since the protection order. That issue will be discussed further in relation to the termination by Allarco Entertainment of the Alliance contracts.

[29] There is a dispute between the parties concerning the content of the negotiations which preceded the termination by Allarco Entertainment of the Alliance contracts. This dispute will be referred to in the discussion of the termination issue hereunder.

[30] As of August 17, 2009, Allarco Entertainment repudiated its contracts with Alliance and noted, "Any damages suffered by Alliance as a result of such repudiation will be dealt with in the claims process in the CCAA proceedings".

[31] Although the PLA providers set out in the Appearances section hereunder have been given notice of this application, only MGM has provided evidence and submissions on the motion, although many of the other parties attended the hearing by telephone. MGM is owed in excess of \$1,400,000.00 in outstanding claims for licensing fees not paid to it prior to the date of the initial order in these proceedings. MGM would have expected payments in excess of \$2,000,000.00 between the date of the initial order and February 2010 in the ordinary course. MGM will continue to provide Allarco with new films, at a discounted price, while MGM defers certain other payments for films which have already been delivered to Allarco. MGM is of the view that the continuation of the CCAA process is in the best interest of MGM and likely in the best interest of many other programming suppliers in these proceedings.

b) Legislative

[32] Section 11 of the CCAA reads:

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.

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

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

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
 - (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
 - (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
- (4) 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) 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.

[33] In 1997, the following amendment was made to s. 11 of the BCCA:

- 11.3 No order made under section 11 shall have the effect of
- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
 - (b) requiring the further advance of money or credit.

(Emphasis added)

2. At this stage of the CCAA proceedings, does the court have the jurisdiction to approve unilateral contract changes proposed by Allarco Entertainment to Alliance Film contracts?

[34] The short answer to this question is, No.

[35] As a prelude to the discussion of the specific issue which is before the court, the court observes that the conclusion reached by Bauman J. in *Smith Brothers*, a leading decision on the interpretation of s. 11.3 of the CCAA, to the effect that it is the use (emphasis in the original at

para. 19) of “leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a)” also apply here. The implications of that finding are twofold: the Alliance contracts are “true” licenses within the meaning of **Smith Brothers** - which means on the one hand that they are not security documents - and, Alliance cannot be forced to provide the portions of those contracts which relate to the provision of services post-protection without an immediate claim for those services.

[36] The nature of the Alliance contracts is that they provide a service - the right to advertise and broadcast the availability of a package of programming - rather than the right to make a single broadcast. The advertising by Allarco Entertainment of the availability of the Alliance Films packages, including SVOB rights, constitutes “use” of the Alliance Films licensed property.

[37] Allarco argues that s. 11.3 (a) of the CCAA which entitles a service provider to require immediate payment for services provided after the initial order does not indicate the payment basis on which those services will be provided. Allarco Entertainment suggests that this gap in the legislation is one which the court has the jurisdiction to fill and that the test for determining payment should be what is a just and equitable basis for compensation. Alliance argues that there is no gap, or that if there is a gap, the terms of the contract relating to payment should be accepted as being the proper basis for the provision of post-protection services.

[38] To provide guidance in filling the gap, Allarco Entertainment proposes American jurisprudence pursuant to s. 503(b) of the *Bankruptcy Code* which allows a court to give priority treatment to “administrative expenses”. However, in order to do so, the court must conclude not only that the debt arises out of a transaction with the debtor in possession, but also that the payment of the debt is beneficial to the operation of the debtor’s business. Allarco notes that the concept of “beneficial” is narrowly interpreted, as is to be expected in a regime where those administrative expenses receive priority. For example, in **Kmart Corporation**, the bankruptcy court asserted that “post-petition performance alone does not automatically translate into a benefit to the estate, even if there was inducement on the part of the debtor”; the same principle was also applied in **Enron**.

[39] I agree with Allarco Entertainment that there is a gap in the CCAA relating to the payment for post-protection services.

[40] However, with respect, I disagree with Allarco Entertainment's proposed use of American jurisprudence. As the B.C. Court of Appeal emphasizes in **West Bay SonShip**, although similar policy objectives inform Canadian and American insolvency legislation, and while certain American decisions might even be persuasive in certain Canadian insolvency situations, in each specific potential use of American jurisprudence care must be exercised to ensure that, in the particular case, both the American legislative scheme is similar to that in Canada and, in the absence of expert evidence on the state of American law, that the American reasoning in a particular case is not conflated with the state of American jurisprudence on the issue.

[41] For example, here the Alliance Films PLAs are, in Canadian or Albertan parlance, executory contracts. However, American authorities are not helpful on the treatment of "executory contracts" in the CCAA partly because the specialized interpretation of that term in American bankruptcy law is different from the interpretation of that term in Alberta and perhaps in Canada:

31 In "A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals - Joint Task Force on Business Insolvency Law Reform - March 15, 2002", the authors cited the following meanings for "executory contract":

What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:

a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.
(Countryman, "Executory Contracts in Bankruptcy" (1974) 57 Minnesota Law Review 439 (Part 1), at 460).

[42] More pertinently in this particular case, while there is in the *American Bankruptcy Code* a priority for administrative expenses which include "the actual, necessary costs and expenses of preserving the estate", there is no such limitation in s. 11.3 of the CCAA. Here, all post-protection service providers are entitled to claim immediate payment for their services. Therefore, the American jurisprudence is not, in this particular case, helpful.

[43] In any event, however, no decision has been brought to my attention in which an American court has, other than in a utility situation which will be discussed later in the context of Canadian case law, itself calculated a price other than the contract price for the provision of post-protection services. Indeed, the weight of American jurisprudence on the issue appears to be that the contract price is assumed to be a reasonable price unless the debtor can show that the contract price is clearly unreasonable.

[44] In the circumstances here, rather than to rely on American jurisprudence for guidance, it is more appropriate to rely on Canadian law and on first principles. As has been noted in much of the jurisprudence which interprets the CCAA, there is jurisdiction in the statute for a court to work out arrangements that will maximize benefits to all affected parties. As our Court of Appeal put it in *Smoky River Coal, (Re)*:

16 CCAA orders become the roadmap for the proceedings and the litigation which may follow. Orders must therefore be drafted with clarity and precision. The purpose of

the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The CCAA is remedial legislation. As was stated in *Re Lehndorff General Partner Ltd.* (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div):

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.

(Emphasis added)

[45] The court's jurisdiction is not, however, unlimited. One limiting feature is the timing of the court's intervention. There is no doubt that, at the stage of the approval or failure of a plan, a court can impose terms on an unwilling creditor. We are not, however, at that stage.

[46] At this stage, that is the stage of the initial order, whatever services are provided post-protection are offered by service providers who are entitled to be paid for those services. Generally, two payment regimes will be adopted. One is that ongoing service providers will accept, at least until the presentation of a plan, some new, negotiated, plan. Obviously if the parties to a contract agree to a variation of the terms of that contract, that variation governs. However, a service provider is not required to provide post-protection services without the right to claim immediate payment. If a service provider will not agree to modify its contractual payment terms in order to provide post-protection services, then the debtor must either terminate the contract or pay the contractual amount. In reaching this conclusion, I rely on the fact that, at the stage of the initial order, it would be inappropriate for a court to attempt to draw up a contract for the parties. What the parties have negotiated in a contract should generally be presumed to be a fair and reasonable price for the services provided. Not only are courts not business experts, but the cost of attempting to bring the court up to speed on the reasons that a creditor and a debtor each have for advancing a payment proposal would exhaust the financial capacity of an already insolvent debtor. At the stage of the presentation of a plan, the situation is, of course, different: at that stage the court has much more information on which to rely, including the business acumen of all other creditors.

[47] Two exceptions to the general rule that contract terms govern have been identified in the jurisprudence. First, there are utility contracts: see *Hydro-Québec*. Even though the original contract for service did not contain any form of security payment, a court approved a security deposit as a term of post-protection provision of services. The provision of utilities is, however, a unique form of contract. On the one hand, utility contracts are contracts of adhesion whose payment terms are typically regulated by government or government-established commissions, and, on the other, the debtor does not typically have any choice in service providers. In those circumstances, it is appropriate for a court to set the terms of payment for post-protection services since a utility provider should not be required to provide post-protection services which require the advance of further credit: see s. 11.3(b). It appears that American jurisprudence takes

a similar view with respect to utilities: see *Thatcher Glass*. The crucial nature of utility services requires the intervention of the court where the parties cannot agree on a fee for post-protection services; in other circumstances, a service provider can protect itself by refusing to provide services. These principles are usefully addressed by the Court of Appeal in *Hydro-Québec*:

80 L'alinéa a) de l'article 11.3 de la LACC établit un principe clair : pendant la période de suspension, le fournisseur a droit d'être payé pour les services qu'il rend au fur et à mesure de leur utilisation.

81 Voici d'ailleurs les commentaires du professeur Richard H. McLaren au sujet de cet article:

Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(a), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(a) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.¹⁶

82 Ce principe connaît cependant des limites pratiques. Il arrive parfois que la réalité s'oppose à ce que le fournisseur soit payé immédiatement pour les services qu'il fournit à une compagnie débitrice. La fourniture d'électricité en est un exemple patent : il s'agit d'un service continu qu'il est impossible de facturer au fur et à mesure de la consommation.

83 En pareilles circonstances, il est juste et équitable pour le fournisseur de services de demander des garanties de paiement. Commentant la décision *Re Smoky River Coal Ltd*¹⁷, les auteurs Houlden, Morawetz et Sarra déclarent:

Under its inherent powers, the court can create a security for creditors who supply goods and services to the debtor after the filing of a CCAA petition and can provide for the priority and ranking of such a security interest with respect to other security holders. If the plan under the CCAA fails, the court can determine who are entitled to share in the proceeds of the security interest.¹⁸

...

87 Au sujet du droit applicable, le juge Rolland s'exprime en ces termes:

[13] Il découle de ce qui précède qu'un fournisseur ne peut exiger d'être payé d'avance pour un service à fournir.

[14] Ainsi, un créancier peut exiger d'être payé immédiatement lors de la livraison, mais pas de recevoir un paiement d'avance pour des services à fournir.

[15] La situation est relativement simple lorsqu'il s'agit d'un bien individualisé, vendu et livré.

[16] Cela peut être plus compliqué dans les cas d'un approvisionnement continu d'un service comme l'électricité, le téléphone ou le gaz.

[17] Exiger de la débitrice qu'elle paie un mois d'avance comme le demande Gaz Métro, alors qu'elle entend fermer plus de 30 locaux au cours des prochains jours ou semaines, a pour effet de créer un fardeau trop onéreux pour la débitrice.

[18] La LACC ne fait pas exception quant aux créanciers qu'il s'agisse de fournisseur d'un service continu par opposition à un fournisseur de biens.

[19] Le tribunal a discrétion pour établir une procédure permettant au fournisseur de ne pas être préféré ou pénalisé par rapport aux autres créanciers.
(je souligne)

[48] In that particular case, the court concluded that a \$42,000.00 guarantee was reasonable in the circumstances.

[49] The second exception from the obligation to pay the contract price for post-protection service, an exception which constitutes a lesser intrusion on the freedom of contract than the outright establishment of new payment terms, is the selection by a court from amongst the provisions of one contract of certain services for which the debtor must pay the contract price while other provisions are identified as ones for which the debtor is not immediately required to pay: **Nortel**. In that case, the contract - a collective agreement - included both payments to persons who were no longer providing service to the debtor and payments to persons who were providing post-protection service to the debtor. The union advanced two arguments in support of its claim that all contract payments should be made post-protection. The first was that the services that had been provided in the past were part of the consideration for services that were being provided post-protection. The second was that, because of a statutory requirement, the union did not have the freedom which most service providers have, to refuse to provide ongoing service to a debtor which has received protection from its creditors. (On this latter point, there is a certain analogy between the union - which could not, for legislative reasons, withdraw its services despite the wording of s. 11.3(a) - and Alliance, which cannot withdraw the services which it provided in three contracts because those contracts grant licences to Allarco Entertainment without termination rights arising on insolvency.) The **Nortel** court rejected both arguments. Although the court decided which portions of the contract had to be paid, it did not purport to vary the contractual basis for payment; it merely decided which portions of the contract were eligible for payment post-protection.

[50] It appears that a similar approach was taken in **Les Boutiques San Francisco**: the debtor could either decide to terminate the contract for display shelves, or pay the contract price for those units.

[51] There may be other exceptions to the general rule but I have not been provided with any Canadian case law which has identified any such exceptions.

[52] The two exceptions to the rule that post-protection services are to be paid according to the contract price reinforce the generality of the rule. Generally, contracts cannot be varied by

courts: they can be interpreted or rectified but not varied. Even courts of equity limited themselves to remedies which recognized the basic authority of contracts: a court of equity might, for example, require a contracting party to render proper accounts even though that was not a term of the contract if the rendering of accounts was necessary to enforce the contract. Similarly, a court of equity might grant relief from the consequences of certain contracts - such as contracts that were unconscionable. In other cases, a court might decide that, for public policy reasons, certain contracts, such as gambling contracts, would not be enforced by the justice system.

[53] Legislation could, of course, give to the courts a broad jurisdiction to create or vary contracts or to over-ride them. An example of the latter is the *Divorce Act* which provides that a court should taken into account any contract between the parties in relation, for example, to spousal support, but that the court is not limited in making a spousal support order by the terms of the contract between the parties.

[54] Given the respect for contracts in the common law, explicit statutory provisions are required to give courts the jurisdiction to impose unilateral variations in contracts. Such explicit authority is not given to courts in the CCAA at the initial order stage.

[55] Moreover, as was noted at the outset, it is important to correctly identify the nature of the Alliance PLAs: these are not pay-per-play contracts, but rather contracts which allow Allarco Entertainment to advertise the availability of Alliance product without in fact broadcasting Alliance product. The effect of imposing a pay-per-play payment term on Alliance at this stage would be to impose upon Alliance the obligation to provide a continuing service - allowing Allarco Entertainment to continue to advertise the availability of Alliance programming - without providing payment for that service. Indeed, as Alliance has emphasized, Allarco Entertainment's web-site continued, post-protection, to advertise Alliance programming. It is not necessary on this application to determine whether forcing Alliance to continue to provide its services to Allarco Entertainment can also be characterized as requiring Alliance to make a further advance of credit to Allarco.

[56] For the reasons set out above, having now heard argument from the party affected, this court varies para. 16 of its initial, *ex parte*, order by removing the reference to para. 43(b) of the Knox affidavit and replacing it with a reference to the contractual payments due to Alliance.

3. Should the court invalidate Allarco Entertainment's termination of the Alliance Films contracts?

[57] The short answer to this question is, No.

[58] Alliance correctly states that the statutory right of a debtor which has obtained protection from its creditors to terminate contracts is subject to judicial oversight. Alliance argues that it is not reasonable for Allarco Entertainment to terminate its contracts because:

- Allarco was able to obtain a "pay-per-play" clause and they should therefore be required to honour the contracts;

- the exchanges between Allarco and itself establish that Allarco was intent on obtaining a “pay-per-play” provision to give itself additional, inappropriate, power in its negotiations with Alliance;
- it is not appropriate for Allarco Entertainment to defend its actions by starting from the proposition that it has only so much cash available; rather, Allarco should be required to raise additional funds;
- Allarco Entertainment did not negotiate in good faith.

[59] For the purpose of this application, the court sets the following test which Allarco Entertainment must meet for termination of its contracts with Alliance Films: the termination must be fair, appropriate, reasonable, and must have been issued after good faith negotiations. I have concluded that Allarco Entertainment meets that test.

[60] In coming to that conclusion, the most important of the reasons considered by the court is the evidence that Alliance attempted, during the negotiations, to become a secured creditor, an effort that would have given Alliance an unfair advantage over other Allarco Entertainment creditors. The fact that Alliance was negotiating for such security benefits is acknowledged by Alliance; it takes the position, however, that this was not a “new” feature since some of its contracts contained provision for granting security. With respect, this is not defensible. Each contract must be enforced on its own; three of the Alliance contracts did not contain a security clause. With respect to those agreements, the addition of a security clause would be “new”. Moreover, even with respect to those two contracts which did contain a security clause, no security documents had been executed.

[61] In addition to the grave concern about Alliance attempting to improve its position relative to other debtors, there are other factors which the court weighs in Allarco Entertainment’s favour in concluding that it should not invalidate Allarco’s termination of Alliance contracts:

- while it is true that, during the negotiations, Allarco Entertainment was the beneficiary of a “pay-per-play” regime and had thus obtained what it wanted relative to Alliance as a creditor, Allarco Entertainment was also aware that Alliance had attacked the legitimacy of that provision. While on this motion Allarco valiantly argued in favour of the “pay-per-play” regime relative to Alliance, it is not unreasonable to assume that Allarco also came to an informed decision that it was at least vulnerable on that issue;
- there was a reasonable business basis for Allarco Entertainment’s original application for a “pay-for-play” regime relative to Alliance. It appears to me that the main business argument in Allarco’s failure is that substantial ongoing payments to Alliance throughout the year as opposed to what the evidence describes as the overwhelming position in other contracts which provide for payments at the beginning and at the end of the licence period, or at the beginning, after 12 months and at the end of the licence period seriously hamper Allarco’s attempts to establish a plan which would allow them to go forward rather than to fall into bankruptcy;
- there is a dispute between Allarco Entertainment and Alliance about the cost to Alliance of the “pay-per-play” provision: Allarco states that it had paid more than 5 cents on the dollar of contractual obligations. Alliance states that termination of its contracts will place it in a worse

position that the PLA providers with whom Allarco has been able to reach an accommodation. While it may be true that termination will be less advantageous to Alliance than going forward on some accommodation basis, part of the point of the CCAA is to allow for the termination of some contracts so long as the test for termination is met;

- similarly, it is a reasonable business concern of Allarco's to have fresh programming to offer potential subscribers and that such programming not consist solely of leftovers from other potential licensees;

- it would not make sense to impose upon an insolvent company the obligation to borrow more money in order to meet all its debts before it terminated certain of its contracts. Such an inflexible rule would make an effective reorganization impossible. On the evidence on this motion, at this stage of the CCAA proceedings, Allarco Entertainment has made reasonable arrangements with its banker and guarantor;

- there is no evidence that Allarco negotiated in bad faith. Rather, the evidence suggests that Allarco was attempting to make reasonable accommodations with Alliance. For example, it is not reasonable that Allarco should be required to take only that programming which has been refused by all other potential licensees. Nor is it the case that Alliance is irrevocably linked to Allarco: Alliance has other markets to which it can offer its programming;

- finally, the opinion of MGM - a creditor which is roughly in the same position relative to Allarco Entertainment as is Alliance - that there have been significant changes in the business of all affected companies which legitimizes the writing down of entertainment packages for the purposes of the development of a CCAA plan supports the general approach which Allarco Entertainment has taken in the negotiations.

[62] Although Alliance Film's notice of motion requests an order invalidating Allarco Entertainment's termination of the Alliance Films contract, at the hearing Alliance suggested that what it really wanted was a determination of the variation agreement first. If that issue were resolved in its favour, Alliance then hoped that further negotiations with Allarco Entertainment would be possible. Alliance suggested that even if Allarco Entertainment were to maintain its termination of the contracts, then Alliance may require some additional evidence to support its position that the termination should not be approved. With respect, I cannot adopt that approach. The determination about whether a termination at this stage meets the required test should be made as close as possible to the date of termination in order to ensure that the court has the same overall perspective as did the parties as of the date of termination.

4. Costs

[63] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard on the 2nd, 3rd, 8th and 9th days of September, 2009.

Dated at the City of Edmonton, Alberta this 14th day of September, 2009.

J.B. Veit
J.C.Q.B.A.

Appearances:

Frank R. Dearlove, Bennett Jones LLP
for the Applicant, Alliance Films Inc.

Charles P. Russell, Q.C., McLennan Ross LLP
for Allarco Entertainment Inc. and Allarco Entertainment 2008 Inc.

Richard T.G. Reeson, Q.C., Miller Thomson LLP
for Alberta Treasury Branches

Michael J. McCabe, Q.C., Reynolds Mirth Richards & Farmer LLP
for Pricewaterhouse Coopers Inc.

David Ullmann, Minden Gross LLP
for MGM Television of Canada, a division of Metro-Goldwyn-Mayer Studios, Inc.

Marc-Andre Morin, McMillan
for Twentieth Century Fox/Incendo Television Distribution Inc. and
Incendo Media Inc.

Harry Fogul, Aird & Berlis LLP
for Twentieth Century Fox/Incendo Television Distribution Inc.

Eric Vallieres, McMillan
for TVA Films, a division of TVA Group Inc.

Patrick Roche, Heenan Blaikie
for Maple Pictures Corp.

Roger P. Simard, Fraser Milner Casgrain LLP
for National Bank of Canada

Andre Bennett, President & CEO, Cinema Esperanza International Inc.
for Cinema Esperanza International Inc.

Danny M. Nunes, ThorntonGroutFinnigan LLP
for NBC Universal

Bertrand Langlois, CA, VP Finance, Christal Films Distributions Inc.
for Christal Films Distributions Inc.

Alan H. Brown, Boughton Law Corporation
for Starz Media LLC

Appendix A

The following are the portions of para. 43 of Mr. Knox's first affidavit which are incorporated by reference in para. 16 of the initial court order:

- (a) For those existing Program License Agreements in which the fee for delivery of a single broadcast, such as a prize fight, must be paid upon delivery of that Program, the cash flow contemplates such payment as each Program is delivered;
- (b) In the case of those existing Program License Agreements with fixed terms and with a limited number of Exhibition Days, and where the license window is already open, the Cash Flow Projections have been prepared based upon a formula where the overall cost of the Contract is divided by the total number of Exhibition Days permitted, with that Exhibition Day rate being applied for the number of Exhibition Days the Business actually runs that program during the Cash Flow Projection period;
- (c) For existing Program Licensing Agreements which provide for monthly payments, those payments falling due during the CCAA proceedings will be paid;
- (d) As a license window opens during the CCAA Proceedings on a Licensing Agreement now in existence, license fees shall be paid in accordance with that Licensing Agreement; and
- (e) For Programming which is obtained by the Business during the CCAA Proceedings under Licensing Agreements not now in existence, the licensing fees shall be paid in accordance with the terms of each such Program License Agreement.

(Emphasis added)

The only program licence agreements which come within the terms set out in para. (b) above are the Alliance Films Inc. PLAs.

TAB 2



Dylex Ltd. (Re)

Ontario Judgments

Ontario Court of Justice (General Division)

(Commercial List)

Farley J.

Heard: February 16, 1995.

Judgment: February 16, 1995.

Court File B4/95

[1995] O.J. No. 595 | 31 C.B.R. (3d) 106 | 54 A.C.W.S. (3d) 504 | 1995 CanLII 7370

IN THE MATTER OF an application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a compromise or arrangement with respect to Dylex Limited and all other companies set out in Schedule "A" hereto and a recognition of share capital of Dylex Limited under the Canada Business Corporations Act, R.S.C. 1985, c. C-44 Application under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36

(9 pp.)

Case Summary

Creditors and debtors — Debtors' relief legislation — Companies' creditors arrangement legislation — Store closures, staying of.

This was a motion brought by the respondents to determine the right of the applicants to proceed with their intended closure of stores in the respondents' malls. The applicant was the owner of three stores in the malls. It sought to close the stores in order to save money. It was under the strict scrutiny of its bank as a result of a default on a loan. The respondent argued that the closures would affect its shopping centres. An order had been made under the Companies Creditors Arrangement Act permitting landlords affected by store closure to apply to the court to determine the right of the applicant to proceed with any intended closures. The respondents brought the within motion pursuant to that order.

HELD: The motion was dismissed.

In balancing the rights of the parties, the court determined that the nod was to be given to the applicants. The respondents were in sound financial shape generally although the two malls were perhaps less than robust. D, however, was in a far more precarious position. As well, an order requiring the applicant to keep certain of the stores open would result in supplying difficulties due to the closure of all of its other stores.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as am. S.C. 1992, c. 1 and c. 27), ss. 65.2, 66(2).
Canada Business Corporations Act, R.S.C. 1985, c. C-44.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Counsel

Dylex Ltd. (Re)

R.J. Arcand, for Cambridge Western Leaseholds Limited, Bramalea Centres Limited, Burnac Corporation, Cambridge Leaseholds Limited, Laing Property Corporation, Markborough Properties Inc., Oxford Development Group Inc., and O & Y Properties Inc. Charles F. Scott and Jennifer Aitken, for the Dylex Group, applicants. T. O'Sullivan, for the Royal Bank of Canada.

FARLEY J.

1 Cambridge Western Leaseholds Limited ("Cambridge") moved for a determination of the right of the applicants ("Dylex") to proceed with the intended closure of stores at Mill Woods Town Centre, Edmonton and at Lethbridge Centre, Lethbridge. It was indicated at the hearing that the request was to keep the stores open until the Companies Creditors Arrangement Act ("CCAA") Plan is voted on (i.e. for a couple of months). Cambridge is the owner-operator of the two shopping centres, both of which are acknowledged to have some operating difficulties re vacancies. Cambridge's position is that Dylex's announced closure of a Tip Top Tailor store on February 18th and a Bi-Way Store on April 8th (both Mill Wood) and a Tip Top tailor store on February 21st (Lethbridge) would materially affect each shopping centre. These three closures are part of a cross Canada program of 200 closures including a previous Thrifty's closure on February 26th in Lethbridge.

2 Allow me to observe that Dylex is under the tight scrutiny of the Royal Bank of Canada ("Royal") which is the special operating lender to Dylex whose loan has, as an event of default, the failure to meet projected cash flows. Dylex has multiple stores in many of the shopping centres across Canada and in this respect has been a tenant of some magnitude. Cambridge is part of the Cambridge Leaseholds Limited group, which at the present time, has indicated an interest in making an investment in the Cadillac Fairview group of some hundreds of millions of dollars; thus it appears that Cambridge is financially secure at this time. However Dylex has demonstrated that it faces severe financial challenges.

3 In a January 23rd letter following the CCAA order (which allowed store closures) given by Houlden J.A. on January 11th, Dylex advised various landlords (including Cambridge):

Where any intended store closures or closure in a mall or project has a material effect on the viability of the mall or project, in the view of the applicable landlord, such applicable landlord shall have the right to apply to the court for a determination of the right of [Dylex] to proceed with the intended closure or closures.

Cambridge has availed itself of that opportunity. In essence it is an amplification of or a specific comeback clause. The CCAA order provided as well that landlords' claims for closures would be determined and form part of the claims compromised in the CCAA Plan.

4 The Mill Wood Centre is 442,345 sq. ft. of which 193,701 sq. ft. is represented by 109 ancillary stores (including the subject stores). The present vacancy rate is 26% of the ancillary stores; with the proposed closures this would increase to 34%. The Lethbridge Centre has 338,130 sq. ft. of which the 83 ancillary stores represent 146,547 sq. ft. Presently 26% of the ancillary space is vacant and the proposed closure would increase this to 31%. Both Centres apparently suffered from an extended recession in the retail business and competition from other centres in each city.

5 With restructuring Dylex will not have any Bi-Way stores west of Ontario after April; thus an isolated Bi-Way store may cause management and stocking problems. The Lethbridge Tip Top lease will expire August 31st; it would be inconceivable that Dylex would attempt to extend this lease beyond its expiry. The subject stores have been a financial drain on Dylex, at a time when it is in a tight financial squeeze. Their closure is projected to bring about variable cost saving and an amelioration of some fixed costs (i.e. the elimination of what would normally be regarded as fixed costs in terms of certain overheads).

6 The two subject Centres are experiencing some difficulty; however they were experiencing this difficulty generally before the time of Dylex's troubles. Generally it appears that Cambridge is in a secure financial position although the health of the two Centres is less than robust. Of course, vis-a-vis the subject closings, there is always the aspect of the straw which breaks the camel's back. However in my view a compelling case has not been made out by Cambridge in this regard. Rather what we have are some vague generalities such as the following from the Gordon Harris report:

Competitive regional malls are heavily reliant on anchor stores and high profile national tenants in order to establish the identity and traffic needed to generate sales in the centre. Dylex stores are viewed as highly desirable retail concepts that help shape consumers shopping patterns. The loss of Dylex tenants at Mill Woods Town Centre will alter, possibly on a permanent basis, shopping patterns away from Mill Woods Town Centre to other major malls in Edmonton.

The loss of BiWay and Tip Top at this time is a damaging blow to a centre which has had difficulty achieving the kind of occupancy and sales performance levels needed to achieve dominance in the local market. Recent sales increases point to a stabilisation at Mill Woods Town Centre. The revenue lost as a result of the closures will effectively wipe out the gains in overall CRU sales increases achieved in the past two years.

It is therefore our opinion that the Dylex action will have a significant negative impact upon the ability of Mill Woods Town Centre to maintain its market share, to keep its other tenants, and to retain its customers.

These factors will certainly affect the long-term economic viability of Mill Woods Town Centre.

7 I am therefore of the view that in weighing the balancing of interests in a CCAA context, the nod should continue to be given to Dylex which is in a precarious position as opposed to Cambridge which is in a sound financial condition although the two subject Centres may be less than robust. However this pallor of the two Centres is not caused by these three subject closings. I as well note that the one closure in Lethbridge will occur no matter what (barring a complete miracle) on the expiry of that lease on August 31st. Also the Bi-Way closing in Edmonton is not scheduled to take place for almost two months which is the anticipated Plan vote time in any event. I am of the view that my discretion should be exercised in favour of Dylex in this situation: see *Meridian Developments Inc. v. Toronto-Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta Q.B.) at pp. 113-4; *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta.Q.B.) at pp. 12-3; *Hong Kong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at p. 318; *Elan Corp v. Comiskey* (1990), 1 C.B.R. (3d) 101 (Ont.C.A.) at pp.1 19-20; *Re Lehndorff General Partner Ltd.* (1992), 17 C.B.R. (3d) 24 (Ont.Gen.Div.) at p. 31.

8 It is clear that s. 11 of CCAA gives the power to the court to sanction a plan which includes termination of leases as part of the debtor's plan of arrangement: see *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont.Gen.Div.) at p. 625; *Re Armbro Enterprise Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen.Div.) at p. 84. In the interim between the filing and the approval of a plan, the court has the inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of CCAA, including the survival program of a debtor until it can present a plan: see *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) at pp. 93-4 and generally *Lehndorff*, supra at pp. 35-8. While not specifically mentioned in *Re Triangle Drugs Inc.* (1993), 12 O.R. (3d) 219 (Ont.Gen.Div.), it was inherent jurisdiction which I was relying on to fill the gap in that legislation, namely the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as amended by S.C. 1992, c. 27) ("BIA").

9 Mr. Arcand freely and voluntarily acknowledged that if he had to meet the test of a mandatory order he would be in difficulty: see *Bramalea Ltd. v. Canada Safeway Ltd.* (1985), 37 R.P.R. 191 (Ont.H.C.J.); *Islington Village Inc. v. City Bank* (1992), 27 R.P.R. (2d) 100 (Ont.Gen.Div.) affirmed November 23, 1992 (Ont.C.A. Doc.C.A. C13327); *Chatham Centre Mall v. New Miracle Food Mart Inc. et al.* (Farley J., released June 23, 1994); and *566719 Ontario Limited v. New Miracle Food Mart Inc. et al.* (Farley J., released August 11, 1994).

10 Lastly allow me to deal with Cambridge's point that I should import the principles of s. 65.2 BIA into the CCAA proceedings for the purpose of requiring Dylex to satisfy me that without these three closures it would not be able to

Dylex Ltd. (Re)

make a viable proposal. The authority said for this proposition was Triangle, supra at p. 222 where in the Cambridge factum it was stated:

25. The philosophy of the CCAA in certain parts has been imported into the BIA The procedure set out in s. 65.2 of the BIA should be imported into the CCAA.

Firstly let me observe that the 1992 amendments to the BIA regarding reorganizations in particular got into intricate detail, but as pointed out in Triangle had an obviously overlooked gap. However CCAA since its inception has been a skeleton piece of legislation, almost pre-Victorian in style. The history of CCAA law has been a evolution of judicial interpretation. My observation about s. 66(2) BIA in Triangle was to the effect that a BIA proposal could be transferred to CCAA and thus where BIA was inappropriately silent in the reorganizational regime, it would be appropriate to measure the situation according to the philosophy in the parallel situation under CCAA. However it should be noted that s. 66(2) BIA is a one way street; there is no similar provision for transferring from CCAA to BIA (although I do note that a bankrupt company would be eligible to file under CCAA).

11 Secondly and just in passing I note that I would not think it would be appropriate to view these three stores in isolation vis-a-vis the question of the viability of Dylex (or its plan of reorganization). It appears that the three stores are part of a pre-plan restructuring program package.

12 I would also observe that given whom Mr. Arcand represents, I would think it more than likely that if Cambridge were successful in these motions, there would be a torrent of other applications.

13 The motions are dismissed. Cambridge is to pay Dylex \$3,500 costs forthwith. I note in this respect that Royal's legal fees would be added as a loan charge so that this award of costs may be regarded as joint Dylex/Royal since there is only one pocket.

FARLEY J.

TAB 3

CITATION: Timminco Limited (Re), 2012 ONSC 4471
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120803

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

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

**RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: MORAWETZ J.

COUNSEL: Maria Konyukhova, for the Applicants

Robin B. Schwill, for J. Thomas Timmins

Steven J. Weisz, for the Monitor

Debra McPhail, for the Superintendent of Financial Services

**Thomas McRae, for B51 Non-Union Employee Pension Committee and B51
Union Employee Pension Committee**

Charles Sinclair, for the United Steelworkers

James Harnum, for Mercer Canada

HEARD: JUNE 4, 2012

ENDORSEMENT

OVERVIEW

[1] Mr. J. Thomas Timmins, a former Chief Executive Officer (“CEO”) of Timminco Limited (“Timminco”) moves for an order that Timminco be ordered to comply with its obligations under a consulting agreement between Timminco and Mr. Timmins dated September 19, 1996 (the “1996 Agreement”) and to remit to Mr. Timmins the monthly amounts that he claims to be entitled to under the 1996 Agreement.

[2] In response, Timminco brought a cross-motion for an order declaring that Timminco's obligations under the 1996 Agreement, as amended by letter agreement effective May 28, 2011 (the "Letter Agreement" and, together with the 1996 Agreement, the "Agreement"), constitute pre-filing obligations which are stayed by the Initial Order granted in these proceedings on January 3, 2012.

[3] Alternative positions have also been presented by the parties.

[4] Timminco puts forth the alternative that, if Mr. Timmins' motion is granted, Timminco seeks an order that the 1996 Agreement be disclaimed in accordance with section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and that the effective date of the disclaimer of the Agreement (if such a disclaimer is held to be required) should be April 30, 2012.

[5] In response to this alternative position, Mr. Timmins seeks an order that the court deny Timminco's request to have the 1996 Agreement disclaimed and, in any event, if the 1996 Agreement is disclaimed, Timminco should not be relieved of its obligation to pay the monthly fees that have and continue to accrue from the date Timminco commenced CCAA proceedings until the date that any such disclaimer is effective.

[6] Mr. Timmins asks that the court deny Timminco's request to have the 1996 Agreement disclaimed in accordance with section 32 of the CCAA as the disclaimer would not necessarily enhance the prospects of a viable arrangement being made in respect of Timminco, and would objectively result in significant financial hardship to Mr. Timmins.

FACTS

[7] Mr. Timmins resigned from his position as CEO on May 28, 2001, but remained a director of Timminco until mid-2007, at which time he resigned from the board and sold all of his remaining equity interests.

[8] The preamble to the 1996 Agreement provides:

The Consultant is an executive of the Corporation who has gained such a level of knowledge, experience and competence in the Corporation's business that it is in the Corporation's interest, following his retirement from employment, to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.

[9] The 1996 Agreement provides that Timminco agreed to pay Mr. Timmins a monthly amount by which \$29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins] retirement under any pension or retirement plans of [Timminco].

[10] The monthly payments were to commence on the first day of the month following Mr. Timmins retirement and terminate only on Mr. Timmins death (subject to earlier termination due

to any breach of obligations by Mr. Timmins). There has been no alleged breach on the part of Mr. Timmins of any such obligations.

[11] Under the 1996 Agreement, Mr. Timmins was to consult with Timminco “within the time limits from time to time of his physical and other abilities...; provided, however, that consultation and advice shall never occupy [Mr. Timmins] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities”.

[12] At the time of his resignation as CEO, the 1996 Agreement was amended by the Letter Agreement.

[13] Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of \$20,833.33 without further deduction except as may be required by law, commencing on July 1, 2001.

[14] The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001.

[15] In connection with the Letter Agreement, Mr. Timmins executed a release and indemnity which provides, in part, as follows:

Whereas I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as “Timminco”) effective immediately.

And whereas I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the “Retirement Agreement”), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;...I understand and agree that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without limitation obligations pursuant to the *Employment Standards Act (Ontario)* and the *Human Rights Code (Ontario)*. For the said consideration, I covenant that I will not file any claims or complaints under the *Employment Standards Act (Ontario)* or the *Human Rights Code (Ontario)*.

[16] Following his retirement in 2001, Mr. Timmins remained a member of Timminco’s board of directors until October 2007 and served as a member of several board committees until that time, including the strategic committee of the board from June 2003 until October 2007. He received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

[17] Mr. Timmins states that he has fulfilled all contractual obligations imposed on him by the 1996 Agreement and that he has always been prepared to provide his consulting services to Timminco, as required by the 1996 Agreement, whenever from time to time requested by Timminco.

[18] The evidence of Mr. Kalins, President, General Counsel and Corporate Secretary of Timmins, is that Timminco has not sought or received any consulting services from Mr. Timmins following his retirement.

[19] Mr. Timmins has a different view. His evidence is that he provided consulting services during the early period of Dr. Schimmelbuch's term as CEO.

[20] Since the execution of the Letter Agreement, Timminco has paid Mr. Timmins approximately \$2.625 million. Mr. Kalins states that the payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement.

[21] Timminco has filed statements of pension, retirement, annuity and other income ("T4A Forms") and/or statements of amounts paid or credited to non-residents of Canada ("NR4 Forms") with the Canada Revenue Agency in connection with payments made by Timminco to Mr. Timmins in each year from 2002 to 2011. The T4A Forms and NR4 Forms filed by Timminco with respect to Mr. Timmins in each of those years list amounts paid to Mr. Timmins under the category of "retiring allowances". Mr. Kalins deposed that Timminco is not aware of any requests from Mr. Timmins to amend or refile any of the T4A Forms or NR4 Forms filed by Timminco since 2002.

[22] Timminco complied with its obligations to pay the monthly consulting fee to Mr. Timmins until December 2011.

[23] Payment was due on January 1, 2012, which was not made. The Initial Order was granted on Tuesday, January 3, 2012.

[24] On February 8, 2012, a debtor-in-possession financing agreement (the "DIP Agreement") between Timminco and QSI Partners Ltd. ("QSI" or the "DIP Lender") was approved. Mr. Timmins was not served with notice of the motion to approve the DIP Agreement.

[25] On March 30, 2012, counsel for Timminco sent a letter to counsel for Mr. Timmins enclosing a formal notice of disclaimer of the 1996 Agreement pursuant to section 32 of the CCAA. According to the correspondence, the 1996 Agreement was to be disclaimed effective April 30, 2012.

ANALYSIS

[26] Counsel to Mr. Timmins set out four issues:

- (a) Was Timminco entitled to stop paying the monthly consulting fee to Mr. Timmins, notwithstanding Mr. Timmins' position that these payments are post-filing obligations under the 1996 Agreement between the parties?
- (b) Should Timminco be entitled to disclaim the 1996 Agreement notwithstanding that:
 - (i) the company's ongoing obligations under the 1996 Agreement have not impeded its ability to effect a successful sale of its assets; and
 - (ii) the disclaimer would result in significant financial hardship to Mr. Timmins.
- (c) In the event that Timminco was not entitled to stop paying the monthly consulting fee, is Mr. Timmins entitled to payments for the period from January 1, 2012 up to the effective date (if any) of the disclaimer?
- (d) In the event that Timminco is entitled to disclaim the 1996 Agreement, what should the effective date of that disclaimer be?

[27] Counsel to Timminco set forth the issue as being whether Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

[28] In a supplementary factum, counsel to Timminco broadened the issue to read as follows:

- (a) Should Mr. Timmins' motion for an order that the 1996 Agreement is not to be disclaimed or resiliated be granted; and
- (b) If Mr. Timmins' motion referenced in (a) above be granted, should the effective date of the disclaimer of the 1996 Agreement be extended past April 30, 2012 (the day that was 30 days after the day on which Timminco gave notice of the disclaimer to Mr. Timmins).

[29] Counsel to Mr. Timmins submits that the 1996 Agreement is clear and unambiguous and that Timminco's attempts to describe the unpaid monthly consulting fees as a pre-filing claim inappropriately mischaracterizes the nature of the 1996 Agreement. Counsel submits that the unpaid amounts can only be characterized as the pre-filing claim if Mr. Timmins earned the right to be paid an amount during his employment with Timminco (which amount was then to be paid out to him over time after the termination of his employment), without further obligations owing from Mr. Timmins to Timminco. Counsel to Mr. Timmins submits that clearly is not the case as the monthly consulting fees do not constitute compensation deferred from a prior employment agreement between the parties and the fees cannot be said to be owing for employment services previously performed by Mr. Timmins.

[30] Mr. Timmins takes the position that, while the Letter Agreement dealt with a number of termination of employment issues, it specifically did not amend the 1996 Agreement other than to fix the monthly consulting fee and, in other respects, the 1996 Agreement was to remain in full force and effect.

[31] Specifically, from Mr. Timmins standpoint, there were no pension or retirement benefits to forego at the time he entered into the Letter Agreement as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.

[32] Counsel for Mr. Timmins goes on to submit that the purpose and effect of the 1996 Agreement is clear and unambiguous on its face – (i) to ensure that Mr. Timmins advice remains available to Timminco; (ii) to ensure that he or his investment company do not engage in activities which are competitive to Timminco's business; and (iii) to ensure that Mr. Timmins does not disclose or otherwise use confidential information.

[33] Counsel submits that Mr. Timmins' and Timminco's obligations under the 1996 Agreement are ongoing post-filing obligations, and as such cannot be stayed and suspended in the CCAA proceedings.

[34] In my opinion, the arguments of Mr. Timmins are flawed.

[35] It seems to me that the benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement are, in substance, termination and/or retirement benefits. These are unsecured claims. Counsel to the Applicant has summarized the following attributes or characteristics of the Agreement in support of the Applicant's position that the claim of Mr. Timmins is, in substance, for termination and/or retirement benefits:

- (a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefit that Mr. Timmins would receive from Timminco;
- (b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;
- (c) under the Agreement, Mr. Timmins is not entitled to any retirement or pension benefits from Timminco following his retirement other than the payments;
- (d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments;
- (e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and
- (f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as CEO.

[36] From the standpoint of Timminco, for all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

[37] In addition, in connection with the Letter Agreement and his retirement, Mr. Timmins also executed a release in indemnity wherein he released any and all claims he may have had relating to his employment with Timminco or the termination thereof and agreed that the consideration described in the Agreement satisfies all of the obligations of Timminco arising from or out of his employment with Timminco or the termination of his employment.

[38] It is especially significant that the release and indemnity specifically references both the 1996 Agreement and the Letter Agreement.

[39] Further, the filings made by Timminco with the Canada Revenue Agency constitute further evidence of the payments made to Mr. Timmins under the Agreement are, in substance, unsecured termination and/or retirement benefits. Mr. Timmins discounts this point indicating that it is the responsibility of Timminco to issue the tax forms. However, it is the responsibility of Mr. Timmins to file the return and to ensure its accuracy.

[40] In my view, the inescapable conclusion is that when the 1996 Agreement is considered together with the amendments set out in the Letter Agreement, in substance, the parties entered into an arrangement that addressed termination and/or retirement benefits.

[41] The law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings. See *Indalex Limited (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J.), *Re Nortel Networks Corporation, Re [Recommendation of Benefit Motion]* (2009) 55 C.B.R. (5th) 68 [Nortel] and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217.

[42] Further, the debtor company's obligation to make retirement, termination, severance and other related payments to unionized and non-unionized employees have been held to be pre-filing obligations. See Nortel, paras. 10, 12, 67. At para. 67, I stated:

...The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3 [of the CCAA]. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[43] It is clear in this case that Mr. Timmins did not provide any services after the date of the Initial Order.

[44] The Timminco Entities are insolvent and are not able to honour their obligations to all creditors. If the benefits conferred on Mr. Timmins under the Agreement are not stayed, Mr. Timmins would, in effect, receive an enhanced priority over other unsecured creditors, which would be contrary to the scheme and purpose of the CCAA. In this respect, it is noted that the position of the Applicant on this motion was supported by counsel to FSCO, both the Non-Union and Union Employee Pension Committee, the United Steelworkers and Mercer Canada.

[45] The Monitor expressed no view on whether the monthly payment obligations were a pre-filing or a post-filing obligation. The Monitor did, however, approve of the proposed disclaimer (see below).

[46] In my view, it is necessary to briefly address the submission made by counsel to Mr. Timmins that the CCAA order does not preclude Mr. Timmins' claim for the unpaid monthly consulting fees and the related submission that the CCAA order does not stay pre-filing obligations. Paragraph 11 of the CCAA clearly provides that the Timminco Entities are directed to make no payments of principal, interest or otherwise on account of monies owing by the Timminco Entities to any of their creditors as of January 3, 2012. Having made the determination that the obligation of Timminco to Mr. Timmins under the Agreement constitutes a pre-filing claim, this provision is broad enough to cover any and all pre-filing obligations owing to Mr. Timmins.

[47] The foregoing is sufficient to dispose of the issues raised in the motion and cross-motion. However, in the event that I am in error in my conclusion, the secondary issue has to be addressed; namely, whether Timminco should be entitled to disclaim the 1996 Agreement and, if so, what should be the effective date of the disclaimer.

[48] Section 32 of the CCAA permits a counter-party to a contract disclaimed by the debtor company to apply to court for an order that the agreement is not to be disclaimed or resiliated.

[49] Section 32(4) sets out factors to be considered by the court, among other things, in deciding whether to make the order:

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[50] In alternative submissions, counsel to Timminco takes the position that the motion of Mr. Timmins should be dismissed because:

- (a) the Monitor has approved the proposed disclaimer;
- (b) the disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Timminco;
- (c) the disclaimer is expected to benefit the stakeholders of Timminco as a whole in that it will permit Timminco to maximize recoveries to its stakeholders;
- (d) the disclaimer will not cause any significant financial hardship to Mr. Timmins; and

- (e) prohibiting Timminco from disclaiming the Agreement will result in a windfall to Mr. Timmins at the expense of the other unsecured creditors of the Timminco Entities.

[51] In analyzing this aspect of the motion, I accept the submission of counsel to Timminco that the scope of the CCAA and the various protections it affords debtor companies should not be interpreted so narrowly as to apply only in the context of a restructuring process leading to a plan arrangement for a newly restructured entity. The Court of Appeal for Ontario stated in *Nortel (Re)* 2009 ONCA 833, there is “no reason...why the same analysis cannot apply during a sale process that requires the business to be carried as a going concern”.

[52] In my view, the section 32 (4)(b) requirement that a disclaimer of an agreement with a debtor company enhance the prospects of a viable compromise or arrangement being made should be interpreted with a view to the expanded scope of the statute.

[53] In this particular case, the overriding objective of the CCAA must be to ensure that creditors in the same classification are treated equitably. Such treatment will enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company.

[54] Similar views were expressed by the court in *Homberg Invest Inc. (Arrangement Relatif à)*, 2011 QCCS 6376 where the Quebec Superior Court held, among other things, that it is not necessary to demonstrate that a proposed disclaimer is essential for the restructuring period. It merely has to be advantageous and beneficial.

[55] It is also noted that counsel to the Applicants submitted that at the commencement of the CCAA proceedings, the Timminco Entities ceased making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and to implement a successful sale of their assets. The continued existence of the Agreement and of the requirement to make the payments thereunder would have further strained the Timminco Entities already severely constrained cash flows. Further, counsel contends that disclaimer of the Agreement and the cessation of payments to Mr. Timmins thereunder improved the Timminco Entities' cash flows and their ability to continue implementing a sales process with respect to their assets.

[56] Counsel to Timminco also points out that under the DIP Agreement, approved on February 8, 2012, the Timminco Entities are restricted to use the proceeds of the DIP Facility for the purpose of funding operating costs, expenses and liabilities in accordance with the cash flow projections. Although the DIP Agreement does not prohibit the payment of amounts akin to the amounts owing under the Agreement, the cash flow projections approved by the DIP Lender do not provide for a payment of the monthly payments under the Agreement; making such payments would accordingly result in an event of default under the DIP Agreement. Further, counsel adds that without access to the DIP Facility, the Timminco Entities would have been unable to implement a sales process designed to maximize the benefits to their stakeholders.

[57] I am satisfied that, in the context of this alternative argument, the disclaimer of the Agreement, if necessary, is fair, reasonable, advantageous and beneficial to the Timminco Entities' restructuring process.

[58] Counsel to Mr. Timmins also raised the issue that the disclaimer of the 1996 Agreement would objectively result in significant financial hardship to Mr. Timmins.

[59] However, Mr. Timmins did acknowledge that, if the test of whether the disclaimer of an agreement that pays a party \$250,000 per year will cause “significant financial hardship to that party” depends on the individual characteristics and circumstances of that party, the disclaimer of the 1996 Agreement will not cause significant financial hardship to Mr. Timmins.

[60] I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for “significant financial hardship” would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

[61] Based on the record, I am unable to conclude that the disclaimer would likely cause significant financial hardship to Mr. Timmins.

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco’s unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[63] For the foregoing reasons, the alternative relief sought by Mr. Timmins, to the effect that the Agreement is not to be disclaimed, is denied.

[64] The remaining outstanding issue is whether or not the disclaimer of the Agreement should be effective April 30, 2012. Counsel to Mr. Timmins takes the position that the effective date of the disclaimer should be no earlier than the date of the determination of this motion.

[65] On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins’ counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with section 32 (2) of the CCAA, on April 13, 2012, Mr. Timmins filed his motion objecting to the disclaimer. Counsel to Mr. Timmins sought to have the motion heard in advance of April 30, but on account of scheduling issues, the motion did not proceed until June 4, 2012. Counsel to Mr. Timmins takes the position that given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the 1996 Agreement, it is only fair that payment for such obligations should be made up until the date that the court makes its determination on this motion.

[66] The contrary position put forth by counsel to Timminco is that the Timminco Entities did not deliver a notice of disclaimer until March 30, 2012 because they were of the view that the obligations under the Agreement constitute Timminco’s unsecured pre-filing obligations which

were stayed by Initial Order and that Timminco was authorized to stop making the payments under the Agreement without being required to disclaim the Agreement. Consequently, counsel submits that the Timminco Entities only delivered a notice of disclaimer in response to correspondence with Mr. Timmins' counsel and did so expressly without prejudice to their position that the obligations under the Agreement were pre-filing obligations.

[67] Counsel to Timminco acknowledged that, if the court found that Timminco's obligations did not constitute pre-filing obligations and the Agreement needed to be disclaimed prior to Timminco being entitled to cease making payments, Timminco would be obligated to make the payments that became due prior to the effective day of the disclaimer, namely, April 30, 2012.

[68] I am satisfied that the delay between the commencement of this motion by Mr. Timmins and its hearing was attributable to scheduling issues and the demands on Timminco's management and counsel's time placed by the Timminco Entities' CCAA Proceedings, including the sales process being undertaken by the Timminco Entities for the benefit of their stakeholders. Given these competing priorities, it seems to me that it would be unfair to extend the effective date of the disclaimer, if necessary, beyond April 30, 2012.

[69] As noted, my comments with respect to the disclaimer issue are for the assistance of the parties, in the event that my determination of the pre-filing issue is found to be in error.

DISPOSITION

[70] In the result, the motion of Mr. Timmins is dismissed. The relief requested by Timminco in the cross-motion is granted.

MORAWETZ J.

Date: August 3, 2012

TAB 4

Citation: Doman Industries et al
2004 BCSC 733

Date: 20040525
Docket: L023489
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Tysoe
Pronounced in Chambers
May 25, 2004

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

AND

**IN THE MATTER OF THE *COMPANY ACT*
R.S.B.C. 1996, c. 62**

AND

**IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*
R.S.C. 1985, c. C-44**

AND

**IN THE MATTER OF THE *PARTNERSHIP ACT*
R.S.B.C. 1996, c. 348**

AND

**IN THE MATTER OF DOMAN INDUSTRIES LIMITED,
ALPINE PROJECTS LIMITED,
DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED,
DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED,
DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD.,
DOMAN-WESTERN LUMBER LTD., EACOM TIMBER SALES LTD.,
WESTERN FOREST PRODUCTS LIMITED,
WESTERN PULP INC.,
WESTERN PULP LIMITED PARTNERSHIP,
and QUATSINO NAVIGATION COMPANY LIMITED**

PETITIONERS

Counsel for the Petitioner,
Western Forest Products Ltd.: E.J. Harris, Q.C.
and P.D. McLean

Counsel for Hayes Forest
Services Ltd.: I.G. Nathanson, Q.C.
and S.R. Schachter, Q.C.

Counsel for Tricap Restructuring
Fund: M.I. Buttery

Counsel for Strathcona
Contracting Ltd.: S.R. Ross

Counsel for Committee of
Unsecured Noteholders: K. Zych

Counsel for Petro-Canada Inc.: C.E. Hirst

[1] **THE COURT:** One of the Petitioners, Western Forest Products Ltd., ("Western") applies, in these proceedings under the ***Companies Creditors Arrangement Act*** (the "***CCAA***") involving the Doman group of companies, for authorization or approval of the termination of contracts it has with Hayes Forest Services Ltd. ("Hayes") and Strathcona Contracting Ltd. ("Strathcona").

[2] The Doman group of companies ("Doman") carry on business in the B.C. forestry industry. Doman encountered financial difficulties and has been in the process of attempting to restructure under the ***CCAA*** for approximately one and a half years. The liabilities of ***Doman*** consist of secured term debt in the principal amount of U.S. \$160 million, unsecured term notes in the principal amount of U.S. \$513 million, unsecured

trade debt in excess of \$20 million, a secured operating line of credit and other miscellaneous obligations.

[3] The restructuring process is nearing completion. A plan of compromise and arrangement (the "Restructuring Plan") has been filed and the meeting of creditors to consider it has been scheduled to be held in approximately two weeks. The deadline for creditors to file proofs of claim is today.

[4] In very simple terms, the Restructuring Plan contemplates that the lumber and pulp assets of Doman will be transferred into new corporations and that the unsecured noteholders, trade creditors and other unsecured creditors will have their debt converted into shares in one of the new corporations, which will own the lumber assets and the shares of the other corporation holding the pulp assets. The secured term debt is to be refinanced and the secured operating line of credit will be unaffected. The existing shareholders of Doman are to receive warrants entitling them to purchase a limited number of shares in the new parent corporation.

[5] The implementation of the Restructuring Plan is subject to the fulfilment of numerous conditions precedent. One of the conditions is the termination of the contracts with Hayes and Strathcona which are the subject matter of this application.

[6] Western holds certain forest tenure, including licenses relating to an area known as the Nootka Region on Vancouver Island and at least one island off the coast of Vancouver Island called Nootka Island. In 1991, the B.C. government decided that logging contractors should have a form of security similar to the tenure enjoyed by license holders and created the concept of replaceable contracts under the **Forest Act**.

[7] The attributes of replaceable contracts were discussed at length by the B.C. Court of Appeal in **Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.** 2003 BCCA 344 and I will not repeat all of them here. In short, a replaceable contract is a form of evergreen contract which contains statutorily mandated provisions, the most important of which is that the license holder must offer a new or replacement contract to the contractor upon each expiry of the term of the contract as long as the contractor is not in default under the contract. If the parties are not able to agree on the new rates under the replacement contract, an arbitrator will determine the rates, which are mandated to be competitive within the industry and to permit the contractor to earn a reasonable profit on top of its costs. The contractors with such contracts are known in the industry as Bill 13 contractors. A

license holder must have at least 50% of its annual allowable cut harvested by Bill 13 contractors.

[8] Western has 7 full-phase Bill 13 logging contracts with 6 contractors for the Nootka Region. Hayes is one of those contractors and it has the full-phase contract for the Plumper Harbour area of the Nootka Region. A full-phase contract includes all aspects of logging ranging from road construction, falling, hauling, sorting and delivery to transportation points. Hayes sold the road construction aspect of its contract, and the replaceable contract for road construction was assigned to Strathcona.

[9] When Doman first commenced these **CCA** proceedings, it was anticipated that the restructuring process would be completed in a relatively short period of time. It was contemplated that all unsecured debt other than the unsecured bondholders would be paid in full and that the unsecured bondholders would take most, but not all, of the equity in Doman in exchange for some of the indebtedness owed to them and would take security for the remainder of their indebtedness. The confirmation or come-back Order of December 6, 2002 authorized a downsizing process for Doman, but it was not instituted in view of the anticipated restructuring.

[10] The restructuring initially contemplated by Doman did not take place, in part because I made a ruling that the covenants in the trust deed for the secured term debt could not be overridden into the future. By the beginning of April 2004, the unsecured bondholders were pressing for their own restructuring plan and had made it clear that there should be some downsizing in Doman's operations, particularly the closure of Doman's pulp mill in Port Alice. On April 6, 2004, I declined Doman's application for an extension of the stay for the sole purpose of pursuing refinancing of its debt and the sale of the Port Alice pulp mill, but I also declined an application of the unsecured bondholders to call a meeting of creditors to consider its plan of arrangement. I extended the stay for the purpose of allowing Doman to file its own restructuring plan while still pursuing refinancing and sale alternatives, but I imposed a fairly concrete deadline by directing that the creditors meeting be held on June 7. In my April 6 Order, I authorized Doman to reinstitute its downsizing process with special emphasis on the closure of the Port Alice pulp mill if a purchaser was not located. I also placed a restriction on any downsizing by providing that any termination of a replaceable contract under the **Forest Act** was not to be effective unless authorized by the court.

[11] By letters dated April 27, 2004, Western terminated its contracts with Hayes and Strathcona effective upon court approval of the terminations. An affidavit of Mr. Zimmerman, a Western employee, provided the following rationale for the decision to terminate these replaceable contracts:

As part of the reorganization and "downsizing" processes of [Western], we have looked at methods to rationalize harvesting operations in the Nootka Region so as to reduce costs and improve profitability of [Western]. [Western] has worked in conjunction with representatives of the Bondholder committee who have asked for recommendations so as to increase profitability. [Western] has determined that within the Nootka Region, operational efficiencies can be achieved and significant cost savings can be achieved if the number of contractors is reduced and if that contractor's allocated volume is re-allocated to the remaining contractors. [Western] has recommended this reduction to the Bondholders Committee and the representatives of the Committee have asked that [Western] institute a rationalization and termination of contract, which is subject to Court approval as provided in this Court's Order of April 6, 2004.

The affidavit goes on to state that the rationalization can best be carried out by the termination of the Plumper Harbour contracts, principally because the contractor costs associated with this location are the highest in the Nootka Region. The volume under the contracts would then be re-allocated to other Bill 13 contractors in the Nootka Region. The average contract rate for logging a cubic metre of timber under the Hayes contract for the period from 1998 to 2001, as determined

by arbitration, was approximately \$4 higher than the average rate under the other contracts for the Nootka Region.

[12] Mr. Zimmerman's affidavit indicated that Western did not intend to harvest at Plumper Harbour for the next three years and set out the savings that Western would be able to achieve by terminating the Hayes and Strathcona contracts. These savings were estimated at \$5 million over the next three years and \$800,000 for each year thereafter. These included annual savings of approximately \$165,000 in road building costs, but the main reason Western wants to terminate its contract with Strathcona is that the full-phase contractor replacing Hayes may have its own road building capabilities. Mr. Zimmerman also exhibited to his affidavit a proposal which Hayes had made to Western in 1999 whereby Hayes offered to exchange its rights under its Bill 13 contract for the exclusive right to do helicopter logging in the Nootka Region with an annual minimum guarantee. In the proposal, Hayes stated that the average cut for many of the Bill 13 contractors had been reduced below an efficient economic operating level and that higher costs were being passed on to Western. The proposal was not accepted by Western because it did not want to give exclusive rights for helicopter logging with a guaranteed entitlement.

[13] Representatives of Hayes and Strathcona swore affidavits disputing that the savings would be of the magnitude estimated by Mr. Zimmerman. They also set out the prejudice which their companies would suffer if the contracts were terminated, including the loss of employment and the inability to utilize fixed assets. Mr. Hayes deposed that there is no reasonable or rational economic reason for Western to forego harvesting in Plumper Harbour this year because most of the engineering and road construction costs have already been incurred. Mr. Hayes estimated that if Western harvested the timber on its logging plan for this year in Plumper Harbour, it would receive revenue, net of additional harvesting costs, of approximately \$2 million.

[14] The affidavit of Mr. Hayes also stated that Hayes recognized that the operations of the Bill 13 contractors in the Nootka Region are inefficient, unwieldy and costly. Despite this acknowledgment, Mr. Hayes expressed a view that the termination of its contract will not have a material impact on cost reduction in the Nootka Region when one takes into account that the Province will be taking back approximately 20% of Western's annual allowable cut in the Nootka Region pursuant to the recently enacted **Forestry Revitalization Act** and will thereby cause a reduction in the

volumes harvested by all of the Bill 13 contractors. No affidavit was sworn by a Western representative to dispute this statement.

[15] Mr. Zimmerman, Mr. Hayes and the deponent on behalf of Strathcona were cross-examined on their affidavits. In his cross-examination, Mr. Zimmerman stated that Western did intend to liquidate the developed timber at Plumper Harbour of approximately 130,000 cubic metres over the next two years before putting the area in abeyance for a three year period. Western has not introduced any evidence with respect to the anticipated costs if this developed timber is harvested or is harvested by other Bill 13 contractors rather than Hayes.

[16] In addition to the **Skeena Cellulose** decision which dealt with the termination of replaceable contracts in **CCAA** proceedings, counsel referred me to several other cases involving the termination of contracts, leases or licenses in **CCAA** proceedings.

[17] In **Re Dylex Ltd.**, [1995] O.J. No. 595 (Q.L.) (Ont. Ct. of Jus.), Farley J. authorized the insolvent company to repudiate the leases of three of its stores as part of a program to close 200 of its stores across Canada. The three stores had been a financial drain on Dylex. Although the closures were going to have a detrimental effect on the shopping centres in

which the stores were located, Farley J. held that in weighing the balancing of interests in a **CCAA** context, the court's discretion should be exercised in favour of Dylex over the landlord, which was in sound financial condition. Farley J. declined to import into the **CCAA** the requirement applicable to proposals under the **Bankruptcy and Insolvency Act** that the insolvent company has to show that it would not be able to make a viable proposal unless it terminated the leases in question.

[18] In **Re Blue Range Resource Corp.** 1999 ABQB 1038, the insolvent company had been authorized by the court under the initial stay order to terminate such of its contracts as it deemed appropriate to permit it to proceed with an orderly restructuring of its business. Blue Range terminated some of its natural gas supply contracts and three of the parties to such contracts sought to challenge the termination of their contracts. One of the issues they raised was that the stay order should be varied to provide that Blue Range would only be permitted to terminate the contracts if it was incapable of performing them or if the termination was essential to the success of their restructuring. Lo Vecchio J. dismissed the application to vary the stay order in this fashion. He made

the following comments at paras. 36 through 38, which have been quoted in subsequent cases:

The purpose of the CCAA proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.

A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in Section 16.e or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range's liability for damages seems to have been assumed by Duke and Engage in their set-off argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.

The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathize with the Applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route.

[19] Lo Vecchio J. held that the court has the necessary jurisdiction to permit termination of contracts and that the termination of the contracts in question was necessary to the company's survival program.

[20] In **Re T. Eaton Co.**, [1999] O.J. No. 4216 (Q.L.) (Ont. Sup. Ct. of Jus.), Farley J. refused to order specific performance of an exclusive license to provide credit card services that had been repudiated by the insolvent company as part of a sale of its assets which was the foundation of its restructuring plan. He held that the licensee could be adequately compensated in damages and should not have a higher claim than any other unsecured creditor. In the course of his reasons, he quoted the above portions of the **Blue Range** decision, and said the following at para. 7:

It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases, and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would constitute an insurmountable obstacle for most debtor companies attempting to effect compromises and reorganizations under the CCAA. Such a restriction would be contrary to the purposive approach to CCAA proceedings followed by the courts to this date.

Farley J. also spoke about being cognizant of the function of a balancing of prejudices within the general approach to the **CCAA**.

[21] The issue of the court's jurisdiction to authorize the termination of replaceable contracts under the **B.C. Forest Act** was first addressed in the predecessor to the **CCAA** proceedings of Skeena Cellulose, **Re Repap British Columbia Inc.**, June 11, 1997, Docket No. A970588 (B.C.S.C.). Thackray J. held that the court had the jurisdiction under the **CCAA** to authorize the insolvent company to terminate replaceable contracts. None of the replaceable contracts in question were actually terminated until the subsequent Skeena Cellulose proceedings.

[22] In the Skeena Cellulose proceedings, the come-back order authorized the company to terminate replaceable contracts in order to facilitate the downsizing and consolidation of its business and operations. As part of Skeena Cellulose's plan of compromise and arrangement, a third party agreed to purchase the shares in the company for \$8 million, which was to be used for distribution to the creditors having claims in excess of \$400 million. It was a condition precedent to the purchase that two of Skeena Cellulose's five replaceable contracts be terminated, and letters of termination were sent.

The two contractors applied to the court for a declaration that the terminations were invalid.

[23] Brenner C.J.S.C. dismissed the application. In his decision (cited at 2002 BCSC 1280), he said the following at para. 25:

SCI has no authority to decline to replace the applicants' replaceable contracts under the terms of those contracts, or in accordance with the provisions of the Regulation that deal with when and how a replaceable contract can be terminated. The only authority for SCI to terminate, or indeed, jurisdiction for this court to approve such terminations, must be found in the terms of the Come-back Order, and in the provisions of the CCAA. To be effective, the terminations must:

(a) comply with the procedures and conditions stipulated in the Come-back Order; and,

(b) conform to the broader principles of economic necessity and fairness which underlie the court's discretionary jurisdiction under the CCAA.

Brenner C.J.S.C. expressed the view that the statutory privileges given to the Bill 13 contractors are not sufficient to justify the creation or recognition of a preference in favour of the contractors over other creditors.

[24] The appeal from Brenner C.J.S.C.'s decision was dismissed. In its decision, the B.C. Court of Appeal held that the court had an equitable jurisdiction to supplement the **CCAA** by approving a plan of arrangement which contemplates the

termination of contracts by the debtor corporation.

Newbury J.A. held that in approving such a plan involving the termination of replaceable contracts, the court was not overriding provincial legislation because nothing in the legislation purported to invalidate a termination of a replaceable contract but that, in any event, the doctrine of paramountcy would result in preference being given to the **CCAA** over the **B.C. Forest Act** in the case of a conflict.

[25] The Court of Appeal found no error in the exercise of discretion by Brenner C.J.S.C. Newbury J.A. said the following about the concept of fairness at para. 60:

I have no difficulty in accepting the appellants' argument that fairness as between them and the other three evergreen contractors and as between the appellants and Skeena was a legitimate consideration in the analysis of this case. (Indeed, I believe the Chief Justice considered this aspect of fairness, even though he did not mention it specifically in this part of his Reasons.) The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. In the case at bar, the Court was concerned with the

deferral and settlement of more than \$400 million in debt, failing which hundreds of Skeena's employees and hundreds of employees of logging and other contractors stood to lose their livelihoods. The only plan suggested at the end of the extended negotiation period to save Skeena from bankruptcy was NWBC's acquisition of its common shares for no consideration and the acceptance by its creditors of very little on the dollar for their claims.

The Court of Appeal concluded that there was a business case for the terminations. Newbury J.A. stated that the situation in **Dylex** was no different in principle because, like the leases in **Dylex**, the replaceable contracts were too costly for Skeena Cellulose to continue operating under them.

[26] Although the Court of Appeal's decision in **Skeena Cellulose** settles that the court has the necessary jurisdiction to deal with the termination of contracts, none of the above decisions includes any detailed discussion with respect to the basis upon which the court becomes involved in decisions to terminate contracts. Newbury J.A. discussed the jurisdiction in terms of the court approving a plan of arrangement which involves the termination of contracts, but the court will often authorize the termination of contracts prior to the formulation of a plan of arrangement.

[27] If a debtor company repudiated a contract prior to commencing **CCAA** proceedings, the court would not have any direct involvement in the termination of the contract unless,

possibly, the other party to the contract sought specific performance of the contract (which, as Brenner C.J.S.C. pointed out in **Skeena Cellulose**, is particularly inappropriate in an insolvency). The other party to the contract would have a claim for damages in respect of the repudiation and would be treated like any other unsecured creditor for the purposes of the plan of arrangement.

[28] Once an insolvent company seeks the assistance of the court by commencing **CCAA** proceedings, the company comes under the supervision of the court. The supervision also involves a consideration of the interests of the broad constituency served by the **CCAA** mentioned in **Skeena Cellulose** by Newbury J.A. These interests, when coupled with the exercise by the court of its equitable jurisdiction, bring into play the requirements for fairness and reasonableness in weighing the interests of affected parties.

[29] Generally speaking, the indebtedness compromised in **CCAA** proceedings is the debt which is in existence at the time of the **CCAA** filing, and the debtor company is expected to honour all of its obligations which become owing after the **CCAA** filing. It is common for the initial stay order or the come-back order to provide that the debtor company is to continue

carrying on its business and to honour its ongoing obligations unless the court authorizes exceptions.

[30] In many reorganizations under the **CCAA**, it is necessary for the insolvent company to restructure its business affairs as well as its financial affairs. Even if the financial affairs are restructured, the company may not be able to survive because portions of the business will continue to incur ongoing losses. In such cases, it is appropriate for the court to authorize the company to restructure its business operations, either during the currency of the **CCAA** proceedings or as part of a plan of arrangement. The process is commonly referred to as a downsizing if it involves certain aspects of the business coming to an end. The liabilities which are incurred as a result of the restructuring of the business operations, for such things as termination of leases and other contracts, are included in the obligations compromised by the plan of arrangement even though the debtor company will have been honouring its ongoing commitments under the leases and other contracts after the commencement of the **CCAA** proceedings. The inclusion of these liabilities in the plan of arrangement is an exception to the general practice of debtor companies paying the full extent of post-filing liabilities and compromising only the pre-filing liabilities.

[31] It is within this context that the court is called upon to authorize the termination of contracts which the debtor company could have repudiated without any authorization prior to the commencement of **CCAA** proceedings. The liabilities to be compromised have, in general terms, been crystallized by the filing of the **CCAA** petition, and the affairs of the debtor company are under the supervision of the court, which is required to exercise its equitable jurisdiction fairly and reasonably.

[32] I do not approach the matter in the same fashion as Lo Vecchio J. did in **Blue Range**. I do not see the resistance of a party to the termination of a contract with the debtor company to be an attempt to elevate their claim for damages above the claims of all the other unsecured creditors. Apart from any monies which may have been outstanding under the contract at the time of the **CCAA** filing, the party to the contract was not an unsecured creditor who was going to be subjected to a compromise under a plan of arrangement. The party only becomes a creditor in respect of its damage claim if the contract is terminated. Although Lo Vecchio J. could be interpreted as suggesting in the quoted paragraphs 36 to 38 that a debtor company may terminate contractual relations as long as the resulting damage claim is included in its plan of

arrangement, I do note that he subsequently commented that the termination of the contracts in that case was necessary to the company's survival program.

[33] I prefer the approach of Farley J. in *Dylex*, which involves the court weighing the competing interests and prejudices in deciding what is fair and reasonable. I would anticipate that in the majority of cases a debtor company will be able to persuade the court to exercise its discretion in favour of the termination of contracts and other steps required to downsize or rationalize its business affairs. A debtor company must be insolvent to qualify under the *CCAA* and the insolvency may have been caused by over-expansion or continual losses by a part of the business. If the company is to have a reasonable prospect of surviving into the indefinite future, it will be appropriate to downsize its operations or bring an end to the losing aspects of the business. The interests of the broad constituency of stakeholders in taking reasonable steps to ensure the ongoing viability of the business will often outweigh the prejudice caused to parties having their contracts or other arrangements with the debtor company terminated and their consequential damage claim being included in the plan of arrangement. There is no single test for the debtor company to satisfy apart from demonstrating

that the termination is fair and reasonable in all of the circumstances. As held in *Dylex*, it is not necessary for the debtor company to demonstrate that the termination of the contract is essential to the making of a viable plan of arrangement.

[34] An example of this type of situation has already occurred in these proceedings. Doman's pulp mill at Port Alice has been losing money for a significant period of time and causing a financial drain on Doman's resources. At the suggestion of the bondholders, it was decided that the mill should be closed and should not be part of the restructured company. Although the closure of the mill would have had a devastating effect on the employees of the pulp mill and the Village of Port Alice as a whole, I authorized the closure because it would not have been reasonable to require the restructured company to operate a division of its business which was anticipated to continue to lose money. Fortunately, Doman was able to find another party who was willing to take over the pulp mill prior to its closure.

[35] On the other hand, there will be circumstances where it will not be appropriate to authorize the debtor company to terminate contracts. For example, suppose that a debtor company became insolvent because its business had been

operating at a loss but market conditions had changed and, with a financial restructuring of its existing debt, it was expected to be profitable in the future. Suppose further that the debtor company was party to a contract which did not cause the company to operate the relevant aspect of its business at a loss but the contract was not as favourable as the market would permit the company to obtain if it could divest itself of the existing contract. If the company could terminate the contract and enter into a new one with different rates, it could become substantially more profitable into the future. In these circumstances, it may well be inappropriate for the court to authorize the termination of the contract. The risk of the failure of the debtor company after its restructuring would be relatively low and, depending on the terms of the plan of arrangement, the future benefit of the contract termination may accrue to the shareholders of the company or to the creditors of the company who took risks in exchange for high rates of return.

[36] On the present application, all that the evidence establishes is that Doman will likely be able to reduce its costs to some extent at some point in the future if it can terminate the two contracts in question. Mr. Zimmerman's affidavit states that the reason Western made the

recommendation to terminate the two contracts was to improve or increase its profitability. There is no evidence on this application with respect to the following points:

- (a) whether the logging at Plumper Harbour under the existing contracts has produced a loss in the past or is expected to produce a loss in the future;
- (b) whether other logging operations of Doman produce a greater loss;
- (c) whether other aspects of Doman's business produce a loss and, if so, what consideration has been given to rationalizing that loss in comparison to the termination of the contracts in question;
- (d) whether it is expected that the restructured company will operate at a profit;
- (e) what parts of the constituency of stakeholders will benefit from the termination of the contracts in question;
- (f) whether the developed timber at Plumper Harbour can be harvested in the next two years by other contractors at a cost less than the cost under the contracts in question; and

- (g) what is the fallacy, if any, in the assertion of Mr. Hayes that the termination of the contracts will have no material impact on cost reduction after taking into account the 20% government take-back.

[37] Some reliance was placed by counsel on the fact that the termination of these contracts is a condition precedent of the Restructuring Plan. In my view, this condition precedent is materially different than the condition precedent in **Skeena Cellulose**. In that case, it was an independent purchaser of the shares in **Skeena** that negotiated the condition on the basis that it was not prepared to purchase the shares unless two of the five replaceable contracts were terminated. The condition resulted from an arm's length negotiation which required the purchaser to put up funds to purchase the shares. In the present case, the bondholder committee produced the initial draft of the Restructuring Plan, which was finalized after a limited negotiation that served to advance the interests of the existing directors and shareholders of Doman. The condition precedent in question was not contained in the initial draft of the Restructuring Plan put forward by the bondholders and there is no evidence as to why the condition was inserted in the Restructuring Plan. I am unable to conclude that the condition precedent was the result of a

truly adversarial negotiation and that, unlike the situation in *Skeena Cellulose*, the restructuring is unlikely to proceed if the condition is not satisfied.

[38] In my opinion, therefore, there is insufficient evidence for me to conclude that the proposed contract terminations are fair and reasonable in all of the circumstances. All that the evidence available to me supports is a conclusion that the restructured company will have an opportunity of being more profitable if the contracts are terminated. It has not been demonstrated that the loss of this opportunity will outweigh the prejudice which will be suffered by Hayes and Strathcona if the contracts are terminated. In weighing the competing interests on the evidence before me, it is my conclusion that I should exercise my discretion against approving the contract terminations. I dismiss the application with costs.

"D.F. Tysoe, J."
The Honourable Mr. Justice D.F. Tysoe

TAB 5

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-036133-094

DATE: MAY 21, 2009

THE HONOURABLE DANIÈLE MAYRAND, J.S.C., PRESIDING

IN THE MATTER OF THE PLAN OF ARRANGEMENT OF:

ABITIBIBOWATER INC.

and

ABITIBI-CONSOLIDATED INC.

and

BOWATER CANADIAN HOLDINGS INC. ET AL

Respondents

and

ERNST & YOUNG INC.

Monitor

and

SFK PULP GENERAL PARTNERSHIP

Applicant

JUDGMENT

[1] The applicant, SFK Pulp General Partnership ("**SFK**"), seeks cancellation of the notice of repudiation (the "**Notice**") sent to it by Abitibi-Consolidated Company of Canada ("**ACI**"), relating to two wood chip and bark supply agreements (the "**Contracts**").

[2] Under the protection of the *Companies' Creditors Arrangement Act*¹ ("**CCAA**"), AbitibiBowater Inc. and its subsidiaries (the "**ABI group**") have availed themselves of s. 46(f) of the Initial Order granted by this Court on April 17, 2009, authorizing them to terminate their Contracts.

[3] Since the preliminary discussions between ACI and SFK were unsuccessful, ACI sent the Notice on April 24, 2009, taking effect immediately. The party that considers itself injured may, under the [TRANSLATION] "snap-back provision" in the Initial Order, request a review of the decision to terminate the Contracts. Hence the present application.

[4] Initially, SFK's application included applications for provisional orders and protection orders. In order to avoid additional costs and delay, the parties have agreed to have the issue decided forthwith on its merits.

THE PARTIES

➤ **SFK**

[5] SFK is a general partnership that owns and operates a northern bleached softwood kraft ("**NBSK**") pulp mill (the "**Mill**") located in Saint-Félicien, in the Lac-Saint-Jean region. It acquired the Mill from ACI in 2002 and paid \$628 million for it, notably through public issues. Shares, which sold for \$10 at that time, are now trading at 35¢.

[6] The Mill is the only one in Quebec that produces commercial NBSK pulp, recognized for its superior quality. SFK sells it to the paper industry and exports it elsewhere in Canada, to the United States and Europe. The Mill has 306 employees and generates a large number of indirect jobs. It goes without saying that it is one of the engines of the local and regional economy.

➤ **ABI Group and ACI**

[7] The background, corporate status, and indebtedness of the ABI group are amply described in the Initial Order granted by this Court on April 17, 2009. The ABI group's indebtedness is close to \$10 billion and its losses during the past nine months amount to approximately \$1.9 billion. The indebtedness of ACI and its subsidiaries was \$6 billion and its operating losses \$1.06 billion in 2008.

¹ R.S.C. 1985 c. C-36.

[8] The ABI group operates 23 pulp and paper mills and 30 lumber mills in the United States, Canada, the United Kingdom, and South Korea. Mill operations are down, running at 32% of capacity, in rotation and by work shift in order to limit job losses. Some mills have completely shut down.

[9] The ABI group owns six sawmills and has a substantial interest in at least three others within a 100-km radius of the Mill in Saint-Félicien. It is central to the regional economy, and in much greater proportions than SFK.

THE ISSUE

THE QUESTIONS TO BE DECIDED CAN BE SUMMARIZED AS:

1. What are the criteria applicable to the repudiation of contracts under the CCAA?
2. In light of these criteria, does the Court need to intervene to restore the Contracts?

THE POSITION OF THE PARTIES

➤ SFK

[10] According to SFK, the Court should refuse to endorse the repudiation of the Contracts because the balance of inconvenience and the prejudice involved weigh in favour of SFK, already seriously affected by the economic crisis. It invokes s. 32 of *Bill C-47*,² assented to in December 2007 but not enacted.

[11] It claims, *inter alia*, that the contract for wood chips is to ACI's advantage, and that repudiation constitutes a disguised unilateral amendment.

➤ ABI Group and ACI

[12] The ABI group is required to compromise its debt and reorganize its operations. ACI, with the Monitor's approval, decided to repudiate the Contracts on the grounds that they were too onerous in several respects and would be harmful to its reorganization.

[13] Contrary to what underlies SFK's claims, the ABI group and ACI argue that the prejudice needs to be evaluated on a collective, not an individual, basis.

[14] Apart from the Monitor, which supports what they are doing, the ABI group and ACI have received support from their long-term lenders and the holders of secured and unsecured debt, which insist that SFK be treated the same way they are.

² *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 (amended S.C. 2007, c. 36, ss. 61 to 82) (*Bill C-47*).

PURPOSE OF THE CCAA AND THE JUDGE'S ROLE

[15] The main purpose of the CCAA is to enable an insolvent company to continue in business and return to solvency, to the benefit of all those who are affected and who will be involved in the reorganization.

[16] Other Canadian courts designate these parties as the “broader constituency of investors, creditors and employees and reflects diverse societal interests”.³

[17] For the ABI group and ACI, these are their creditors (secured and unsecured), their investors (the holders of secured and unsecured debt), and their shareholders, employees, suppliers, and bridge lenders. For the purposes of this judgment, the Court shall refer to them as stakeholders.

[18] Vested with broad judicial discretion, [TRANSLATION] “...the role of the judge, assisted by the Monitor, is like that of a captain in the midst of a storm who has to decide whether to throw the problem cargo overboard in order to save the ship. There is no room for prevarication”.⁴

[19] These considerable powers are exercised in a fair and reasonable manner, in light of the facts in the present case, while keeping as a guideline the main purpose of the CCAA: to facilitate the reorganization of a company for the benefit of the company and its stakeholders.⁵

[20] From the perspective of the CCAA, there are no winners, but a single hope, that the debtor company will emerge successfully from its restructuring, for its benefit and that of the stakeholders.

ANALYSIS

1. The criteria applicable to the termination of a contract under the CCAA

[21] It is not disputed that the CCAA permits the debtor company to terminate its contracts. Furthermore, the Initial Order explicitly provides for this. Where the parties disagree is concerning the standard and its application.

[22] First, one comment must be made. SFK claims that the amendments projected by *Bill C-47* must be considered. These amendments are not in force and cannot be taken into consideration to decide the present question.⁶

³ *Skeena Cellulose Inc.* (B.C.C.A.) 2003 Carswell BC 1399 at para. 35.

⁴ *9145-7978 Québec inc.* (Arrangement relatif à) 2007 QCCA 768 at para. 11.

⁵ *Supra* note 3 at para. 39.

⁶ *Supra* note 4 at para. 5.

[23] This being so, the standard retained by the courts permits the debtor company to terminate a contract insofar as such termination is advantageous and beneficial for its reorganization, although it does not have to establish that it is essential thereto.

[24] Since the judgment in *PCI*,⁷ which endorsed this standard and the decision of the Court of Appeal in *Mine Jeffrey*⁸ confirming its principles, the state of law has remained the same, subject, however, to the comments below.

[25] The power to repudiate contracts derives from the statutory discretion conferred by the CCAA and not the inherent jurisdiction⁹ to which courts had recourse when called to decide questions whose innovativeness was limited only by the lawyers' imagination.

[26] The exercise of this statutory discretion, including the discretion which allowed repudiation of contracts, is subject to an analysis of the criteria of fairness and reasonableness essential to each decision made by a judge pursuant to the CCAA.

[27] This analysis is done in a collective manner, by taking all the stakeholders into account, not each one individually. In *Skeena Cellulose Inc.*,¹⁰ the British Columbia Court of Appeal wrote the following in this regard:

[60] The appellants are obviously part of the "broad constituency" served by the CCAA. But the key to the fairness analysis, in my view, lies in the very breadth of that constituency and wide range of interests that may be properly asserted by individuals, corporations, government entities and communities. Here, it seems to me, is where the flaw in the appellants' case lies: essentially, they wish to limit the scope of the inquiry to fairness as between five evergreen contractors or as between themselves and Skeena, whereas the case-law decided under the CCAA, and its general purposes discussed above, require that the views and interests of the "broad constituency" be considered. ... As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. **Each of them might also ask "Why me?"** However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

(Emphasis added.)

[28] More recently, the Quebec Court of Appeal considered the standard applicable to the termination of a lease:¹¹

[TRANSLATION]

[27] ...But, in any case, does there need to be a peril? Is it enough that termination is essential for a turnaround? Is it enough for it to be expedient or desirable?

⁷ *PCI Chemicals Canada Inc.* (Re) J.E. 2002-718 (Sup. Ct.), leave to appeal refused, 2002 (J.Q.) No. 9988 (Que. C.A.).

⁸ *Syndicat national de l'amiante Asbestos inc. v. Mine Jeffrey Inc.*, J.E. 2003-346 (C.A.) at para. 32.

⁹ *Supra* note 3, para. 35; *Metcalfe & Mansfield Alternative Investments Corp.* (Re) 2008 ONCA 587 at paras. 50-52.

¹⁰ *Supra* note 3 at para. 60.

¹¹ *Supra* note 4 at para. 27.

[29] In response, the Court of Appeal cited the comments of Mtre Sylvain Vauclair,¹² which it sets forth as the general rule in this area, namely:¹³

[TRANSLATION]

[28] Concerning the standard that is to guide a judge, the appellant cites Mtre Sylvain Vauclair who, after an overview of the situation in the United States, the common-law provinces of Canada, and Quebec, finds that:

First, no decision contradicts the proposition that a debtor company may terminate the contracts to which it is a party and which are harmful to its restructuring under the terms of the CCAA.

Second, the courts exercise their inherent jurisdiction with prudence, certainly, but not only in cases necessary to the survival of the debtor company or otherwise of importance.

[29] In an apt analysis of Dylex, the author writes:

The owner of certain shopping centres is opposed to the debtor company terminating the leases for these centres on the ground that these terminations “would materially affect each shopping centre”.

These terminations are part of a program of 200 store closures.

These three terminations, taken singly, do not seem crucial to the plan or to the survival of the debtor company and the judge describes the situation in the following manner at page 109, para. 5:

“The subject stores have been a financial drain on Dylex, at a time when it is in a tight financial squeeze. Their closure is projected to bring about variable cost saving [*sic*] and a [*sic*] amelioration of some fixed costs...”

Once again, a court points out:

“It is clear that s. 11 of the C.C.A.A. gives the power to the Court to sanction a plan which includes termination of leases as part of the debtor's plan of the arrangement...”

It should be noted that the court specifically rejects the argument to the effect that the desired terminations must be essential to the success of the plan of arrangement.

(Emphasis added.)

[30] In short, the CCAA aims to allow the debtor company to overcome its financial difficulties while at the same time limiting the prejudice suffered by those whose

¹² S. Vauclair, S. “Termination of a contract under the terms of an order, pursuant to the CCAA,” second advanced lecture on bankruptcy and insolvency, *Derniers développements législatifs et pratiques* (2002).

¹³ *Supra* note 4 at para. 28.

interests are affected, taking into consideration the interests of all the stakeholders. That is why the decisions leading to it must be fair and reasonable.¹⁴

[31] The law having been stated, it may now be applied. As Farley J. pointed out: "Equitable treatment does not mean equal treatment. Equal treatment may be contrary to equitable treatment."¹⁵

2. Does the Court need to intervene and restore the Contracts?

[32] First of all, two matters raised by SFK must be dealt with. SFK is wrong to accuse ACI of bad faith for initiating discussions before sending the Notice. Even if the termination of the Contracts could have the effect of [TRANSLATION] "forcing" negotiations, this in itself is not illegal.

[33] The Court also cannot retain SFK's story that ACI is making money with the wood chips or that it is a [TRANSLATION] "good business". This cannot be supported. The wood chips are by-products of the activities of the sawmills operated by the ABI group, the cost of production for which is very high when done outside lumber manufacturing operations.

➤ The forest industry against the backdrop of the world economic crisis

[34] That said, the analysis of this question must take into account the global decline in the forest industry and paper mills.

[35] In 2007 and 2008, the unprecedented slump in the U.S. housing market was evidenced by the decline in housing starts (less than 500,000 units under construction), unheard of since World War II. As a result, the profitability of forestry operations and of the paper mills dependent on these operations has been wavering.

[36] Since November 2008, the ABI group's operations have been reduced to 32% of their capacity. All sawmills are running a deficit on an annual basis, and there is no sign that points to a rebound in the lumber industry in the short- or medium term.¹⁶

[37] The termination of the Contracts is part of the restructuring of the ABI group's wood products segment, namely logging, transportation of wood to sawmills and manufacture of lumber.

[38] In addition, there are by-products from wood processing, including wood chips and bark.

¹⁴ 9145-7978 *Québec inc. (Arrangement relatif à)*, 2007 QCCA 618 (Gendreau J.A.) judgment granting leave to appeal at para. 17.

¹⁵ *Samni Atlas Inc., Re*, 1998 3 C.B.R. (4th) 171 at para. 4.

¹⁶ Testimony of ABI's Yves Laflamme, Senior Vice President, Wood Products, whom the Court qualifies as being very credible.

[39] SFK, which does not have wood or stumpage rights, needs wood chips to fuel the Mill and bark to meet its energy consumption. During the acquisition of the Mill in 2002, ACI and SFK therefore agreed on Contracts.

[40] The wood chip supply contract, with a term of twenty (20) years, guarantees a wood chip supply of 612,000 dry metric tons ("**DMT**") per year; 70% must come from black spruce, and the remainder from gray pine or other softwood.

[41] The price per DMT is calculated by correlating the price of NBSK pulp and the market value (the "**market price**") of wood chips. The price per DMT cannot however be \$20 more than or less than the market price of a DMT of wood chips in a given year. SFK assumes freight at a cost of \$16.23 per tonne. At least 70% of the base quantity comes from the ABI group sawmills, which are located less than 100 km from the Mill.

[42] As a result of market fluctuations, the price of NBSK pulp plummeted, while for wood chips, it rose to a historic high (\$145 DMT). The price of wood chips is also higher in Quebec than anywhere else in North America.

[43] According to the price ratio stipulated in the contract, ACI sells its wood chips to SFK at \$125 DMT. Since 2002, SFK has accordingly benefited from a discount of \$20 per DMT, compared to the market price. ACI established that since 2002, this discount has translated into a cost of \$90 million, or \$12.24 million per year (\$20 multiplied by the number of tonnes sold to SFK).

[44] There is, however, more.

[45] Economic conditions considerably reduced lumber processing activities, and ACI could no longer produce a sufficient quantity of wood chips to meet the needs for maintaining the paper mills in the ABI group and also to discharge its obligation to deliver 612,000 DMT of wood chips to SFK annually.

[46] ACI is therefore required to buy wood chips from third parties and produce a limited quantity of wood chips by processing entire logs. According to the Monitor's report, ACI must add an annual loss of \$1.5 million for the past four years because of this inefficient production.¹⁷

[47] In 2007 and 2008, ACI had to buy respectively 1,050,000 DMT and 786,000 DMT of wood chips from third parties at the market price, and in some cases, even at a higher price, given the major repercussions of falling demand for wood products. These losses are in addition to those resulting from the low level of sawmill operations.

¹⁷ Monitor's fourth report, para. 30.

[48] The EBITDA¹⁸ of the ABI group sawmills, including that of the sawmills located in the Lac Saint-Jean region, is as follows:

	Fiscal 2007	Fiscal 2008	1st Quarter 2009	April 2009
ABI group	-\$91 million	-\$45 million	-\$16 million	-\$4.4 million
Lac-Saint-Jean region	-\$23 million	-\$9 million	-\$5.4 million	-\$2.3 million

[49] The ABI group must therefore compromise its debt repayment and reorganize its operations. Under the circumstances, ACI decided to repudiate the Contracts, which were too costly and harmful to its reorganization.¹⁹ The resulting savings from the repudiation of the wood chip contract worked out to 25% of the results for April 2009.

➤ **The position of SFK**

[50] When a major industry player like the ABI group wavers, it will inevitably affect its suppliers, employees and service providers.

[51] The position of SFK is not exactly robust, but it is nonetheless stronger than that of ACI. Hard hit by the crisis in the forest industry and the decline in the price of NSBK pulp, SFK had suspended operations in the Mill twice since December 2008, for a total period of 62 days, even before receiving the Notice.

[52] While the financial position of the ABI group and ACI has been worsening for a number of years, the financial deterioration of SFK's operations is more recent. The financial statements of SFK and its affiliates have reported a negative EBITDA since the first quarter of 2009. Beforehand, EBITDA was as follows: 1) 2006 = \$39.8 million; 2) 2007 = \$39.2 million; and 2008 = \$39.5 million.

[53] SFK's consolidated forecasts for fiscal 2009 show a negative EBITDA of \$17.5 million if it pays for wood chips at the market price, *i.e.*, \$1 million more a month.

¹⁸ Earnings before interest, income taxes, depreciation and amortization.

¹⁹ Supra note 3, para. 57: "... In the terminology used by Mr. Forstrom, there was a "causal link" between the terminations and the chances of success of the Reorganization Plan. For this reason, I do not agree with his submission that Dylex is different in principle from the case at bar: the appellant's contracts in particular were said to be too costly for Skeena to continue operating under them, in the same way the terminated leases were said to be too costly for Dylex to continue leasing under them. And, weighing Dylex's precarious financial position against that of the landlord (which was described as "less than robust"), the Court 'gave the nod' to the insolvent corporation, rejecting the proposition that Dylex should have to prove that without the three proposed closures (of leases), its proposal would not be viable. ...

(Emphasis added)

[54] SFK argues that its survival is at stake because with the higher costs of chips at market price, it will be unable to respect the solvency ratios under its financial covenants,²⁰ which makes it vulnerable vis-à-vis its lenders.

[55] This is likely. However, according to its consolidated financial statements, the assets of the holders of partnership shares are quite significant: \$522 million in 2008, \$509 million in 2009, and \$449 million according to forecasts for fiscal 2009.

[56] SFK will need to discuss with its lenders and ACI, which offers to continue to supply it, but to a lesser degree (500,000 DMT) and at market price.

[57] In passing, the Court points out that the restructuring concerned is not that of SFK, but rather of the ABI group and ACI.

[58] Furthermore, SFK has not shown that without the wood chip contract, it could not have obtained supplies elsewhere.

[59] SFK currently has approximately 56,000 DMT of wood chips and is already obtaining supplies from a third party. In March 2009, it entered into a supply contract with Chantiers Chibougamau for the delivery of 100,000 DMT at a price of \$138, excluding freight. It obtained supplies there in March instead of from ACI, invoking the CFI standard.

[60] During this time, ACI, bound by the wood chip contract, was unable to sell wood chips in addition to being unable to sell them to third parties at market price. Lastly, wood chip inventories will become available for SFK because ACI will no longer need to get supplies from third parties, which will free a corresponding number of tonnes of wood chips.

[61] One cannot quite simply consider, as SFK proposes, that the \$12 million profitability gap is “a drop in the bucket” for ACI.

[62] The ABI group sawmills are running at a monthly deficit of \$4.4 million, with those at Lac-Saint-Jean at \$2.3 million. The wood chip contract contributes up to 25%, which is not insignificant over a seven-year period, as it amounts to \$90 million.

[63] Short-term lenders, of which ACI is in dire need, will only materialize if ACI has a chance of honouring its obligations.

[64] In reality, SFK's position is tantamount to requesting to balance the inconvenience resulting from the termination of the Contracts in light of the criteria for

²⁰ (R-9) Credit agreement dated October 30, 2006.

obtaining a protection order under the *Code of Civil Procedure*. The criteria guiding the judge under the CCAA are different.²¹

[65] It bears repeating that what is at stake here is not limited to SFK, the ABI group, and ACI, but extends to the stakeholders dependent on its survival, including 10,000 employees in Canada, 1,700 forestry workers, 2,300 self-employed workers, 950 local and regional suppliers, 500 forestry operations specialists, and the list goes on.²²

[66] According to ACI and the Monitor, the repudiation of the contract is advantageous, beneficial and necessary for the reorganization of the company. The evidence supports this observation. In this context, bearing in mind the interests of all the stakeholders, the Court considers that there is no need to become involved.

[67] It is small consolation, but SFK can file a proof of claim as an unsecured creditor for the damages suffered as a result of the termination of the Contracts.

[68] As case law shows,²³ the one whose contract has been repudiated must be treated in the same way as all the other creditors of the debtor:

43 The applicants state that "SCI is a large, multi-million dollar business enterprise." While that is true, SCI has also been struggling for many years to become profitable. There are many people in addition to the applicants who depend on SCI's viability. While the applicants will no doubt be adversely affected by the terminations, they are in no different position in this regard than many other unsecured creditors of SCI who must prove their claims under the Plan and who stand to recoup only a small fraction of their claims. It is to be noted that while the sale price of SCI was \$8 million, the applicants have filed proofs of claim in excess of \$5 million.

44 It is the unfortunate and generally unavoidable result of an insolvency restructuring that some individuals or entities will suffer hardship. In this case as part of its restructuring, SCI had to terminate numerous employees. They no doubt suffered hardship.

[Emphasis added.]

[69] Although the challenge facing ABI and its stakeholders is enormous, it dates back to April 17, 2009. ACI has established that the wood chip contract is a drag on the restructuring of its operations and that it is bad for the reorganization of ABI group as a whole. That is enough in the circumstances.

²¹ It is appropriate to distinguish *Doman*, on which SFK relies, where the debtor wanted to take advantage of the repudiation of a contract without having established that it benefited therefrom for its reorganization: *Doman Industries Ltd., Re*, 2004 BCCA 382.

²² See para. 318 of the *Application for the issue of an initial order* that was made in this record.

²³ *Skeena Cellulose Inc. (Re)*, 2002 Carswell BC 2032 at paras. 43-44, *per* Brenner J. (B.C. Sup. Ct.).

➤ **Bark contract**

[70] Bark is also a by-product of sawmill operations. The bark contract provides for delivery of 102,551 DMT of fresh bark to SFK every year at market price. Since 2007, ACI has not complied with the tonnages that should be delivered, for the same reasons as those stated previously regarding the production of wood chips.

	2007	2008
Fresh bark	83,000 DMT	57,000 DMT
On-site bark	16,000 DMT	21,000 DMT
Total	99,000 DMT	78,000 DMT

[71] Even though SFK did not flag this default, the termination of the contract here is also justified because ACI will not be able to comply with the terms and conditions without slipping into the hole even further.

[72] The impact of this termination on SFK is not so prejudicial because it can obtain supplies from the on-site bark, in the Lac-Saint-Jean region, which offers sufficient quantities for the next twenty to thirty years.

[73] Although on-site bark costs a bit more than fresh bark, given its humidity level, and even though additional costs must be taken into consideration to access it, the cost will be substantially lower than that of fuel oil.

[74] Under the circumstances, there is no question of the Court intervening here.

THE MONITOR'S RECOMMENDATION

[75] In closing, even if the Monitor gave its approval only after the repudiation of the Contracts, it had been consulted beforehand and had identified the difficulties encountered in maintaining the Contracts. It recommended their termination. The Monitor's fourth report has a complete analysis of the impact of the Contracts and convinced the Court that this recommendation should prevail.

FOR THESE REASONS, THE COURT:

DISMISSES the *Motion to institute proceedings for provisional, protection, and final orders, declaring the repudiation of certain Contracts null and void*;

WITH COSTS.

Danièle Mayrand J.S.C.

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Dates of hearing: May 11, 12, 13, and 14, 2009

TAB 6

Century Services Inc. Appellant

v.

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

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

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

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

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

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

Century Services Inc. Appelante

c.

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

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

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Facts and Decisions of the Courts Below

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

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

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

1. Faits et décisions des juridictions inférieures

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

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

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

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

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

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

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

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

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

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

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

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

2. Issues

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

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the CCAA and give priority to the Crown's *ETA* deemed trust during CCAA proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its CCAA authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

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

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

2. Questions en litige

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

- (1) Le paragraphe 222(3) de la LTA l'emporte-t-il sur le par. 18.3(1) de la LACC et donne-t-il priorité à la fiducie réputée qui est établie par la LTA en faveur de la Couronne pendant des procédures régies par la LACC, comme il a été décidé dans l'arrêt *Ottawa Senators*?
- (2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la LACC en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?
- (3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

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

3. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvable ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la LACC dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la LACC, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3^e sess., 34^e lég., 3 octobre 1991, 15:15-15:16).

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

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

[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,

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

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

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

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

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

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

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

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

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

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

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

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

3.2 *GST Deemed Trust Under the CCAA*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

222. . . .

. . . .

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

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

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

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

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

222. . . .

. . . .

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

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

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

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

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

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

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

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

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

18.3 . . .

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

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

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

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

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

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

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

18.3 . . .

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

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

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

18.4 . . .

. . . .

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

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

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

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

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

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

18.4 . . .

. . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in those Acts carving out an exception for GST claims.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[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. 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.

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

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

3.4 *Fiducie expresse*

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

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

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

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

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

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

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

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

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

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

4. Conclusion

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

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

The following are the reasons delivered by

FISH J. —

I

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

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

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

4. Conclusion

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

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

Version française des motifs rendus par

LE JUGE FISH —

I

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

(2) 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* . . .

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

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

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

(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.

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

(3) 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* . . .

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

[102] 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.

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

. . .

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

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

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

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

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

. . .

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

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

. . .

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

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

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

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

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

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

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

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

III

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

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

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

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

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

III

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

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

The following are the reasons delivered by

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

[115] Section 11¹ of the CCAA stated:

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

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

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

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

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

Version française des motifs rendus par

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

[115] L’article 11¹ de la *LACC* disposait :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

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

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

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

[TRADUCTION] ... en matière d’interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l’intention du législateur lorsqu’il a adopté la loi. Cette règle fondamentale l’emporte sur toutes les maximes, outils ou canons d’interprétation législative, y compris la maxime suivant laquelle le particulier l’emporte sur le général (*generalia specialibus non derogant*). Comme l’a expliqué le juge Hudson dans l’arrêt *Canada c. Williams*, [1944] R.C.S. 226, [...] à la p. 239 ... :

On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n’est pas une règle de droit mais un principe d’interprétation, cède le pas

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

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

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

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

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

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

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

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005², le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l’opinion exprimée par ma collègue, cette observation est réfutée par l’al. 44f) de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l’effet (inexistant) qu’a le remplacement — sans modifications notables sur le fond — d’un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

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

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

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

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

. . .

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

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

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

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

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

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

Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1^{re} sess., 38^e lég., 23 novembre 2005, p. 2147)

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

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

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

for payment of the GST funds during the CCAA proceedings.

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

[136] I would dismiss the appeal.

APPENDIX

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

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

. . .

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

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

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

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

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

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

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

[136] Je rejetterais le présent pourvoi.

ANNEXE

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

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

. . .

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

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

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

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

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

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

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

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

. . . .

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

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

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

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

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

(i) the expiration of the order,

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

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

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

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

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

. . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

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

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

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

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

(3) [Burden of proof on application] The court shall not make the order unless

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

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

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

(i) the expiry of the order,

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

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

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

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

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

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

(i) à l'expiration de l'ordonnance,

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

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

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

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

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a)(i)* à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

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

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l’égard d’une compagnie qui est un débiteur visé par la loi provinciale, s’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

(2) [Cessation d’effet] Les passages de l’ordonnance qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d’avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l’égard de toute somme qui devient due à Sa Majesté après le prononcé de l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

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

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

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection

perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

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

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

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

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

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

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

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

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

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

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

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L’ordonnance prévue à l’article 11.02, à l’exception des passages de celle-ci qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

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

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

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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

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

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

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

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

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

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

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

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

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

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

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

Loi sur la taxe d’accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

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

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

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

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

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

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

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

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

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

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

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

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

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

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

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

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas a) et b),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

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

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

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

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

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

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers’ compensation, in this section and in section 87 called a “workers’ compensation body”, rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

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

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

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

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

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

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

86. (1) [Réclamations de la Couronne] Dans le cadre d’une faillite ou d’une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d’une province ou d’un organisme compétent au titre d’une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

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

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

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

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

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

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

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

Appeal allowed with costs, ABELLA J. dissenting.

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

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

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA est dissidente.

Procureurs de l’appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l’intimé : Procureur général du Canada, Vancouver.

TAB 7

IIC-ART Vol. 5-4
Insolvency Institute of Canada (Articles)
— Recent Trends in DIP Financing

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—*Wael Rostom and Caitlin Fell**

1. INTRODUCTION

When an insolvent company contemplates filing for protection under one of Canada's principle restructuring statutes, it may require interim financing or, as more typically referred to, debtor in possession (DIP) financing. DIP financing should provide the applicant company with sufficient liquidity to fund its operations and to cover the costs of the court-supervised proceedings while the applicant company attempts to successfully restructure its business. The availability of reliable DIP financing can also help to increase stakeholder confidence in the company's restructuring efforts, which may in turn lead to greater cooperation by stakeholders. The availability of, and allowance for, DIP financing under the *Companies' Creditors Arrangement Act*² (CCAA) and the proposal provisions of the *Bankruptcy and Insolvency Act*³ (BIA) is intended to reflect and complement the statutory objectives of the CCAA and proposal provisions of the BIA, which are to allow a debtor time and breathing space to facilitate a going concern solution that maximizes value for the benefit of all stakeholders. Thus, where a company requires DIP financing, the selection of the DIP lender and the terms and conditions of the financing will be crucial decisions.

While DIP financing is far from a new phenomenon in Canada, recent CCAA cases involving companies financed by DIP loans have shed light on several emerging issues and trends in DIP lending. This paper will explore these recent issues and trends, including DIP loan terms and pricing, issues pertaining to DIP lender control in a proceeding and whether a competitive DIP loan selection process should be required. This paper will also explore the current uncertainty in the judicial treatment of roll-ups and creeping roll-ups. These cases provide restructuring professionals and lenders with important guidance on how to properly structure DIP financing in practice and ultimately maximize the chances of successfully obtaining court approval.

In addition, the authors argue that adequate notice of more than just a few days for a motion to approve DIP financing is required to ensure procedural fairness. Adequate notice should permit stakeholders time to review the detailed terms and conditions of the DIP financing proposal, its impact on their position and the restructuring proceedings more generally, and time to prepare any responding materials. This simple procedural step should impose more discipline on the moving party to rely on substantive justification for the specific terms and conditions of the proposed DIP financing sought and mitigate the over-reliance that is frequently placed on factors such as "urgency" and expediency. The authors have observed that Canadian courts are increasingly viewing assertions of urgency with greater skepticism, recognizing that sometimes emergencies are self-made. Courts should impose and guard adequate notice requirements to encourage meaningful consultation by the debtor and proposed DIP lender with major stakeholders.

2. BACKGROUND OF DIP FINANCING

While DIP financing was only codified in the CCAA and BIA in 2009, previously courts nonetheless approved DIP financings on the basis of their inherent jurisdiction.⁴ Effective in 2009, Parliament codified the use of interim financing and the test to be applied by the court in approving DIP financing. Section 11.2 of the CCAA grants the court the ability to approve interim financing, and a corresponding charge in favour of a DIP lender, in an amount that is required by the debtor, having regard to its cash-flow statement.⁵ The application by the debtor for DIP financing must be with notice to any secured creditors likely to be affected. Section 11.2(4) sets out a non-exhaustive list of factors to be considered by the court in determining whether to grant an order approving DIP financing. In deciding whether to grant such order, the court is to consider, among other things:

- the period during which the company is expected to be subject to proceedings under the CCAA;
- the management of the company's business and financial affairs during the proceedings;
- whether the company's management has the confidence of its major creditors;
- whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- the nature and value of the company's property;
- whether any creditor would be materially prejudiced as a result of the security or charge; and
- the monitor's report referred to in paragraph 23(1)(b) of the CCAA, if any.⁶

Since the codification of DIP financing, trends have emerged which have spurred debate on how to properly balance the necessity for protections of a DIP lender to encourage lending in an insolvency situation with the interests of the debtor and other stakeholders. These competing interests are not new in Canada or the United States. However, the balancing of these interests becomes particularly important at a time when commodity prices are dangerously low and when some Canadian debtors are severely impacted by the decline in the Canadian dollar. Current market conditions put in jeopardy the value of recovery for existing creditors and, in some cases, even the DIP lenders themselves. Increased tensions between the rights of DIP lenders and the objectives of the CCAA are resulting in justifiably greater oversight and direction by the court in setting the standard of fairness within the circumstances of each CCAA case.

3. OBSERVATIONS ON DIP PRICING

When approving a DIP loan, courts will consider the reasonableness of the financing terms and the fees charged by the DIP lender. As mentioned by the Court in *Canwest Publishing Inc./Publications Canwest Inc., Re*,⁷ there should be evidence presented to the court as to the reasonableness of the fees charged by the DIP lender. Increasingly, courts are turning to, and relying on, the monitor of the debtor for recommendations as to the terms and fees charged under the DIP loan. Generally speaking, courts will expect to see evidence that demonstrates that pricing and terms are better than, or equal to, other DIP proposals received by the debtor or that the DIP facility, and its terms are not out of line with comparable DIP facilities approved in other cases.⁸ However, as discussed further below, pricing alone should not be the determining factor in the selection of a DIP loan.

The authors examined a sample of DIP financing cases in Canada between 2010 and 2015. The average fixed interest rate in the sample for DIP financing was approximately 10.75%, with a range of between 2% and 21%. With respect to floating or variable interest rate DIP financing, base rates included prime rate or LIBOR loans with or without floor base rates. It was not uncommon to see floor base rates in the range of 3% to 4%. In the sample, the average interest rate premium over the applicable base rates was approximately 6.08%, with a range of interest premium between 2% and 11%.

The pricing elements of DIP financing can also include all, or a combination of, commitment fees, unused line fees, cash pay interest, extension fees, exit fees, cost and professional fee reimbursements and other fees. Looking at a sample of DIP financing cases, the range of total upfront administration, structuring, closing or commitment fees charged by a DIP lender, in the period from 2011 to 2015, was between 2% and 14%. With respect to exit fees, DIP lenders in the sample charged a range of 2% to 6.15% during the same period. These pricing examples are intended to be illustrative only. The reality is that the Canadian DIP lending market is not robust enough to produce true "market" DIP interest rates and fees.

The pricing of DIP financing will be influenced by a number of factors, including macroeconomic conditions, industry conditions, company credit risk analysis, priority ranking of security for the DIP financing, cost of capital and investment hurdle rates for the DIP lender, motivations of the proposed DIP lender in providing the DIP loan and whether or not the company

ran a competitive DIP financing selection process. The costs of a DIP loan will necessarily result in reduced cash available to the debtor or for net distributions to creditors. In addition, the circumstances under which some fees are triggered can have an impact on the options available to a debtor during the case. For example, some DIP loans include an exit fee payable to the DIP lender when the loans advanced are fully repaid. Some exit fees are simply deferred compensation to the DIP lender for a successful restructuring resulting in repayment of the DIP. However, the authors have observed some "exit fees" that appear to be to be payable in full, even if only \$1 is advanced and then repaid under the DIP loan and payable on any refinancing of the DIP. This latter feature can have the effect of entrenching the incumbent DIP lender by making it very expensive to replace the DIP lender if relations sour at some point in the case. While there may be sufficient justification for such fees in the particular circumstance of a case, it is important for the debtor and the monitor to fully explain the impact of such fee arrangements to the court and other stakeholders. Certainly, there is a question as to whether an exit fee should become effective if the consideration of the DIP loan approval remains subject to determination on the comeback hearing, in case the initial DIP advance is repaid from a subsequently approved replacement DIP loan.

Courts must weigh the financial economics of the loan against other terms or conditions of a DIP loan, which may impose onerous controls on the debtor. For instance, the Court in *Crystallex*⁹ approved a proposed DIP loan of \$36 million that was more expensive and provided for fundamental changes to Crystallex's governance and capital structure over a competing \$10 million DIP at a simple interest rate of 1% proposed by Crystallex's noteholders.¹⁰ The competing noteholder DIP essentially provided for low cost interim financing without requiring fundamental changes to Crystallex's governance and capital structures. Notwithstanding the availability of a DIP with cheaper financial terms, the Court approved the more expensive DIP loan on the basis that it provided much more certainty.¹¹ The approved DIP provided committed funding until the expected conclusion of the restructuring whereas the proposed noteholder DIP only provided funding to a date by which Crystallex would need to have developed an acceptable restructuring proposal.¹² The risk to Crystallex was that, if the noteholders did not agree to provide the additional funding when needed, then Crystallex could be restricted in concluding a restructuring. Crystallex believed that it would be difficult for the company to return to the market to solicit DIP proposals if it needed additional funding, as financing sources would be reluctant to spend additional time and resources to submit another financing proposal. Further, the Court noted that the cheaper noteholder DIP with a 1% interest rate would only assist in removing, or seriously eroding, the chance of Crystallex going to the market in time for a new loan that could be comparable to the below market noteholder DIP, thereby making the company unduly beholden to the noteholders.¹³

4. DIP LENDING AS MEANS OF ASSERTING GREATER CONTROL

In addition to assessing the financial terms of each proposal, factors such as timing, prejudice, risk and uncertainty play a central role in approving a DIP loan, especially when the court is presented with a competing DIP.¹⁴ The assessment of these factors has become important in light of the increasing scrutiny that some courts are giving to "control" provisions in the DIP loan documentation. DIP financing is not just a way for the company to finance its restructuring proceedings — it is, and will inevitably always be, a tool to facilitate greater control in the proceedings, whether by the debtor or the DIP lender.

A debtor may be advised to attempt to obtain a DIP loan that provides the maximum amount of flexibility to carry out its contemplated restructuring and thereby reduce the amount of control or influence that existing creditors might otherwise exert. On the other hand, an existing secured creditor viewing matters from its unique position in the capital structure may wish to provide DIP financing to mitigate some of the debtor's extraordinary powers in a CCAA and place added restrictions on the debtor's conduct in the case to obtain maximum recovery on their pre-filing exposure. Therefore, it is not uncommon for an existing first secured lender, that believes that its position might be potentially impaired by a runaway restructuring process, to offer a DIP loan to ensure that the process does not create further risk or that its collateral position will not be eroded. In contrast, a junior creditor whose position may be on the cusp of being "in the money", may wish to advance super-priority financing on the strength of the senior lenders' collateral, and may hope that a long and extended process may create new options for it to recover value on its out of the money position. In addition, an existing stakeholder or new lender may wish to advance the DIP loan as a "loan to own" acquisition strategy.

There is nothing inherently problematic with the foregoing rationales for when a creditor might provide DIP financing or in relation to a debtor's selection of a proposed DIP loan. However, the problem lies where the DIP loan is used as a tool to gain an inappropriate or overreaching level of control in the proceedings to the prejudice of other stakeholders. For example a DIP lender may try to use its senior secured DIP position to gain certain unfair advantages for its pre-filing position. While it should be expected that any existing stakeholder that offers to provide a DIP loan will be seeking certain advantages as a result of the loan, the emphasis of concern should be on unfair or inappropriate advantages. The phenomenon of overreaching control is not new and the detrimental implication of excessive lender control in a proceeding was articulated by a United States Court:

Under the guise of financing a reorganization, the Bank would disarm the debtor of all weapons useable against it for the bankruptcy estate's benefit, place the debtor in bondage working for the bank, seize control of the reins of reorganization, and steal a march on other creditors in numerous ways. The financing agreement would pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specifically crafted for the benefit of the bank and the debtor's principals who guaranteed its debt.¹⁵

In *Great Basin Gold Ltd., Re*, the Court acknowledged that DIP lenders employ leverage to control the process in order to obtain advantages relative to other stakeholders. Thus, there is a need for the court, as the role of gatekeeper, to ensure that the terms of a DIP loan are reasonable, especially in circumstances where a court is being asked to approve DIP financing on the basis of urgency.¹⁶

I recognize that in some restructuring proceedings, certain stakeholders may use existing leverage, to the extent that they have it, to take advantage of the chaos and uncertainty that are inherent in these situations. Strategies might be employed to secure for themselves advantages that they would not otherwise obtain. These advantages inevitably come at the expense of other stakeholders in the proceedings. These advantages are also almost always Court approved so that they cannot be later revisited. In those circumstances, the Court must be constantly vigilant against such strategies.¹⁷

Specific overreaching control provisions can include the following:

- aggressively short milestones to run a sale process and to complete a transaction (presumably where there was sufficient liquidity to run a longer process) and failure to achieve such milestones constituting an event of default;
- restrictions on the borrower's ability to sanction a plan that does not provide for the payment in full of the DIP lender's pre-petition obligations;
- provisions which require a sale transaction to pay out the pre-filing debt of the DIP lender; or
- provisions which limit the discretion of the court.

Recently, there has been an increased focus by the courts on whether certain control features in DIP loan documents are overreaching. The approval by the court of DIPs containing onerous control terms necessarily results in a greater risk of these terms becoming market practice, and consequently, being used as precedents in future cases to approve such DIP proposals. Notably, the inclusion of overreaching control provisions recently resulted in the Court refusing to approve certain provisions in a DIP financing proposal in the CCAA proceedings of *Essar Steel Algoma Inc.*¹⁸

On November 9, 2015 (the "filing date"), Essar Steel and certain of its related affiliates filed for protection under the CCAA, at which time the Court approved senior secured DIP financing by a syndicate of lenders comprising of the pre-filing revolving lenders and certain of the pre-filing term lenders.¹⁹ The initial order affidavit submitted by the debtor requested approval of a DIP loan, which had the support of the monitor. The monitor was of the opinion that the DIP agreement was the product of a rigorous and thorough bidding process between the debtor, the DIP lender and another competing bidder for the DIP facility.²⁰ The DIP loan contained certain milestones for the marketing and sale of Essar Steel's assets. These milestones and certain

other onerous control provisions were the subject of opposition from subordinated stakeholders, including the senior secured noteholders and the junior noteholders. The basis of the opposition included the following covenants contained in the DIP loan:

- the requirement that Essar Steel file a motion for bidding and sales procedures before January 4, 2016 (approximately eight weeks from the filing date);
- the requirement that Essar Steel obtain an order from the Court approving the bidding and sales procedures (SISP) before January 11, 2016 (approximately nine weeks from the filing date);
- the requirement that Essar Steel obtain an order from the Court before May 1, 2016 (approximately 25 weeks from the filing date), approving a sale or investment transaction and authorizing the distribution of the proceeds from the sale or investment transaction to the DIP lenders in full for the obligations under the DIP agreement and the pre-petition lenders in an amount sufficient to pay in full the obligations under the pre-petition senior facilities;
- the requirement that Essar Steel complete the above sale or investment transaction and distributions outlined above before August 31, 2016 (approximately 42 weeks from the filing date), as potentially extended; and
- a provision which limited the Court's discretion by providing that on an event of default, and after giving of notice of an event of default, the only issues that may be raised by any party in opposition thereto being whether, in fact, an event of default has occurred.

The subordinated lenders opposed the DIP financing on the basis that the milestones would force Essar Steel to rush into a sale process at an early stage. This had the potential to impair the ability of the debtor to examine and develop a broad range of restructuring alternatives and paths to maximize value. In his endorsement, Newbould J. took issue with several aspects of the DIP loan and ultimately required that changes be made to the terms of the DIP facility, notwithstanding that the monitor supported the DIP.²¹ In its endorsement, the Court noted that the proposed DIP was far from ideal and articulated concern with respect to the amount of control sought by the DIP lenders:

I do not see the DIP lenders as being merely altruistic. Like any DIP lender, it is in their interest to take what they can get. Their interest, of course, in a situation such as this in which they are all ABL or Term lenders, is to see the business successfully restructure, but to be sure they work it on their terms as much as possible.²²

In the endorsement, the Court specifically took issue with the following DIP term provisions:

- a provision which would cause an event of default unless a plan provided for either the payment in full in cash of all obligations under the pre-petition senior facilities; and
- a provision which limited the recourse of any party if an event of default were to occur, to raising the question as to whether, in fact, the event of default has occurred or is continuing.²³

Newbould J. directed the parties to amend these provisions as well as the milestones based on the concessions negotiated between the parties, which included a 10-day moratorium before an event of default could occur for failing to meet the milestones.²⁴ At the November 19, 2015 hearing, the DIP lenders agreed to further amendments to provide Essar Steel with additional time to run a sales and investment solicitation process. The milestones in the amended DIP were as follows:

1. Essar Steel and its advisors develop a business plan acceptable to the required DIP lenders, including a pricing outlook, before February 1, 2016 (approximately 12 weeks from the filing date).
2. Essar Steel develop and obtain an order for the SISP seeking potential sale of or investment in its business by no later than February 1, 2016 (approximately 12 weeks from the filing date). Any purchase or investment offer under the SISP must contain a sufficient cash (or other consideration satisfactory to the required DIP lenders) component to repay all amounts owing under the amended DIP agreement, including the revolving and term loan components.

3. Essar Steel must use its best efforts to launch the SISP by February 15, 2016 and no later than March 1, 2016 (approximately 16 weeks from the filing date), if necessary and after consultation with the required DIP lenders.
4. The deadline for final offers under the SISP will be May 15, 2016 (approximately 26 weeks from the filing date). An extension may be granted, but never beyond June 1, 2016 (approximately 29 weeks from the filing date), with the consent of the monitor after consultation with the required DIP lenders or as determined by the Court.
5. Any transaction under the SISP must have court approval no later than 30 days after the final offer deadline (by June 14, 2016). Any plan of compromise or arrangement resulting from the SISP must have court approval no later than 60 days after the final offer deadline (by July 14, 2016).
6. Any sale transaction must close or any implementation of any plan of compromise must be in place by August 31, 2016 (approximately 42 weeks from the filing date).²⁵

The issue of milestones in a DIP loan is generally the subject matter of intense negotiation between the debtor and the DIP lender. For the debtor, the obvious risks of tight milestones may be that the milestones: (i) do not facilitate a robust sale process; (ii) do not allow the debtor sufficient time to explore a stand-alone reorganization or other restructuring alternatives; and (iii) take advantage of a decline in the applicable markets without giving parties in interest a reasonable time to assess the likelihood that such markets will rebound during the CCAA proceedings.²⁶ Further, in accepting aggressive timelines in a DIP financing proposal, a court should be cognizant of the establishment of tight timelines if the debtor has not provided evidence typically required in a sale process approval motion. On a sale process approval motion, a debtor must demonstrate that a fair, open and competitive sale solicitation process that meets the *Soundair* test²⁷ can be implemented within the proposed milestone dates.

The authors contend that sale milestones in a DIP agreement are necessary since an expensive and prolonged process could simply serve to further erode value without any guarantee of a higher or better outcome at the end of such process. It is important for courts and stakeholders to appreciate that there is no simple answer to the length of time a debtor should be given to have an opportunity to restructure. The approval of milestones in a DIP should be based on evidence by the debtor and the monitor that the requested DIP milestones are informed by an analysis taking into account market conditions, the nature of the assets, any deterioration of the business or collateral over time, the liquidity of the debtor and whether the sale process milestones permit the debtor to carry out a competitive and commercially reasonable process. A monitor and the court should therefore be mindful of sale milestones in a DIP to ensure that these milestones are based on a sensible, rational and evidentiary based assessment of the circumstances of each company.

5. DIP SELECTION PROCESS

While it appears intuitive that a company will look to select the least expensive DIP financing proposal, the considerations in choosing a DIP proposal are rarely that simple. The authors find that the issues around non-pricing terms, such as control, timelines, milestones and roll-up features, to be potentially more challenging considerations in a DIP loan selection process.

In selecting an appropriate DIP financing proposal, it is an unfortunate reality that many companies wait far too long to do serious planning and structuring of a potential formal court-supervised restructuring, including to adequately solicit multiple proposals for DIP financing. While in some cases delay in engaging in serious planning might be justified, given the time, money and resources required to undertake a DIP selection process, many seasoned practitioners would agree that there is generally a strong bias by management to postpone contingency planning for far too long. The authors contend that some of the very issues that cause the most significant opposition from stakeholders or a court on a motion for approval of DIP financing might be avoided, or at least mitigated, with a proper DIP selection process and adequate time for a company and a proposed monitor to properly consider the financial and control features of each solicited DIP proposal.

To obtain a DIP with terms that assists a debtor in seeking a going concern solution, a debtor, with the assistance of a financial advisor, should look to run a competitive DIP selection process. This can be done prior to the commencement of CCAA

proceedings, or after such time, if the debtor has sufficient cash and a filing under the CCAA without DIP financing will not prejudice the operations of the debtor.

In *Crystallex*,²⁸ the debtor, under the terms of the initial order, was authorized to pursue all avenues of interim financing of its business to permit it to proceed with an orderly restructuring. The initial order further provided that the best DIP offer, as determined by *Crystallex*, pursuant to the auction procedures, shall be afforded the protection of the *Soundair*²⁹ principles so that it would be too late to make topping offers after the bid deadline.³⁰ The *Soundair* principles require a court to consider and determine: (i) whether there has been sufficient efforts to obtain the best price; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and (iv) whether there has been unfairness in the working out of the process.³¹ As a result of a robust financing solicitation process, *Crystallex* sought and obtained approval for a DIP loan that would allow it to pursue recovery for its creditors from the significant cash proceeds that were expected to be obtained from pursuing an arbitration award.

In *Crystallex*, the *Soundair* principles were cited, in part because the DIP loan included an investment feature but also to avoid last minute topping bids. The one challenge in strictly applying the *Soundair* principles to a DIP selection process is that it may not be feasible or desirable to seek DIP proposals from the full universe of possible lenders. A much more modest and targeted list of possible lenders should be sufficient in most cases. With suitable modifications, it may be beneficial for a court to consider the *Soundair* principles in evidencing the fairness of a process in the selection by a debtor of a suitable DIP financing proposal.

The benefits of management running a DIP selection process are fairly obvious:

- a DIP selection process will hopefully identify more than one DIP option and management can review the identities of the proposed DIP lenders and the terms of multiple proposals to determine which DIP provides the best overall financing arrangements for the case;
- choosing between alternative DIP proposals provide the company with more leverage to negotiate and obtain better terms;
- a competitive process should impose discipline on pricing, reduce the cost of DIP financing and reduce the level of onerous control provisions; and
- the cost and disruption of potential last minute DIP proposals being presented for tactical reasons will be reduced.

The question of whether the DIP selection process should occur prior to or after the commencement of the case will depend on the facts and the debtor's financing needs. In any event, the decision as to how to proceed should be made early on to avoid missing out on the benefits of the process for the debtor and stakeholders and to avoid unnecessary "urgent" filings with one take-it-or-leave-it DIP proposal.

In implementing a DIP selection process, the authors contend that debtors and financial advisors must analyze not only the pricing and financial items of a DIP proposal but also the control provisions required by a DIP lender that may limit the debtor's options or ability to run a robust sale or restructuring process. The very fact that a reasonable competitive DIP process was run should demonstrate to the court and stakeholders that efforts were made to obtain the best and the most suitable proposal. Importantly, running a DIP selection process should assist with providing evidence to the court for the approval of the proposed successful DIP loan by providing highly relevant comparables in the specific case.

6. THUMBS UP OR DOWN FOR ROLL-UPS?

Roll-ups, and permutations thereof, continue to be hotly debated largely because there is a serious question under Canadian restructuring laws about the use and permissibility of "roll-up" DIPs.

Under a true roll-up, a DIP lender's pre-filing debt or a portion thereof is paid back using advances under the DIP financing, and the pre-filing debt is thereby "rolled" into the DIP facility. In addition to a true full or partial roll-up mentioned above, a DIP lender may also try to seek approval of a "creeping roll-up". Under a creeping roll-up, instead of DIP proceeds being

used to pay down pre-filing obligations, a debtor's cash from operating during the CCAA proceedings is swept and used to pay down pre-filing obligations, and there is a corresponding draw on the DIP facility to fund further operations. More rigorous and carefully structured "creeping roll-ups" only sweep the receivables that existed on the filing date or that are generated from inventory that existed on the filing date.

The judicial treatment of roll-ups and creeping roll-ups is inconsistent as to their permissibility. With respect to full or partial roll-ups, the Court in the CCAA proceedings of *White Birch Paper Holding Co., Re*³² approved DIP financing and a corresponding super-priority charge, notwithstanding that \$50 million of the \$140 million DIP facility would directly repay and discharge the pre-filing asset based revolving credit facility extended by the DIP lender. In approving the White Birch DIP facility, the Court noted that the priming DIP charge would not secure any obligations that were owing prior to the filing. However, in the CCAA Part 4 recognition proceedings of *Hartford Computer Hardware Inc., Re*,³³ it was expressly noted that a provision in the DIP agreement, which required that all cash collateral that comes in the possession of the debtor after the petition date would be deemed to have been remitted to the pre-petition lender for the repayment of the pre-petition credit facility, would *not* be permissible under section 11.2(1) of the CCAA.

With respect to creeping roll-ups, several courts have approved interim DIP financing facilities that required the applicants to use receipts from operations to pay down pre-filing obligations.³⁴ In *Angiotech*, the Court approved an initial order which directed the debtors to cash collateralize the pre-filing obligations, and that the DIP charge would not secure any obligations that were incurred pre-filing in accordance with section 11.2 of the CCAA.³⁵ In *Cow Harbour*, the Court expressly held that the features of creeping roll-up DIP financing are not prohibited by section 11.2(1).³⁶ In rejecting the argument of certain creditors that the arrangement (in which a pre-filing credit facility was being converted to a DIP facility) violated section 11.2(1), the Court gave the following rationale:

In other words, [the creditors] complain that [the DIP lender] is bootstrapping itself. From a strict statutory interpretation perspective, that interpretation is incorrect because the interim financing security does not secure the previous indebtedness. The term sheet says that. And I approved the initial order on that basis. The super-priority secures only the interim financing and no more.

From a practical perspective, however, the creditors complain that the [lender's] nonprime security is becoming primed security because as [the lender] gets its initial money order paid it turns around and lends that money to the debtor under the interim financing. That would be a strong argument, except that the debtor is using the interim money financing to pay for its ongoing operations such as payroll. The payments to [the lender] are coming out of cash-flow not interim financing. If there were little or no ongoing costs then the creditor's argument would be much stronger. Granted at this time there is no interim financing money outstanding, but we are all aware that the debtor had to meet payroll on April 9, 2010, using interim financing money, and I suspect it will have to meet it again on April 30, 2010.³⁷

In the CCAA proceedings of *Comark*,³⁸ the Court approved a DIP financing facility which in essence provided for a creeping roll-up on the basis of an approval of the existing cash management system. In *Comark*, the cash management system in effect prior to the CCAA proceedings required that all cash be deposited into a blocked account, which was under the control of a pre-filing secured lender. In order for Comark to access liquidity in the CCAA proceedings, Comark was required to deposit all cash from operations into the blocked account in order to pay down the pre-filing revolver facility. Payments towards the pre-filing revolver would result in availability under the DIP facility extended by the same pre-filing secured lender. The Court accepted that, since the pre-filing revolver facility was only being reduced by the use of Comark's cash generated from its business, the DIP charge would only be securing advances made post-filing under the DIP facility. Accordingly, the DIP charge would not secure an obligation that existed prior to the commencement of the CCAA proceedings.

There has yet to be judicial consensus or a fully reasoned analysis as to the availability of roll-ups or creeping roll-ups. The authors argue that, subject to certain conditions and checks and balances being put in place to protect stakeholders, roll-ups

should be permitted in certain circumstances. Roll-ups can protect a creditor with a first ranking security interest on all of a debtor's accounts receivable and inventory from being prejudiced by the erosion of its working capital collateral.

The issue with respect to the uncertainty of the use of roll-ups has arguably manifested as a result of the varying interpretations of section 11.2 of the CCAA. Section 11.2 of the CCAA provides that a DIP charge may not secure an obligation that exists before the order approving the DIP financing is made.³⁹ This section of the CCAA came into force with the 2009 amendments to address an issue that arose in the *Air Canada*⁴⁰ CCAA proceedings in which a DIP lender was able to secure its unsecured pre-filing aircraft lease obligations with the DIP charge, thereby directly elevating its pre-filing debt to super-priority secured indebtedness.

In order to address the risk of preferences and cross collateralization, a plain reading of section 11.2 of the CCAA results in a narrow restriction — that a DIP charge cannot secure a pre-filing obligation. This is consistent with the *White Birch* decision. There is nothing in the language that suggests that DIP financing, secured by a DIP charge, cannot be used to pay pre-filing obligations, including a pre-filing loan. Some insolvency practitioners would suggest that the payment of pre-filing obligations using DIP proceeds or cash from operations indirectly secures such pre-filing obligations in contravention of section 11.2 of the CCAA. If this interpretation were true, all payments of pre-filing obligations such as wages and critical supplier payments would be in contravention of section 11.2 of the CCAA. Accordingly, the authors contend that full or creeping roll-ups should be permitted if they are fully disclosed to the court and, if based on the circumstances of each case, they do not prejudice the rights of other stakeholders by altering their relative priorities.

Roll-up, or creeping roll-ups, are often necessary to protect pre-filing working capital lenders who become the DIP lender. Under a pre-filing loan, a lender advances funds on the strength or value of the debtor's assets, including its receivables and inventory. The logic is that, since the pre-filing working capital lender's loans were used to generate this working capital and, assuming its security is valid and enforceable, the pre-petition lender should be able to recover that collateral rather than have it dissipated or diminished by funding the proceedings. If the working capital lender lent based on asset-based lending formulas, it relied on the recovery of that very collateral for its repayment (not necessarily a going-concern sale). It is often the case that the level of working capital generated during the CCAA proceedings is reduced, thereby compromising the repayment of the pre-petition loan which was originally advanced based on its strength of such working capital. Accordingly, a roll-up or creeping roll-up seeks to mitigate this risk for a pre-filing lender. With respect to a DIP lender, the reduction in working capital doesn't present the same risk as new DIP loan advances are made with the full costs and impact of the restructuring proceedings taken into account when determining the amount of the DIP loan commitments and conditions of availability. DIP roll-ups may also permit more DIP loans in proceeding being offered by parties that are willing to refinance the existing lenders to avoid hostile DIP loan fights.

Courts should consider, approving full or partial roll-ups and continuing to approve creeping DIP roll-ups in appropriate circumstances where:

- the monitor has provided an opinion as to the validity and perfection of the pre-filing lender's security;
- the debtor can establish that the roll-up or creeping roll-up does not alter the relative priority of the claims of other creditors to the pre-filing working capital that will be used to repay the pre-petition loan or that appropriate protections for such priority claims have been developed;
- the DIP lender is not obtaining an undue advantage relative to other creditors;
- stakeholders are given adequate notice of the DIP approval motion which includes the roll-up or creeping roll-up provision so that stakeholders who may be prejudiced can oppose the use of the roll-up or creeping roll-up; and
- the availability of a mechanic which can reverse the roll-up in the event there is a successful challenge by other creditors as to the validity, enforceability, extent, perfection or priority of the pre-filing lender's claims.

7. NOTICE — NOT NECESSARILY ALWAYS BETTER LATE THAN NEVER

In approving DIP financing, section 11.2 of the CCAA requires a debtor to provide notice to affected secured creditors. While notice to affected secured creditors is essential because of the priming element of DIP financing, the authors take the view that adequate notice should be provided to all stakeholders as the terms of a DIP proposal, including pricing and control provisions, may be prejudicial to all stakeholders. Notice of a proposed legal action that could affect the rights of interested parties is a fundamental component of any just, fair and effective legal process. Adequate notice of an application for DIP financing provides stakeholders with a reasonable opportunity to consider the merits of the application, engage in informal negotiations and, if necessary, prepare responding materials.

In order to ensure that adequate notice is given to all stakeholders, and that stakeholders have an opportunity to come before the court to oppose the DIP financing, the courts have recently begun to limit the availability of DIP financing to the minimum amount necessary for the debtor to operate in the first week prior to the comeback hearing. The approval of the limited amount of financing ensures that a DIP is not a *fait accompli* before stakeholders have had time to consider the DIP and its impact.

The importance of adequate notice of an application for DIP financing was underscored in *White Birch* where insufficient notice to a major secured creditor led the Court to agree with the secured creditor's contention that it should be allowed to attend a *de novo* hearing where the whole issue of granting a DIP loan and corresponding super-priority would be heard again despite an earlier order of the Court granting super-priority DIP financing.⁴¹ As the Court stated in *White Birch*, "the whole substance of the CCAA is based upon the principle of having and maintaining a 'level playing field' among the various stakeholders involved in a restructuring process".⁴²

In the CCAA proceedings of *Indalex Ltd., Re*,⁴³ the Court was confronted by pension plan members who argued that the debtor's failure to give adequate notice of their motion for DIP financing prejudiced the plan members' ability to fully argue their position. In *Indalex*, the debtor company solicited terms from a variety of possible DIP lenders and eventually agreed to accept the DIP loan offered by a syndicate of pre-filing senior secured creditors. On April 8, 2009, the CCAA Court issued an amended initial order authorizing the debtor to borrow \$24.4 million from the DIP lenders and to grant them security over all creditors. The Court found that the plan members did not participate in the initial proceedings and received little or no notice of the motion requesting DIP financing. The Supreme Court of Canada found that the plan administrator's duty to the plan members meant that, at the very least, the plan members were entitled to reasonable notice of the interim financing motion so that they could have the opportunity to present their arguments.⁴⁴

In the United States, DIP financing is ordered on a split basis, with an interim order being granted on little or no notice and the balance being approved on a hearing for approval of a final DIP order, on 20 days notice to interested parties. The 20-day period provides ample opportunity for stakeholders to understand often complex drafted DIP financing proposals and how such proposals will impact them. In the recent Chapter 11 filing of *MolyCorp, Inc.*,⁴⁵ the notice period provided the opportunity for the debtors to achieve more favourable DIP financing arrangement and maximize value for all stakeholders. In *MolyCorp*, the debtor sought court approval of a total \$135 million DIP by way of an interim order approving only \$22 million with the balance to be approved pending a final DIP hearing 20 days later.⁴⁶ As a result of opposition to the proposed DIP, in the period between the granting of the interim order and the final order, the terms of the DIP financing were renegotiated to remove onerous terms such as a full roll-up of pre-petition debt and consent rights over the Chapter 11 plan. It is the authors' view that the comeback hearing required as part of the model initial order in Ontario should be, at least as it pertains to the DIP loan, extended from seven days to 20 days to allow impacted stakeholders with the necessary time to consider a DIP proposal and its terms.

In addition to the foregoing, to alleviate the time constraints and better enable a court and stakeholders to properly understand what are typically complex and cumbersome DIP agreements, a monitor's report should contain a concise statement of all of the material provisions in the DIP agreement, including control features, roll-ups, whether there is a determination of the validity of pre-filing security, milestones and deadlines to approve a transaction or a plan, the treatment of pre-filing debt, pricing and

economic terms (including the dollar amount of required commitment fees and other costs, the payment of professional fees) and provisions which affect or limit the court's power or discretion.

8. CONCLUSION

It is the authors' view that DIP financing is alive and well in Canada, which is encouraging given that DIP financing is often critical for most CCAA debtors and can be a determinative factor in the success of any restructuring. The authors believe that discussion of these issues both outside and within the court, and the corresponding judicial determination by the court with respect to these issues, is healthy for our practice and for its evolution. This paper is an attempt to add to the ongoing dialogue.

Footnotes

- * Wael Rostom is a partner at McMillan and Caitlin Fell is an associate at McMillan.
- 2 R.S.C. 1985, c. C-36 [CCAA].
- 3 R.S.C. 1985, c. B-3 [BIA]. This paper will focus exclusively on the CCAA.
- 4 See *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 2000 CarswellBC 414 (B.C. C.A.); leave to appeal allowed 2000 CarswellBC 2132, 2000 CarswellBC 2133 (S.C.C.); *T. Eaton Co., Re*, 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Dylex Ltd., Re*, 1995 CarswellOnt 54, 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]).
- 5 CCAA, *supra* note 1, s. 11.2(1).
- 6 *Ibid.* s. 11.2(4).
- 7 *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 2010 CarswellOnt 212 (Ont. S.C.J. [Commercial List]) at para. 45.
- 8 *Comark Inc., Re*, 2015 CarswellOnt 20810 (Ont. S.C.J.) [Comark].
- 9 *Crystallex International Corp., Re*, 2012 ONSC 2125, 2012 CarswellOnt 4577 (Ont. S.C.J. [Commercial List]); affirmed 2012 CarswellOnt 7329 (Ont. C.A.); additional reasons 2012 CarswellOnt 9479 (Ont. C.A.); leave to appeal refused 2012 CarswellOnt 11931, 2012 CarswellOnt 11932 (S.C.C.) [Crystallex].
- 10 *Ibid.* at paras. 88-90.
- 11 *Ibid.* at para. 91.
- 12 *Ibid.* at paras. 23, 28.
- 13 *Ibid.* at para. 89.
- 14 *Great Basin Gold Ltd., Re*, 2012 BCSC 1459, 2012 CarswellBC 2996 (B.C. S.C.) [Great Basin].
- 15 *In re Tenney Village Co., Inc.*, 104 B.R. 562 (Bkcty. D. N.H., 1989) at p. 568.
- 16 *Great Basin, supra* note 13 at para 181.
- 17 *Ibid.* at para 179.
- 18 *Essar Steel Algoma Inc.* (November 9, 2015), Doc. CV15-000011169-00CL (Ont. S.C.J.).
- 19 *Ibid.*
- 20 *Essar Steel Algoma Inc.* (November 9, 2015), Doc. CV15-000011169-00CL (Ont. S.C.J.) (Affidavit of Rajat Marwah) at para. 135.

- 21 *Essar Steel Algoma Inc.* (November 16, 2015), Doc. CV15-000011169-00CL (Ont. S.C.J.) (Endorsement of Newbould, J.).
- 22 *Ibid.* at para. 2.
- 23 *Ibid.* at para. 1.
- 24 *Ibid.* at para. 2.
- 25 *Essar Steel Algoma Inc.* (December 23, 2015), Doc. CV15-000011169-00CL (Ont. S.C.J.) (Applicants' Motion Record Exhibit 2B) at para. 30-31.
- 26 American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11: Final Report and Recommendations* (Alexandria, VA: The Commission, 2014), online: <<http://commission.abi.org/full-report>>.
- 27 *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 7 C.B.R. (3d) 1 (Ont. C.A.) [*Royal Bank*].
- 28 *Crystallex*, *supra* note 8.
- 29 *Royal Bank*, *supra* note 26.
- 30 *Crystallex*, *supra* note 8 at para. 19.
- 31 *Royal Bank*, *supra* note 26.
- 32 *White Birch Paper Holding Co., Re*, 2010 QCCS 1176, 2010 CarswellQue 2675 (C.S. Que.) [*White Birch*].
- 33 *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964, 2012 CarswellOnt 2143 (Ont. S.C.J. [Commercial List]).
- 34 *Cow Harbour Construction Ltd., Re* (April 7, 2010), Doc. Bkcty. 24-115359 (Alta. Q.B.) at para. 51; *Angiotech Pharmaceuticals Inc., Re*, 2011 CarswellBC 124 (B.C. S.C. [In Chambers]) [*Angiotech*]; *Hart Stores Inc. / Magasins Hart inc., Re*, 2012 QCCS 1094, 2012 CarswellQue 2549 (C.S. Que.); *Catalyst Paper Corporation, Re* (January, 31 2012), Doc. S120712 (BC. S.C.).
- 35 *Angiotech*, *supra* note 33 at paras. 47 and 47A.
- 36 *Cow Harbour Construction Ltd., Re* (April 28, 2010), Doc. 1003 05560, EVQ10CO-WHARB (Alta. Q.B.).
- 37 *Ibid.*
- 38 *Comark*, *supra* note 7.
- 39 CCAA, *supra* note 1, s. 11.2(1).
- 40 *Air Canada, Re*, 2003 CarswellOnt 1220, [2003] O.J. No. 1157 (Ont. S.C.J. [Commercial List]).
- 41 *White Birch*, *supra* note 31 at para 26.
- 42 *Ibid.* at para. 9.
- 43 *Indalex Ltd., Re*, 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734 (S.C.C.).
- 44 *Ibid.* at para. 73.
- 45 *In re Molycorp, Inc., et al*, Bkcty. Delaware No. 15-11357.
- 46 Molycorp, News Release, "Molycorp, Inc. Receives Court Approval for \$22 Million in Interim Financing to Support Operations" (3 July 2015).

End of Document

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TAB 8

**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
ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ESSAR STEEL
ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR
STEEL ALGOMA INC. USA**

Applicants

**UNOFFICIAL TRANSCRIPT OF ENDORSEMENT OF
THE HONOURABLE MR. JUSTICE NEWBOULD DATED NOVEMBER 16, 2015**

Counsel: See Counsel Slip

On this comeback motion, some things can be settled, primarily the DIP loan, which is critical to the debtors efforts to restructure.

The timing of this comeback motion has been tight, as has this whole process due to the filing under the CCAA at such a critical time for Essar Algoma. It is clear that the drafting of the documentation is a work in progress.

In reviewing the DIP terms, I have the following comments:

1. The process should be open to persons to come to court. The DIP agreement is lengthy and the parties have not had a great deal of time to consider it – ie other than the debtors, the DIP agent and the Monitor. Some provisions should be changed:
 - the events of default in section 12.01(i) should delete the portions in parenthesis;
 - the provisions on p. 109 as to what may happen in the event of default states that the only issue that may be raised by any party being whether an event of default has occurred and continuing. That language should be removed;
 - Section 12.01(i) is to be amended to delete any reference to payments, as per the affidavit of Mr. Marwah and the statement of counsel to the DIP agent;

- the milestones should be amended as per the statements of counsel to the DIP agent regarding a 10 day moratorium before an event of default could occur and as per the other concessions recently negotiated.

The information flow must be even handed and the DIP lenders or the ABL or term lenders are to be in no privileged position regarding all relevant information. The language is to be settled before any approval of the DIP loan. Counsel for other interested parties should have the ability to participate in the discussions.

The parties are directed to attempt to work out appropriate language for these issues and any other issues regarding the DIP loan. This is not to be an open-ended discussion. If the terms are not agreed by Thursday morning, the parties are to attend before RSJ Morawetz on Thursday afternoon at 2 pm for a determination of the terms of the DIP.

Regarding the DIP in general, it is clearly needed in order for the debtors to pursue a restructuring. I am satisfied that generally the court's hands will not be tied as to what can or cannot be done if there is a default of the terms of the DIP, so long as the changes I have referred to are made. Nor will the other secured lenders be materially prejudiced by the DIP loan.

The DIP terms are supported by the Monitor. The terms are far from ideal and I do not see the DIP lenders as being merely altruistic. Like any DIP lender, it is in their interest to take what they can get. Their interest, of course, in a situation such as this in which they are all ABL or Term lenders, is to see the business successfully restructure, but to be sure they work it on their terms as much as possible.

In this case, the Monitor will have an important role to play in dealing with budgets and I am confident will play a large part in that and bring to the Court any issue that needs to be dealt with. In this connection, the extra terms of the Monitor's duties sought by the *ad hoc* committee of the junior noteholders are approved and are to be added to the amended initial order.

The request by the various parties for payment by the debtors of their pre-filing and post-filing fees and expenses are to be dealt with at a later date, as are the fees and expenses of Evercore.

Whether the special payments regarding pension liability shortfalls are to be made is an open question to be dealt with at a later date without restriction regarding the court's jurisdiction.

Whether the terms of the DIP are contrary to section 347(2) of the Criminal Code or contravene section 8 of the Interest Act are matters to be dealt with at a later date on proper material. The DIP lenders cannot be paid something contrary to these provisions. Para 45 of the draft [order](#) provided by the *ad hoc* committee of the senior and junior noteholders (clients of Goodmans) should be included in the amended initial order, as should a similar provision regarding section 8 of the Interest Act.

Regarding the request of the USW, the proposed tolling clauses should be added to the amended initial order, as should the clauses that any termination of employees should be in accordance with the collective agreements and applicable laws.

Regarding the issues raised by Mr. Bish, on behalf of the owner of Portco and Genco, I would not require a change in the DIP terms requiring the services to be provided to the debtors. These services are essential. The parents owe \$20 million to these companies against \$3 million costs per month.

Paragraphs 9(b), 14(b), 34(k) (recognizing the issue of fees to a number of persons in paragraph 39 have not yet been dealt with), 34(l), 52 and 66 to 70 as drafted by Mr. Chadwick are approved and to be included in this amended initial order.

The court's discretion or any issue raised by the parties is not to be hampered or limited in any way by the terms of the amended initial offer or of the DIP loan. I understand no one *generally* takes a different view.

"Original Signed"

The Honourable Mr. Justice Newbould

TAB 9

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Great Basin Gold Ltd. (Re)*,
2012 BCSC 1459

Date: 20121001
Docket: S126583
Registry: Vancouver

***In the Matter of the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended
and
In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44
and
In the Matter of Great Basin Gold Ltd.***

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Petitioner:

P.J. Reardon
J.L. Cockbill
W. Rostom (via phone)

Counsel for Monitor:

J. McLean, Q.C.
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Counsel for Credit Suisse AG:

P.L. Rubin
K. McEachern
D. O'Donnel (via phone)
M. Chow (via phone)

Counsel for Ad Hoc Group of Convertible
Debenture Holders:

J.R. Sandrelli
C. Cheuk
R. Jacobs
S. Kukulowicz
K. Mak
B. Grossman (via phone)

Counsel for CIBC:

M. Stewart (via phone)

Place and Date of Hearing:

Vancouver, B.C.
September 26 and 27, 2012

Place and Date of Judgment:

Vancouver, B.C.
October 1, 2012

Introduction

[1] The petitioner, Great Basin Gold Ltd. (“GBG”), is a publicly-traded international mining company engaged in the exploration, development and operation of gold properties. From its head office in South Africa, it operates through 22 subsidiary companies. Collectively, I will refer to the group as the “GBG Group”. The assets of the GBG Group comprise, for the most part, certain gold mines located in South Africa and Nevada, U.S.A.

[2] For reasons that will be described in more detail below, various members of the GBG Group, including GBG, have found themselves in a severe liquidity crisis or as management describes it, a “cash-flow insolvency”. The insolvency of GBG, and various of its subsidiaries, has resulted in restructuring proceedings being commenced in South Africa. Most recently, these proceedings were commenced by GBG last week on September 19, 2012. The subsidiaries of GBG are not petitioners in this proceeding.

[3] In the midst of this economic chaos, the two most significant stakeholders in the GBG Group have emerged and have now collided in terms of many issues arising in these restructuring proceedings. Their battleground, at least at this point in time, relates to debtor-in-possession or “DIP” financing required by the GBG Group; in particular, who will be allowed to provide that DIP financing and on what terms.

[4] In one corner stands Credit Suisse AG and Standard Chartered Bank (who I will collectively refer to as “Credit Suisse”), who are existing secured lenders with respect to loans advanced in relation to both mining operations.

[5] In the other corner stand the holders of certain senior unsecured convertible debentures, the majority of whom are represented by counsel on this application. I will refer to this majority as the “Ad Hoc Group”. The debenture holders have advanced significant monies to GBG.

[6] I granted an initial order in favour of GBG in these proceedings on September 19, 2012 (the “Initial Order”). In addition, by that same order, I approved certain DIP

financing that was to be provided by Credit Suisse. My reasons are attached as Appendix "A".

[7] I heard this application on September 26 and 27, 2012, and advised counsel of the results, with written reasons to follow. These are those reasons.

[8] The Ad Hoc Group now applies to set aside the portions of the Initial Order approving the Credit Suisse DIP financing. The Ad Hoc Group also seeks an order approving its own alternate proposal for DIP financing.

[9] Accordingly, there is no dispute on this application but that GBG was entitled to seek protection from this Court pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for the purpose of restructuring its affairs and that the restructuring efforts will, of necessity, include the mining operations in South Africa and Nevada. The Ad Hoc Group does not challenge the granting of the Initial Order. Further, there is no dispute as between GBG, Credit Suisse and the Ad Hoc Group that, given the undisputed insolvency of GBG and many other members of the GBG Group, DIP financing is required.

[10] The contest is therefore about who should provide the DIP financing. Both Credit Suisse and the Ad Hoc Group have presented proposals that no doubt best serve their own interests in the circumstances. The proposals represent strategic choices made by each, again to serve their respective interests. Their strategies have the potential of affecting the course of this restructuring. Each proposal has its own particular strengths and weaknesses. In addition to the financial terms of each proposal, factors such as timing, prejudice, risk and uncertainty play a central role in assessing each proposal. There is also an overarching argument advanced by the Ad Hoc Group that the Credit Suisse DIP financing proposal is invalid in any event as it results in a criminal rate of interest being paid.

[11] This Court approved the DIP facility of Credit Suisse on an *ex parte* basis. The debenture holders were not served with notice of the application for the Initial Order, although counsel for the Ad Hoc Group appeared on the application and

made certain submissions. In these circumstances, having now received evidence from the Ad Hoc Group, further evidence from GBG, and after hearing submissions from all counsel and the Monitor, I approach this application on a *de novo* basis such that the proposed DIP facility from Credit Suisse is to be looked at afresh and in the context of the now competing DIP financing proposal by the Ad Hoc Group.

[12] The applicable statutory authority with respect to DIP financing was recently addressed in *Re Crystallex*, 2012 ONCA 404, leave to appeal ref'd [2012] S.C.C.A. No. 254. In the first instance, the Court adopted certain comments of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 concerning s. 11 of the CCAA and the basis upon which the court will exercise its discretion in approving such financing:

[63] The Supreme Court of Canada had occasion to interpret the CCAA for the first time in *Century Services*. It used that opportunity to make clear that the CCAA gives the courts broad discretionary powers. Those powers must, however, be exercised in furtherance of the CCAA's purposes: para. 59. Section 11, in particular, was drafted in broad language which provides that a supervising judge "may, subject to the restrictions set out in this Act ... make any order that it considers appropriate in the circumstances". For the majority in *Century Services*, Deschamps J. wrote:

[69] The CCAA also explicitly provides for certain orders...

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

[13] Interim or DIP financing is specifically authorized under s. 11.2 of the CCAA:
Interim financing

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

...

Factors to be considered

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

[14] While the factors in s. 11.2(4) of the CCAA are more usually addressed in the context of whether a particular DIP financing proposal will be approved, I consider that the above factors are equally applicable in deciding *who* shall be the DIP lender and on what terms the DIP financing is to be provided. The factors set out in this subsection do not represent the entirety of the factors that may be considered by a judge on this issue - the subsection specifically refers to "among other things". There may, of course, be further factors beyond those enumerated in s. 11.2(4), such as were raised on this application, which are relevant and will be considered by the court in the exercise of its discretion under this section.

[15] I will comment at the outset that the competing DIP proposals here are complex and must be considered within the equally complex circumstances faced by the GBG Group. There are certain preliminary matters to be addressed in relation to

both proposals, and the resolution of those issues affects the viability of those proposals. Even assuming that both proposals are viable, the court must determine which proposal is most appropriate and most importantly, which will best serve the interests of the stakeholders of the GBG Group as a whole by enhancing the prospects of a successful restructuring.

Circumstances of the GBG Group

[16] As stated above, the principal assets of the GBG group include two gold mines: firstly, the Burnstone Property located in South Africa; secondly, the Hollister Property in Nevada, U.S.A.

(i) The Burnstone Property

[17] The Burnstone Property is located approximately 80 kilometers southeast of Johannesburg. Mining development work has been underway at Burnstone since 2007. The mine commenced production in January 2011. There is an estimated 6.4 million gold ounces in reserve and the mine has an estimated life of 25 years.

[18] The mine properties and operations are owned by and operated through various South African subsidiaries, with the principal operating subsidiary being Southgold Exploration (Pty) Ltd. ("Southgold"). The GBG Group employs some 1,275 employees world-wide, approximately 1,032 of which are employed at the Burnstone mine or the South African offices.

[19] Due to some unforeseen ramp-up challenges, the Burnstone mine failed to meet certain production amounts. This, in turn, led to working capital deficits. As a result, GBG announced that it was suspending operations at the Burnstone mine on September 11, 2012. It immediately commenced a care and maintenance program to preserve the value of the mine.

[20] On September 14, 2012, Southgold filed for creditor protection under the applicable South African legislation. Peter van den Steen was appointed as a "business rescue practitioner" in those proceedings (a position which I assume

would be akin to a chief restructuring officer in Canadian proceedings) on September 19, 2012.

[21] The costs associated with the mine shut-down, the care and maintenance program and the restructuring proceedings in South Africa all required immediate funding. Some of those immediate costs included employee severance payments for the approximately 1,000 miners who were laid off upon the mine shut-down.

[22] During the hearing on September 19, 2012, it was recognized that the most urgent matter was funding US\$10 million into the South African operations for the purpose of addressing these immediate cash requirements. I am advised that Credit Suisse did advance this amount late last week and that it advanced such amount under the existing Credit Suisse loan facilities relating to the South African operations. The DIP financing proposal of Credit Suisse, which was approved by my earlier order, requires that this US\$10 million emergency advance be repaid at the time of the initial advance under their DIP facility.

[23] In support of GBG's position that DIP financing remains urgent at this time, Mr. van den Steen has provided a letter dated September 26, 2012 in which he indicates that Southgold is in urgent need of DIP financing in respect of its debt restructure efforts. Mr. van den Steen also states that due to such urgency, any delay in the flow of funds will put the viability of Southgold's restructuring efforts (and hence the Burnstone mine) at risk.

[24] One of the questions addressed - but not answered - on this application is what is the present value of the Burnstone mine? Unfortunately, the estimated values of the mine are widely divergent and accordingly, are not particularly helpful. The book value of the mine is US\$643 million on a going concern basis, although the Monitor understandably commented that this figure was "not necessarily reflective of near term realization values". In addition, GBG has received a number of estimates of value with respect to the mine, ranging from US\$190 million to as much as US\$1.76 billion.

[25] In addition, the Board of Directors of GBG has concluded that the value of the Burnstone mine should be well in excess of the obligations owed to Credit Suisse in respect of the Burnstone in any reasonable realization process of customary length.

(ii) The Hollister Property

[26] The Hollister property is a trial mine located in Nevada. Feasibility work was completed in mid-2007. The Hollister mine has a reserve of approximately 500,000 ounces of gold. Since that time, GBG has focused on obtaining permits, preparing for commercial production and conducting additional underground and surface drilling. I understand that Hollister, while not fully operational, is producing some gold.

[27] Like Burnstone, Hollister has had its share of operational difficulties that have negatively affected its financial performance. For example, whereas management expected surplus cash from operations, Hollister only maintained a break even cash flow for the first six months of 2012. As a result, the Hollister operations have required additional funding from time to time. At this time, Hollister requires ongoing financing in respect of its operations.

[28] The Hollister mining assets and operations are owned by various U.S. subsidiaries. The U.S. holding company is Great Basin Gold Inc. ("GBG Inc."), a wholly owned subsidiary of GBG. The mining operations are conducted through various wholly owned U.S. subsidiaries of GBG Inc., being Rodeo Creek Gold Inc. ("Rodeo") and Antler Peak Gold Inc. ("Antler").

[29] There are 250 employees at the Hollister Property.

(iii) Liabilities

(A) Credit Suisse

[30] Credit Suisse is owed a US\$150 million term debt arising from direct advances to the South African subsidiaries, including Southgold, in relation to the Burnstone Property. I am also advised that there is a hedging facility owed to Credit Suisse of approximately US\$14 million. GBG, as the parent company, has given an

unsecured guarantee of these obligations. It was disclosed at the earlier application that some South African approvals that are required in respect of the security against the South African assets in favour of Credit Suisse had not yet been obtained. The evidence indicated that that process was underway at the time of the hearing last week and that it is anticipated to be finalized in fairly short order. In any event, there was no serious contention on this or the earlier application to the effect that Credit Suisse was not validly secured against the South African mining assets.

[31] Credit Suisse has also advanced monies in respect of the Hollister Property, being a term debt of approximately US\$43 million and a hedging facility of approximately US\$10 million. In addition to direct security over the underlying U.S. assets, Credit Suisse holds guarantees from both GBG and GBG Inc. in respect of amounts owing.

[32] It is of some importance on this application that there is no cross-collateralization between the Burnstone and the Hollister loan facilities in favour of Credit Suisse, except that both facilities represent an unsecured obligation owing by GBG.

(B) The Ad Hoc Group

[33] GBG issued unsecured convertible debentures on November 19, 2009 in the principal amount of US\$126 million. The debentures bear an interest rate of 8% per annum through to maturity on November 30, 2014. The Ad Hoc Group represents a certain portion (65%) of the debenture holders who are owed approximately US\$82 million of the total face amount of the debentures.

[34] The trust indenture does not include any negative pledge or restriction on GBG granting any new security. Nor does it appear to prevent the U.S. subsidiaries from granting guarantees or security with respect to their assets.

[35] In addition, the debenture holders hold guarantees from several of the South African subsidiaries, including Southgold.

(iv) Events Leading to the Filings

[36] The urgency or need of GBG to obtain DIP financing was addressed by this court on the earlier application last week. Urgency remains a factor on this application, although the major stakeholders disagree as to just how urgent those financing needs are at present.

[37] That being so, it is important to understand the circumstances leading up to the insolvency filings.

[38] Given the operational difficulties arising with respect to both mines, GBG was faced with a working capital deficit of approximately US\$23 million as of June 30, 2012. Earlier, in May 2012, GBG had received an unsolicited offer to enter into merger negotiations with another publicly-traded gold company. The Board of Directors immediately formed a special committee to consider strategic alternatives, including a sale of GBG's assets, a merger with a third-party and a reorganization or restructuring of GBG. GBG engaged CIBC World Markets at that time and steps were taken to develop a "data room" and solicit interested parties. Unfortunately, these events did not move quickly enough and the increasing liquidity problems faced by GBG required it to take action. I am advised that GBG's solicitation efforts continue at the present time.

[39] The action taken included the insolvency filing in South Africa on September 14, 2012, to which I have already referred.

[40] The view of the Board of Directors is that this is a "cash flow insolvency" as opposed to a "balance sheet insolvency". The GBG Group has consolidated assets on a net book value of approximately US\$888 million as against consolidated liabilities of approximately US\$403 million. The Board believes that the underlying value of GBG's assets is likely well in excess of GBG's outstanding liabilities. Accordingly, the insolvency filings have been made principally to ensure that the subsidiaries have sufficient working capital for their ongoing business operations while GBG attempts to restructure its business operations. It is well acknowledged that those attempts will include a sale of some or all of the GBG Group's assets.

[41] In conjunction with this strategy, the Board of Directors realized quite quickly that interim financing would be necessary. Inevitably, they were also faced with the question as to who could provide the necessary DIP financing on a fairly urgent basis. Not surprising, the Board, while making efforts to find the necessary financing, appears to have gravitated to its existing secured lender, Credit Suisse, to provide that financing.

[42] The Board's degree of due diligence and its negotiation efforts with respect to obtaining a DIP financing proposal have been a matter of some dispute on this application. Mr. van Vuuren, the Chief Executive Officer and director of GBG, stated on September 19:

Discussions have also taken place regarding debt financing for the Company including debtor-in-possession loan facilities secured against the Nevada operations and the Burnstone operations. Difficulties arose with considering proposals from interested parties, relative to, among other things, implementation structure, due diligence requirements, transaction risk and timing issues. The Board of Directors after consultation with legal counsel concluded that the only financing proposal received that was truly viable was the proposal received from the Existing Lenders.

[43] I will return later in these reasons to the due diligence of the Board of Directors in relation to the DIP financing and, in particular, the Credit Suisse DIP loan proposal.

[44] In any event, it was the conclusion of the Board that the Credit Suisse DIP loan proposal was the only real option available to GBG and its subsidiary companies in the circumstances.

(v) The Credit Suisse DIP Proposal

[45] The Initial Order provides for the approval of the Credit Suisse DIP facility pursuant to a term sheet dated September 19, 2012.

[46] The initial Credit Suisse DIP proposal contemplated a maximum advance of the principal amount of US\$35 million, with an initial term of six months that may, at the discretion of the lenders, be extended up to three times by one-month extension periods, subject to payment of a 1% extension fee. Up to US\$25 million was to be

allocated in respect of the Southgold or Burnstone operations with, as earlier stated, US\$10 million to be repaid in respect of the emergency loan already advanced last week. Up to US\$10 million was to be advanced to Rodeo and Antler in respect of the Hollister operations.

[47] The Credit Suisse DIP loan proposal incorporates a number of other fees and interest, including:

- (a) interest at a rate of LIBOR + 10% per annum;
- (b) an upfront fee equal to 2% of the Principal;
- (c) a commitment fee equal to 4% of the Principal, payable monthly in arrears over six months on the unadvanced portion;
- (d) a requirement that Southgold (who is intended to be a guarantor under the DIP loan) enter into an "Advisory Agreement" with Credit Suisse, under which the Initial DIP Lenders will earn a 15% fee (the "Advisory Fee") on the sale of the Burnstone mine in South Africa, net of (i) the repayment of the Credit Suisse loan relating to the Burnstone Property, current outstanding in the amount of US\$150 million, and (ii) certain other expenses; and
- (e) a requirement that GBG Inc. (who is also intended to be guarantor under the DIP loan) provide a guarantee with respect to GBG's obligations under the Credit Suisse loan in relation to the Burnstone Property, together with super priority over all of GBG Inc.'s assets as security for the GBG Inc. Guarantee (I will collectively refer to this as the "GBG Inc. Guarantee").

[48] The last two requirements of this proposal results in an "either or" proposition. The GBG Inc. Guarantee is called upon only in the event there is a shortfall in respect of Credit Suisse's recovery of its existing Burnstone facility, and in such an event, no Advisory Fee is paid. Conversely, if the Advisory Fee is payable, which presupposes that Credit Suisse recovers all amounts owing under the Burnstone facility, no claim on the GBG Inc. Guarantee would be made.

The Applications

[49] The Ad Hoc Group now applies for various relief, as follows:

- (1) An order adding GBG Inc., Antler and Rodeo as Petitioners to these proceedings;
- (2) Setting aside those portions of the Initial Order which relate to approval of a loan offered by Credit Suisse pursuant to the term sheet dated September 19, 2012;

- (3) Declaring that the terms of the Credit Suisse term sheet amount to an agreement to receive interest at a criminal rate, and will result in Credit Suisse receiving a payment of interest at a criminal rate, both of which constitute offences under s. 347 of the *Criminal Code of Canada*;
- (4) Approving an alternative loan offered by certain members of the Ad Hoc Group pursuant to a term sheet dated September 25, 2012; and
- (5) Increasing the Administration Charge by \$400,000 to \$3 million.

[50] Needless to say, Credit Suisse takes the position that the approval of its DIP financing proposal should be maintained by the court. I am advised that GBG and Credit Suisse are continuing to work to finalize the necessary documentation, and that it is anticipated that signing will take place tomorrow and funding will commence immediately.

The Competing DIP Loan Proposals

[51] I will address the question of urgency again because this is an issue that was a central theme on this application.

[52] The cash flow filed last week anticipated advances under the DIP facility by September 21 of US\$9.2 million (mostly for employee claims relating to Burnstone). As previously stated, those amounts were advanced on an emergency basis by Credit Suisse under the existing Burnstone facility and were to be immediately repaid by advances under the DIP facility. In addition, the Monitor advised on September 26 that GBG advanced further cash of US\$1.8 million to Hollister from existing cash resources and that other amounts, what have been called “time sensitive disbursements”, totaling \$1 million have been paid at Burnstone and one of the other South African subsidiaries.

[53] The cash flow also anticipates further advances this week by the DIP lender of US\$13.1 million. Further advances were anticipated during the weeks ending October 12 (US\$1.5 million), October 26 (US\$2 million) and November 9 (US\$4.5 million - which includes US\$1 million to Burnstone) by which the total DIP facility was to be increased to US\$31.1 million by mid-December 2012.

[54] The Monitor reports that GBG has various significant and time-sensitive obligations totalling US\$14.3 million which it plans to fund this week. These include:

- a) amounts to be paid by Hollister in respect of past-due suppliers, past net proceeds taxes, and overdue royalties, totalling US\$8.7 million;
- b) payroll and benefits for the GBG Group of US\$1.7 million. This initially included approximately US\$500,000 in respect of senior management at Burnstone, but I am now advised that this amount was paid from other funds. Part of the remaining US\$1.2 million relates to payments due at Hollister tomorrow for payroll. I am also advised that if these obligations are not funded, it could cause retention issues with respect to key employees;
- c) professional fees of US\$2.2 million; and
- d) interest on the term loan in respect of the Credit Suisse Burnstone facility of US\$1.7 million.

[55] As between South Africa and Nevada, it was anticipated that further advances would be made this week as follows: US\$3.1 million (less the US\$500,000 now paid) to South Africa; and US\$10 million to Nevada. After this advance to Hollister, it is expected that Hollister can fund its operations from its own resources.

[56] Counsel for the Ad Hoc Group contends that, while the above payments are ones that should be funded within this restructuring, they are not “urgent” to the extent that the Credit Suisse DIP facility should be reconfirmed on this application with a view to providing funding for these obligations this week. This is a critical aspect of the Ad Hoc Group's argument in that there would appear to be some prospect of a delay in funding under the Ad Hoc Group DIP loan proposal (which will be discussed in more detail below).

[57] Counsel for the Ad Hoc Group contends that the Burnstone situation has “stabilized”. With respect, this contention is not supported by the evidence from GBG

or the views of the Monitor. To some extent, this urgent need for funding has been alleviated by the payment of funds for key management personnel at the Burnstone mine, however, Mr. van den Steen remains concerned that a failure to fund these amounts will result in a loss of managers who are vital in respect of the ongoing care and maintenance of the mine and the progress of the restructuring efforts in South Africa. In addition, the emergency advance of US\$10 million by Credit Suisse is due today although it is not particularly evident what arises from any default in payment given that I presume a stay of proceedings is in place in South Africa. A stay of proceedings in Canada is, of course, now in place by reason of the Initial Order.

[58] The Monitor also advises that further funding for Burnstone for electrical bills and suppliers will be required next week in the amount of US\$1.3 million.

[59] In addition, the evidence indicates that the Hollister situation also remains volatile. It is apparent that the amounts owing to the Hollister suppliers have been outstanding for some time. Senior management of GBG have advised the Monitor that payment of these amounts is necessary because "it is becoming increasingly difficult to manage the Hollister supplier base in the absence of definitive interim financing arrangements and clarity as to when these obligations will be paid". No doubt many U.S. creditors are aware of the Canadian and South African filings and are concerned about the prospects of being paid. In fact, I am advised that U.S. suppliers to the Hollister Property are already taking steps to tighten credit arrangements - threatening to stop supply or demanding COD terms - which are further straining the finances of the Hollister operations. Mr. van Vuuren states in his affidavit sworn September 27 that payment of these amounts is "critical" and in his view, if these payments are not made within the next few days, "action will be taken by creditors that could lead to a shut-down of the Hollister mine".

[60] GBG expresses this concern given that the U.S. entities have not sought creditor protection and there is, therefore, no stay in the event that precipitous action is taken against the U.S. assets by any of the U.S. creditors. This is answered to some extent by the Ad Hoc Group who suggests that the U.S. subsidiaries should

file for protection in the U.S. This solution, however, presents its own complications which I will address below. There is also the further complication that even an insolvency filing may not solve the need to pay “critical” suppliers to maintain operations.

[61] Failure to stabilize both mining operations will no doubt give rise to disastrous consequences. Labour unrest remains an issue in South Africa, and there is concern about the loss of mining rights in South Africa if matters are not settled in an orderly fashion. Similar concerns arise with respect to Hollister. GBG estimates that the cost of an orderly shut-down of the Hollister mine would be US\$15 million, funds which are not available. Needless to say, a failure to maintain either mine would raise regulatory issues relating to environmental concerns.

[62] The Monitor has confirmed that in its view, these necessary funds are urgently required.

[63] I therefore accept GBG’s submissions that there is substantial urgency in addressing the DIP proposals this week towards obtaining financing that will stabilize matters both in South Africa and Nevada.

[64] Before I deal with the specifics of the competing proposals, recent events concerning these proposals are of some relevance.

[65] In the face of the original Credit Suisse DIP loan proposal, the Ad Hoc Group prepared its own competing proposal which it now seeks to have approved. Despite some negotiations between the parties, they have been unable to solve the impasse between them. Hence this application.

[66] During the course of submissions made during this hearing, both Credit Suisse and the Ad Hoc Group have adopted what can be called a “carrot” and “stick” approach. The “carrot” approach arose when both proposals were amended “on the fly” to provide for somewhat better terms than did the original proposals in an attempt to improve the odds of having their proposals accepted. In addition, the “stick” approach took the form of Credit Suisse threatening to move on its security

and the Ad Hoc Group threatening to commence litigation against the U.S. subsidiaries to obtain injunctive relief preventing the completion of some aspects of the Credit Suisse DIP proposal. The dynamic nature of this hearing has been challenging in terms of the stakeholders, the Monitor and the Court assessing the competing proposals and is indicative of the nature of these types of proceedings, which has been often described as “real-time litigation”.

[67] The competing proposals have some similar features - the Credit Suisse proposal is in the amount of US\$35 million while the Ad Hoc Group proposal calls for US\$40 million to be advanced. Both require guarantees from all the subsidiaries. Both provide for the repayment of the US\$10 million emergency advance provided last week by Credit Suisse. Both have six month terms, with possible extensions at the discretion of the lender.

[68] I will now address some of the particular terms of the competing offers which highlight the differences as between the two proposals. They are discussed below in ascending order of importance.

(i) Pricing

[69] I have already referred to the pricing of the Credit Suisse DIP facilities earlier in these reasons. The pricing under the Ad Hoc Group’s DIP proposal is slightly less expensive than that of Credit Suisse’s proposal (leaving aside their exclusion of any Advisory Fee). The Ad Hoc Group’s pricing includes: interest at LIBOR + 8.5%, an upfront 1% fee payable at close and a 1.25% commitment fee payable at close. The Monitor has indicated that excluding the Advisory Fee, the pricing as between these proposals is not materially different up to December 14, 2012. To the extent that the financing remains in place to June 30, 2013 (the deadline for the Ad Hoc Group), the pricing is approximately US\$620,000 less under the Ad Hoc Group proposal (although I would note that the Credit Suisse proposal does not anticipate that the proceedings will extend past March 2013).

[70] Accordingly, I acknowledge that the Ad Hoc Group financing becomes less expensive the further that the DIP financing remains in place into 2013.

(ii) Ability to Fund

[71] GBG has requested information from the Ad Hoc Group concerning the identity of the members who would be providing the financing and has sought information that the funds are committed and available. It is my understanding that no such assurance has been given. This point was not, however, pressed in argument, and I place no weight on it. Counsel for the Ad Hoc Group submitted that they are ready to fund and have now offered an emergency advance of US\$5 million pending the commencement of certain U.S. proceedings.

[72] Initially, the Ad Hoc Group indicated that it was the condition of their DIP proposal that necessary government approvals be obtained particularly as they relate to the security proposed with respect to the South African assets. Apparently, it is quite an involved process and the concern was that this approval process could result in a substantial delay. In any event, during argument, counsel for the Ad Hoc Group indicated that they are prepared to waive such approvals in respect of the security they propose to take as against the Burnstone Property. The Ad Hoc Group is therefore prepared to close immediately after certain Chapter 15 proceedings have been finalized, which is discussed below.

(iii) Milestones

[73] Another less distinct difference between the two proposals relates to the milestones, or as more accurately described, the required timing of restructuring efforts by the GBG Group.

[74] Under the Ad Hoc Group's proposal, there is a deadline of June 30, 2013 for both a plan of arrangement for refinancing, restructuring or repayment of the debt relating to Hollister and a sale of the Burnstone assets.

[75] Under the Credit Suisse proposal, the original deadlines required refinancing of Hollister and a definitive sale agreement relating to Burnstone by December 15, 2012 and closings of any sales by March 2013. During argument, the deadlines were recently extended with respect to Burnstone such that now there is a

requirement that only a letter of intent or expression of interest be obtained with respect to Burnstone by December 15, 2012 with a binding offer by January 15, 2013 and closing by March 31, 2013. The Credit Suisse deadlines with respect to Hollister remain the same.

(iv) The Advisory Fee

[76] I have already referred to the Advisory Fee that remains a part of the Credit Suisse proposal. As another part of their “carrot” approach, Credit Suisse has now agreed to reduce the Advisory Fee from 15% to 10% of the calculated amount arising from a successful sale of the Burnstone Property. In addition, the Advisory Fee is to be capped at US\$15 million.

[77] In contrast, there is no such fee required in the Ad Hoc Group DIP facility.

[78] As submitted by counsel for Credit Suisse, it is not uncommon for the pricing under DIP financing proposals to be tied to a measure of success achieved in a restructuring: see for example, *Re Crystallex*, para. 28. While in a different form than regular interest and fees (such as, for example, commitment fees), the entirety of the proposal, including any such “success” fees, must be considered in terms of whether the price of the financing is the best that can be obtained in the circumstances.

[79] Nevertheless, this Advisory Fee, whether viewed as an element of the pricing of this financing or not, does represent potential prejudice to the debenture holders in that payment of this fee will rank in priority to any claim of unsecured creditors of Southgold. The debenture holders hold a guarantee of Southgold and are therefore unsecured creditors of Southgold who will bear this cost, along with any other unsecured creditors of that entity.

(v) The GBG Inc. Guarantee

[80] I have already referred to the requirement in the Credit Suisse DIP loan facility that the GBG Inc. Guarantee be provided with respect of the obligations of GBG in relation to the existing Credit Suisse term loan secured against the Burnstone Property (approximately US\$150 million).

[81] The Ad Hoc Group's proposal does not include any such guarantee or security.

[82] Again, the GBG Inc. Guarantee would be called upon only if Credit Suisse suffers a shortfall in respect of its recovery under its existing Burnstone facility and in that event, no Advisory Fee would be paid. And once more, if the Advisory Fee is payable, no claim on the GBG Inc. Guarantee would be made.

[83] This negative aspect of the Credit Suisse proposal was addressed by me on the earlier application on September 19, 2012. At that time, I observed that it was potentially prejudicial to the debenture holders in the sense that if the Burnstone Property realized less than the amounts necessary to repay the Credit Suisse term loan, then that obligation would be transferred to GBG Inc. Accordingly, where there is any shortfall to Credit Suisse in relation to Burnstone (which would otherwise have been an unsecured claim against GBG to be shared with the debenture holders), it would now be a direct obligation to be satisfied at the GBG Inc. level before any excess value from the Hollister Property would flow up to the Canadian parent (either by dividend or repayment of intercompany loans). It should be noted that the GBG Inc. Guarantee would be subordinate to repayment of the Credit Suisse Hollister term loan and unsecured creditors of Rodeo and Antler.

[84] I say "potentially" because it is not evident at this time that the GBG Inc. Guarantee will ever be called upon. In addition, during submissions, counsel for GBG advised that Credit Suisse was prepared to amend its proposal such that the GBG Inc. Guarantee would only be called on at the earlier of a sale of the Burnstone Property (no later than March 31, 2013) or maturity of the DIP loan (six months after the initial advance). In addition, if the Hollister Property is sold before the Burnstone Property, Credit Suisse has agreed to hold the proceeds in escrow pending a determination as to whether the GBG Inc. Guarantee will be called upon. I should also add that there is no evidence regarding the potential value of Hollister and therefore, whether there is any realistic possibility that funds will flow up to GBG Inc. from Antler and Rodeo as a result of a sale.

[85] Mr. van Vuuren indicates that the Board of Directors carefully considered the effect of granting the GBG Inc. Guarantee as it related to the best interests of GBG, the U.S. subsidiaries and the stakeholders of the GBG Group as a whole. In the face of Credit Suisse's position that it was unwilling to advance the DIP loan without the GBG Inc. Guarantee, he states that the directors "had no choice but to consider the GBG Inc. Guarantee". He stated:

93. After extensive consideration the Board of Great Basin Gold and each of its NV Subsidiaries concluded that the giving of the Burnstone X-Guarantee of the Existing Burnstone Facility was in the best interests of Great Basin Gold and of US Holdco and the Petitioner's stakeholders taken as a whole on a consolidated basis. In exercising its business judgment, the Board concluded that the DIP Loan will enhance the likelihood of survival of each of the corporations in the GBG Group and enhance the likelihood of acceptable asset realization values for the consolidated group given the much longer period available to market, and in the case of Hollister operate, the two principal assets. Accordingly, the Board passed a resolution approving the DIP Term Sheet with the GBGI Guarantee and initiating a CCAA filing to restructure its business.

[86] Pursuant to s. 11.2(1) of the CCAA, any DIP financing charge approved by the court must not provide for security on the "company's property" with respect to amounts owing that exist before the order is made. Given that GBG Inc. is not a "company" or "debtor company" within these proceedings, this provision is not violated by the granting by GBG Inc. of the GBG Inc. Guarantee. The Ad Hoc Group did not contend otherwise, but suggested that the granting of the GBG Inc. Guarantee indirectly achieved what could not be achieved directly. In that regard, the Ad Hoc Group argues that GBG, along with Credit Suisse, have simply made a tactical decision to not include GBG Inc. in these proceedings or commence proceedings in the U.S., both of which would have resulted in a prohibition against the giving of the GBG Inc. Guarantee.

[87] I do acknowledge that the giving of the GBG Inc. Guarantee does represent a potential transfer of value to the prejudice of the debenture holders (and any other unsecured creditors of GBG). As such, this is a factor to be considered pursuant to s. 11.2(4) of the CCAA and in particular, subparagraph (f) relating to "whether any creditor would be materially prejudiced as a result of the security or charge".

[88] Again, it is of some significance that certain government approvals for the security held by Credit Suisse with respect to the existing Burnstone facilities are not yet in hand although there was no serious suggestion on this application that Credit Suisse had invalid security with respect to the South African assets such that they need to shore up their position through the GBG Inc. Guarantee. However, given the wide ranging potential values relating to the Burnstone Property (some of which are only slightly higher than the amounts outstanding to Credit Suisse under its term loan), it remains a possibility that the GBG Inc. Guarantee will be called.

[89] To a large extent, the Ad Hoc Group seeks to invoke the mandatory prohibition in s. 11.2(1) of the CCAA by its application to add GBG Inc. as a petitioner to this proceeding, a matter that I will now address.

(vi) The Chapter 15 Strategy

[90] The proposal of the Ad Hoc Group requires that GBG Inc., Antler and Rodeo be added as petitioners to this proceeding. Following such relief, the Ad Hoc Group's proposal requires:

- (i) an order of this Court approving its DIP facility and specifically priming the security of Credit Suisse as against the Hollister Property (although junior to the Credit Suisse security on the Burnstone Property); and
- (ii) an order of the U.S. Bankruptcy Court pursuant to the *U.S. Bankruptcy Code*, Chapter 15, recognizing the Canadian order, particularly as it relates to priming Credit Suisse on the Hollister Property.

[91] This strategy presents substantial challenges in terms of providing the urgent DIP financing needed in these circumstances. For various reasons, GBG and the Monitor do not consider that it represents a workable solution and in particular, that the timing of such a strategy is workable.

[92] Credit Suisse objects to any such priming of its security against the Hollister Property (although it is, of course, prepared to prime itself under its own DIP proposal).

[93] Before addressing the practicalities of such a strategy, I must consider whether there is any basis upon which GBG Inc., Antler and Rodeo can or should be added as petitioners to this proceeding. If not, then the Ad Hoc Group has indicated that it cannot or will not proceed with its proposal and the remainder of the issues relating to its proposal would be moot.

[94] Supreme Court Civil Rule 6-2(7) provides for the addition of parties and in particular, petitioners:

Adding, removing or substituting parties by order

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

...

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or

(ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or

(ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[95] Supreme Court Civil Rule 6-2(10), however, provides that “a person must not be added or substituted as a plaintiff or petitioner without the person's consent”.

[96] Mr. Reardon, who acts for GBG Inc., Antler and Rodeo, indicates that his clients have no interest in joining these proceedings as a petitioner.

[97] The Ad Hoc Group then contends that these U.S. subsidiaries should be added as respondents to this proceeding. I agree that Rule 6-2 would allow that relief. Sections 4 and 5 of the CCAA expressly provide that a compromise or arrangement may be proposed by not only the “debtor company”, but by any creditor. While rare, CCAA proceedings commenced by creditors of an insolvent

company are not unheard of: see *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.J.). In this Court, a recent example includes the initial order granted in respect of Bear Mountain Master Partnership on March 25, 2010 in proceedings commenced by HSBC Bank Canada as petitioner (#S102120 - Vancouver Registry). In both cases, the “debtor company” was named as a respondent to the proceeding.

[98] Accepting that Rule 6-2 would allow this court to add GBG Inc., Antler and Rodeo as respondents to this proceeding, I must consider whether the CCAA would provide the necessary jurisdiction to do so.

[99] Section 3(1) of the CCAA provides that the *Act* applies in respect of a “debtor company”. “Debtor company” is defined in s. 2 and means in part any “company” that is insolvent. “Company” is also a defined term found in s. 2:

“company” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated

[Emphasis added]

[100] It is not in dispute on this application that GBG Inc., Antler and Rodeo do not do business in Canada. The question then becomes whether they have assets in Canada.

[101] The GBG Group operates a cash management system. Under this system, receipts from gold sales are eventually deposited in various bank accounts and these funds ultimately arrive in Canada. In relation to the Hollister gold sales, the process is as follows: sale proceeds are deposited into an account in Rodeo’s name in Switzerland; those proceeds are then transferred to GBG’s investment account held with CIBC here in Vancouver; GBG, in turn, transfers monies to Rodeo’s accounts in the U.S. to fund the Hollister operations. The proceeds from these gold sales are, upon receipt, immediately credited as against the substantial intercompany loans owing by the U.S. subsidiaries. As of August 31, 2012, the U.S. subsidiaries owed GBG in excess of US\$187 million.

[102] The uncontroverted evidence of Mr. van Vuuren is that GBG Inc., Antler and Rodeo have no assets in Canada, including credit balances in any bank accounts. All bank accounts of Rodeo are located in the U.S.

[103] The Ad Hoc Group contends that GBG Inc., Antler and Rodeo still have some interest in “funds” in Canada. However, upon receipt of these funds into GBG’s accounts in Canada, black letter law would dictate that any credit balance represents a debt owing by the bank to GBG. Further, there is no evidence to suggest that GBG Inc., Antler and Rodeo have any beneficial interest in any Canadian bank accounts in the name of another member of the Group and in my view, the immediate repayment of the intercompany loans owing to GBG by them would suggest otherwise.

[104] In the face of this evidence, I conclude that GBG Inc., Antler and Rodeo have no assets in Canada and are therefore, not “debtor companies” as defined in the CCAA. Accordingly, there is no jurisdictional basis to add those companies to this CCAA proceeding.

[105] That conclusion drives the result that the critical pre-condition of the Ad Hoc Group’s proposal cannot be satisfied. Nevertheless, I will comment on the viability of the Ad Hoc Group’s proposal leaving aside this issue.

[106] It is the intention of the Ad Hoc Group, if its DIP loan proposal is approved by this Court, to seek first ranking priority of a charge with respect to the assets of not only GBG but the Hollister Property, which would prime the presently first-ranking security of Credit Suisse on the Hollister Property. The Ad Hoc Group also seeks security over the Burnstone Property in South Africa, but subordinate to the security of Credit Suisse.

[107] Assuming that such an order was granted, it is the Ad Hoc Group's intention to seek a recognition order pursuant to Chapter 15 of the *U.S. Bankruptcy Code* to recognize all aspects of that order, including the priming of the DIP charge or security with respect to Credit Suisse as against the Hollister Property.

[108] Credit Suisse has indicated that it would vigorously oppose any such attempt to prime its existing security over the Hollister Property. This position is not surprising given that existing lenders are typically very hesitant to allow other parties to take a priority position, particularly in a restructuring.

[109] This strategy of the Ad Hoc Group presents some issues in respect of the appropriateness of its DIP proposal as there are very divergent views concerning any possible U.S. insolvency proceedings.

[110] GBG has raised issues concerning the appropriateness of seeking such relief in the U.S. and also, issues relating to what type of proceeding would take place. Even assuming that this Court added the U.S. parties and approved the Ad Hoc Group DIP financing, issues such as a determination of what the “centre of main interest” (“COMI”) is in respect of these U.S. entities may be significant in terms of what relief, if any, could be obtained from a U.S. court. Based on submissions made, it appears that the COMI of the U.S. subsidiaries could be either the U.S. or South Africa. Issues arise particularly concerning what protections could be obtained in such proceeding to fend off actions by creditors. Counsel for the Ad Hoc Group contends that even if problems arise in obtaining Chapter 15 relief, proceedings may be available under Chapter 11 of the *U.S. Bankruptcy Code* - which is well known to be a much more involved and costly procedure as opposed to that under Chapter 15.

[111] To this point in time, GBG has not seen fit to seek protection from the U.S. courts and its counsel advises that a considered decision was made in that regard. The Ad Hoc Group criticizes this decision and alleges that this is a tactic of GBG and Credit Suisse to avoid the provisions of s. 11.2 of the CCAA. It appears equally arguable that the Chapter 15 strategy is also a tactic to allow the Ad Hoc Group to gain further leverage in respect of the Hollister Property to the detriment of Credit Suisse.

[112] In any event, I am unable to say that there exist no sound reasons for the GBG Group having avoided initiating such proceedings in the U.S. Based on Credit

Suisse's DIP financing proposal that I have already approved, there is funding available to maintain the U.S. operations pending a sale or restructuring of those assets. In those circumstances, and as stated by GBG's counsel, it is not presently necessary to incur the trouble, expense and risks associated with such proceedings.

[113] It also became apparent during submissions that the battle between Credit Suisse and the Ad Hoc Group would have inevitably been joined south of the border. Counsel for the Ad Hoc Group indicated that they were in the process of filing an action in the U.S. for the appointment of a receiver over the U.S. subsidiaries and the Hollister Property, and that they were specifically seeking an injunction to prevent GBG Inc. from granting the GBG Inc. Guarantee. Service was imminent on the affected parties, including GBG and Credit Suisse. This was no doubt part of the "stick" approach of the Ad Hoc Group in approaching the question as to which DIP proposal should be accepted, in that they now argue that litigation in the U.S. arises under both proposals.

[114] Suffice it to say that the Ad Hoc Group's approach in relation to the U.S. subsidiaries involves litigation and is therefore, fraught with uncertainty and risk. I recognize that approval of the Credit Suisse DIP facility also now involves litigation in the U.S., and time will only tell whether Credit Suisse will be successful in opposing any such actions taken by the Ad Hoc Group in the U.S. and whether it will continue to fund in the face of those actions.

[115] It is the risk, uncertainty and timing issues associated particularly with the strategy of the Ad Hoc Group in relation to the Chapter 15 proceedings that has resulted in GBG rejecting such a proposal. The issues arising from this strategy will no doubt take some time to sort out and in the meantime, Rome burns.

[116] I have already mentioned that the Ad Hoc Group has proposed a stop gap measure during what it estimates will be a "two week period" while the battle moves to the U.S. Counsel for the Ad Hoc Group suggests that they could provide interim funding of US\$5 million. One member of the Ad Hoc Group has provided a letter dated September 27 confirming that it is prepared to fund this amount at the same

interest rate as earlier proposed and with a substantially higher commitment fee. Funding would be subject to, *inter alia*, obtaining an order approving the advance and directing second ranking security in its favour on the Hollister Property.

[117] GBG, however, submits that this offer of US\$5 million is not sufficient to cover the expenses of the Group during that timeframe, even assuming a two week timeframe.

[118] The Monitor concurs that the cash flows are reasonable and also concurs in the position that the amounts to be paid under the DIP facility are “urgent”. The Monitor also states that the risk and uncertainty surrounding the proposal of the Ad Hoc Group in the face of these urgent financing needs does not trump the more onerous provisions of the Credit Suisse proposal, including the Advisory Fee and the GBG Inc. Guarantee.

Is the Credit Suisse DIP Loan at a Criminal Interest Rate?

[119] Even if its own proposal cannot or will not be approved by the court, the Ad Hoc Group challenges the Credit Suisse DIP financing in one important respect. It takes the position that the DIP financing represents an agreement that will result in Credit Suisse obtaining an illegal criminal rate of interest in respect of its DIP loan facility. If that position is upheld, that would be a circumstance that would require the court to set aside the previous order approving the Credit Suisse DIP loan facility, whether or not the proposal of the Ad Hoc Group is approved.

[120] The Ad Hoc Group submits that the Credit Suisse DIP loan facility, as approved, and even as amended over the course of submissions, constitutes an offence or is likely to result in the commission of an offence, contrary to s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “Code”). It is an offence under this provision to enter into an agreement for, or to receive, interest at a rate exceeding 60%.

[121] Accordingly, the Ad Hoc Group seeks a declaration that the terms of the Credit Suisse DIP loan facility amount to an agreement to receive interest at a

criminal rate, and will result in Credit Suisse receiving a payment of interest at a criminal rate, both again constituting offences under the *Code*. The Ad Hoc Group also seeks to have the portions of the Initial Order approving the DIP loan set aside on that basis.

[122] During argument, the Ad Hoc Group submitted in the alternative that the court should grant a declaration that the amount paid out pursuant to the Credit Suisse DIP facility, under either the GBG Inc. Guarantee or the Advisory Fee, are subject to an overriding proviso that the total amount payable is capped at US\$6,204,478.98. The Ad Hoc Group says that, based on all of the currently available actuarial evidence, this is the maximum amount that could be paid to Credit Suisse pursuant to its DIP facility before the payments constitute criminal interest.

(i) The Actuarial Calculations

[123] For the purposes of this discussion, I will again summarize the relevant terms of the Credit Suisse DIP facility, both as originally proposed and as recently amended.

[124] The DIP facility contemplates a maximum advance of US\$35 million (the “Principal”), with an initial term of six months that may, at the discretion of Credit Suisse, be extended up to three times by one-month extension periods, subject to payment of a 1% extension fee. Fees and interest include: (a) interest at a rate of LIBOR + 10% per annum; (b) an upfront fee equal to 2% of the Principal; (c) a commitment fee equal to 4% of the Principal, payable monthly in arrears over six months; (d) the Advisory Fee, originally 15% but now 10% calculated based on the sale proceeds of the Burnstone mine in South Africa; and (e) the GBG Inc. Guarantee. Again, an amount may be paid in respect of the Advisory Fee or the GBG Inc. Guarantee, but not both.

[125] The Ad Hoc Group submits that payments made pursuant to the above terms would amount to an effective annual interest rate above 60% per annum.

[126] The ultimate amount payable to Credit Suisse under the DIP facility, as it relates to the Advisory Fee and the GBG Inc. Guarantee, is largely predicated on the net realizable value on the sale of the Burnstone Property. I have already commented on the fact that there is no certainty as to what value might be obtained for the Burnstone Property and that estimates of value vary greatly from as low as US\$190 million to as high as US\$1.76 billion.

[127] Despite the difficulties in valuing the Burnside Property, the Ad Hoc Group have presented several Actuarial Certificates that show the effective annual interest rates for the Credit Suisse DIP facilities as exceeding 60% per annum.

[128] The first Certificate calculates effective annual interest rates based on the following assumptions: (i) a term of six months; (ii) US\$35 million Principal; (iii) a commitment fee calculated as 4% of Principal; (iv) an up-front fee calculated as 2% of Principal; (v) an annual interest rate of US 3-month LIBOR + 10%; (vi) legal fees of \$250,000; and (vii) a Burnstone sale fee equal to 15% of the net sale proceeds of the Burnstone facility, payable at the termination date of the DIP loan. Two calculations are provided based on separate scenarios where the gross sale proceeds are US\$643 million (Scenario 1) and US\$250 million (Scenario 2), with \$176 million deductions in each case (which includes the Credit Suisse Burnstone loans). Based on these figures, the effective annual interest rate is calculated to be 928.9% (Scenario 1) and 111.5% (Scenario 2), respectively.

[129] In response to these figures, and presumably to the Ad Hoc Group's submissions generally, Credit Suisse offered to amend its terms such that firstly, the Advisory Fee would be reduced to 10% of the Burnstone facility sale proceeds and secondly, the total amount payable under the Advisory Fee would be capped at US\$15 million.

[130] These concessions did not placate the Ad Hoc Group. Rather, in response, the Ad Hoc Group submitted further Actuarial Certificates containing additional effective annual interest rate calculations based on the proposed amendments to the Credit Suisse DIP loan.

[131] The first Actuarial Certificate provides a calculation of the effective annual interest rate with the Advisory Fee capped. The assumptions are the same as those listed above, except to clarify that the commitment fee of 4% is calculated on the unused balance of available credit. Based on these assumptions, the effective annual interest rate is calculated at 132.1%.

[132] The second and third Actuarial Certificates contain a reverse calculation in the sense of indicating the maximum amount that can be paid to Credit Suisse from the Burnstone sale proceeds in respect of either the Advisory Fee or the GBG Inc. Guarantee before it constitutes criminal interest over 60%. Based on the same assumptions as in the previous Certificate, the maximum amount payable is calculated at \$6,204,478.98.

[133] Counsel for the Ad Hoc Group relies on these calculations in its argument that the courts should not sanction an agreement the terms of which are likely to offend s. 374 of the *Code* at a future date. Reliance on calculations in Actuarial Certificates is specifically contemplated in respect of proof of the effective annual rate of interest: the *Code*, s. 347(4).

[134] Counsel for Credit Suisse argues that neither the Advisory Fee nor any amounts to be paid under the GBG Inc. Guarantee constitute “interest” for the purpose of calculations under s. 347 of the *Code*. In the alternative, Credit Suisse submits that even if the Advisory Fee and the GBG Inc. Guarantee constitute “interest” under the *Code*, there is no way at this time to calculate what the rate would be. It says that the calculations are frustrated by two factors: (i) the near term realization value of the Burnside Property; and (ii) the term over which the Credit Suisse DIP facility will be paid. Credit Suisse submits that neither of these can be determined at this time; thus, any effective annual interest rate calculations would be highly speculative and arbitrary, as they would be based on imperfect or unknown information. Finally, Credit Suisse says that given this uncertainty, their DIP facility does not violate s. 347(1)(a) of the *Code*.

(ii) The Law

[135] The criminal interest rate offences are found in s. 347 of the *Code*. The relevant provisions are as follows:

347. (1) Despite any other Act of Parliament, every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest at a criminal rate, is

(a) guilty of an indictable offence...; or

(b) guilty of an offence punishable on summary conviction...

...

(2) In this section,

“credit advanced” means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

“criminal rate” means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

...

“interest” means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes...

[Emphasis added.]

[136] This provision creates two offences: (i) entering into an agreement or arrangement to receive interest at a criminal rate; and (ii) actually receiving payment or partial payment of interest at a criminal rate.

[137] In *Degelder Developments Ltd. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90 at para. 34, Major J. summarized the applicable principles in interpreting and applying these provisions:

(1) Section 347(1)(a) should be narrowly construed. Whether an agreement or arrangement for credit violates s. 347(1)(a) is determined as of the time the transaction is entered into. If the agreement or arrangement permits the payment of interest at a criminal rate but does not require it, there is no violation of s. 347(1)(a), although s. 347(1)(b) might be engaged.

(2) Section 347(1)(b) should be broadly construed. Whether an interest payment violates s. 347(1)(b) is determined as of the time the payment is received. For the purposes of s. 347(1)(b), the effective annual rate of interest arising from a payment is calculated over the period during which credit is actually outstanding.

(3) There is no violation of s. 347(1)(b) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement.

[Original emphasis.]

[138] The definition of “interest” is extremely comprehensive, and encompasses “many types of fixed payments which would not be considered interest proper at common law or under general accounting principles”: *Garland v. Consumers’ Gas Co.*, [1998] 3 S.C.R. 112 at para. 27. Any fees, fines, penalties, commissions or other similar charges or expenses are captured by this provision insofar as they are, in accordance with the definition of “interest”, “paid or payable for the advancing of credit under an agreement or arrangement”.

[139] In determining whether a charge or expense - whatever its form - constitutes “interest” under the *Code*, courts look at the substance, and not merely the form, of such payments. As Huddart L.J.S.C. (as she was then) observed in *Mira Design Co. v. Seascope Holdings Ltd.* (1981), 34 B.C.L.R. 55 (S.C.) at 60:

The thrust of the definitions of “credit advanced” and “interest” is to cover all possible aspects of any transaction to ensure that the cost of using someone else’s money never exceeds the criminal rate. Thus, they focus on the actual benefit given to the borrower and the real cost of borrowing. The actual benefit is the real amount in the borrower’s hands minus all the penalties, commissions and other costs incurred. The cost of borrowing is also widely defined. Clearly the intention of the legislature was to concentrate on the substance of the transaction, not on its mechanics or form.

[Emphasis added.]

[140] In conducting this analysis, courts will consider the nature of the relationship between the parties: *De Wolf v. Bell Express Vu Inc.*, 2009 ONCA 644 at para. 39. In

this regard, where the relationship is exclusively one of lending money, any additional charges or fees are inherently connected to the lending of money, regardless their label.

[141] Furthermore, the act of providing a service in connection with a charge or expense does not preclude those payments from being “interest” in s. 347. For example, the B.C. Court of Appeal upheld a lower court’s decision which found “processing fees” with respect to payday loans, or lender’s legal fees that are charged back to the borrower, to be “interest”: *Kilroy v. A OK Payday Loans Inc.*, 2006 BCSC 1213 at para. 15, aff’d 2007 BCCA 231.

[142] Lastly, with particular significance to this case, s. 347(1)(a) (the agreement offence) is not violated if it is not provable by the terms of the agreement that the borrower is required to pay a criminal interest rate. In *Degelder*, Major J. explained this requirement in the following terms:

29 It follows from the foregoing that s. 347(1)(a) should be narrowly construed. That offence is complete upon the formation of an agreement or arrangement for credit, and provable by its terms. As Borins J., then of the Ontario Court (General Division), observed in *Aectra Refining & Marketing Inc. v. Lincoln Capital Funding Corp.* (1991), 6 O.R. (3d) 146, at p. 150:

... the critical time at which a lender commits an offence contrary to s. 347(1)(a) . . . is when the lender “enters into an agreement . . . to receive interest”. It is at that time that the court must determine whether the rate of “interest”, which is very broadly defined in s. 347(2), provided for by the agreement constitutes the “criminal rate” which is also defined in s. 347(2).

Subsection (1)(a) is violated if a credit agreement expressly imposes an annual rate of interest above 60 percent, or if the agreement requires payment of interest charges over a period which necessarily gives rise to an annual rate exceeding the legal limit. [Citations omitted.]

[Emphasis added.]

[143] Accordingly, s. 347(1)(a) is violated only when there is a clear and unambiguous requirement that criminal interest be paid. It is insufficient that there is a mere possibility that the rate of interest could become illegal under the agreement, such as where a significant interest payment is payable on some named but indeterminate event or over some indefinite period: *Degelder* at para. 29; *Bearcat*

Explorations Ltd. (Bankrupt), 2004 ABQB 601 at paras. 99-102; *J.D.M. Capital Ltd. v. Smith*, [1999] 6 W.W.R. 687 (B.C.C.A.). In those circumstances, the effective annual rate of interest “remains speculative until the actual amount of interest and the actual period of repayment are known”: *Degelder* at para. 29. As such, the interpretation requires a “wait-and-see approach” to determining the lender’s liability: *Degelder* at para. 30; *Bearcat* at para. 92.

[144] If a loan agreement “permits but does not require the payment of illegal interest”, the analysis turns to a consideration of s. 347(1)(b) (the payment offence): *Degelder* at para. 33. This provision requires an actual payment of interest exceeding the permissible rate.

(iii) Discussion

[145] There appears to be no doubt that it is the *possibility* of payment of the Advisory Fee or payment under the GBG Inc. Guarantee that may tip the calculation toward a criminal interest rate. That being so, the first question is whether either the Advisory Fee or amounts that may be paid under the GBG Inc. Guarantee are “interest” for the purpose of the calculations under s. 347 of the Code.

[146] As earlier stated, “interest” under s. 347 is a broadly defined term that encompasses many different types of fees and charges, and has included: royalty payments, legal fees, monitoring fees, standby fees, facility fees, commitment fees, brokerage fees, late fees, initial loan fees, fees for extensions, administrative fees and processing fees: *J.D.M. Capital* at para. 17; *Boyd v. International Utility Structures Inc.*, 2002 BCCA 438 at paras. 52-58; *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at para. 11; *Kilroy C.A.*; *Affordable Payday Loans v. Beaudette*, [2004] O.J. No. 3235 (S.C.J.); *Terracan Capital Corp. v. Pine Projects Ltd.*, [1993] 3 W.W.R. 724 (B.C.C.A.); *William E. Thomson Associates Inc. v. Carpenter* (1989), 69 O.R. (2d) 545 (C.A.); *Ayrton v. PRL Financial (Alberta) Ltd.*, 2005 ABQB 311, aff’d 2006 ABCA 88.

[147] Though broadly defined, “interest” refers in the first instance to “charges and expenses”. Here, the Ad Hoc Group stresses the “cost of loan” concept, the actual

benefits given to the lender, as the rationale for characterizing both the GBG Inc. Guarantee and the Advisory Fee as “interest”.

[148] The Ad Hoc Group submits that it is clear that the Advisory Fee is “interest” under s. 347 for the following reasons:

(a) It is a requirement under the Initial DIP Term Sheet that the borrower enter into an agreement to pay the Advisory Fee to the Initial DIP Lender, and as a result it is clearly a “cost or expense ... paid or payable for the advancing of credit”.

(b) The fact that the Advisory Fee arises under a separate agreement does not change the fact that, in substance, it is a charge or expense the borrower must incur in order to obtain credit.

(c) The Initial DIP Loan is clearly a loan transaction in substance, and the nature of the relationship between the Initial DIP Lender and GBG is equally clearly one of creditor and debtor. Accordingly, the Advisory Fee, as a charge associated with the Initial DIP Loan, is inherently connected to advancing of credit.

(d) It is not clear whether the Initial DIP Lender intends or proposes to provide any services to GBG in connection with the advisory agreement, but even if it did this would not change the nature of the Advisory Fee, and would therefore not change its characterization as “interest”.

[149] The Ad Hoc Group further argues that the GBG Inc. Guarantee constitutes “interest”. It states that the GBG Inc. Guarantee, though under a separate agreement, was to be granted at the behest of GBG as part of GBG acquiring credit. As counsel for the Ad Hoc Group framed the negotiations for the Credit Suisse DIP facility: without the GBG Inc. Guarantee, there would be no DIP loan. In addition, if the Burnstone Property fails to generate sufficient funds to pay the Credit Suisse loan relating to Burnstone, the shortfall will be paid pursuant to the GBG Inc. Guarantee and thus represents a “charge or expense”, *albeit* one borne by GBG Inc., that would not otherwise have been paid had that Guarantee not been provided.

[150] Further, the Ad Hoc Group says the GBG Inc. Guarantee is an additional “charge and expense” to GBG because if GBG Inc. is required to pay under the GBG Inc. Guarantee, GBG would at common law be required to indemnify it. This points to a “charge and expense” being borne directly by GBG.

[151] The argument of the Ad Hoc Group concerning the Advisory Fee representing “interest” appears to have some force. It is, however, more difficult to fit the GBG Inc. Guarantee into the category of a “charge or expense”. Furthermore, the case authorities provided to the court on the scope of what is included within “interest” do not consider arrangements comparable to the Credit Suisse DIP facility.

[152] The intertwined nature of the GBG Inc. Guarantee and the Advisory Fee is also likely to be relevant to any determination. As described above, the DIP loan provides an “either or” scenario that is structured to ensure that Credit Suisse collects at least the amount owing on the Burnside term loan. Given that the Advisory Fee is triggered only after the Burnside term loan is satisfied, it is arguable the GBG Inc. Guarantee is precisely what the Ad Hoc Group alleges in the first instance: “an attempt by [Credit Suisse] to bolster the Burnstone Lenders’ security for its existing Burnstone Loan”. In other words, it is arguably not, in substance, interest; rather, it is security granted on an otherwise unsecured loan as consideration for funding under the DIP facility. This may be said to be distinct from a charge or expense paid for the advancing of credit.

[153] I consider that there are valid arguments to the effect that both the Advisory Fee and the GBG Inc. Guarantee constitute “interest” under s. 347. However, this position of the Ad Hoc Group is hotly contested by Credit Suisse.

[154] In my view, however, these are issues for another day. I do not consider that it is necessary at this juncture to engage in a fulsome analysis or to make such a determination, especially given the urgency of the matter. Counsel for Credit Suisse was unable in this case to present a considered argument on these issues given the urgency of the situation.

[155] It is also important to note that even if I were to accede to the position of the Ad Hoc Group on these arguments, it would be of no import given the lack of evidence with respect to the calculation of the effective annual interest rate. I agree with Credit Suisse on this point, in that a determination of this issue is premature. It is not certain, not clear on the face of the Credit Suisse DIP loan, whether GBG is

required to pay an interest rate in excess of 60% per annum at any time in the future. No interest rate can be calculated without either a value of the Burnside Property proceeds or the termination date at which these proceeds will be paid.

[156] The Ad Hoc Group simply cannot show beyond what can only be characterized as a ‘reasonable possibility’ that a criminal interest rate will result from payments made under the Credit Suisse DIP loan. It is also possible in one scenario that neither the Advisory Fee nor any amounts under the GBG Inc. Guarantee will be paid; another is that only nominal amounts will be paid (for example, where the proceeds from the Burnside Property are equal to or close to the amounts payable to Credit Suisse on the Burnside loan). In addition, despite deadlines under the terms of the DIP loan, it remains possible that repayment will occur outside of those deadlines. It would not be unheard if expectations in that regard are not met for any number of reasons. For example, many “pre-pack” restructurings which are intended to be completed in fairly short order turn out to be anything but.

[157] Accordingly, as in *Degelder*, the effective annual rate of interest remains speculative until the actual amount of interest and the actual period of repayment are known. The Credit Suisse DIP loan therefore does not offend s. 347(1)(a) of the *Code*. With respect to this finding, counsel for the Ad Hoc Group conceded at the application that the Credit Suisse DIP loan is not “strictly an offence” today.

[158] In the alternative, the Ad Hoc Group’s contention is not that the terms of the DIP loan necessarily offends s. 347 at this time, but that as a matter of public policy under the *Code* and the *CCAA*, it is incumbent on the Court to refuse to sanction an agreement that may, and based on all available evidence likely will, violate s. 347(1)(b) at some point in the future.

[159] In support of this position, the Ad Hoc Group’s counsel cites *Garland v. Consumers’ Gas Co.* (2001), 57 O.R. (3d) 127 (C.A.). At issue in this case was late payment penalties received by a gas company from its customers pursuant to and in compliance with Ontario Energy Board orders. The company was regulated by the Ontario Energy Board, and as such was subject to Board orders made with respect

to rates for the sale of gas, including a Board order which allowed the company to charge a 5% penalty to its customers for late payment. The plaintiff's actuarial evidence showed that the vast majority of late-paying customers paid within a time period during which the interest rate represented by the penalty was greater than 60% per year.

[160] In discussing the Board's current penalty structure, at para. 34, McMurtry C.J.O. made it clear that, regardless of the success of the plaintiff's claim for restitutionary relief, the Board would need to implement a new penalty that did not "have the capacity to result in a contravention of s. 347(1)(b)".

[161] The Ad Hoc Group submits that this case stands for the proposition that a court should not, as a matter of public policy, sanction an agreement that could possibly violate s. 347 at a later date. It submits further that this policy is particularly applicable when a court is being asked to approve an agreement (as opposed to being asked to provide a ruling on an existing agreement's enforceability).

[162] I do not find this case helpful. I do not agree that the above comment stands for the broad proposition put forth by the Ad Hoc Group's counsel. Firstly, such a proposition flies directly against Major J.'s express directions in *Degelder*. Secondly, such an interpretation of McMurtry C.J.O.'s comment would ignore the context of that case. The evidence in that case demonstrated not only that the penalty was capable of violating s. 347(1)(b), but that it in fact did so violate that subsection. Thus, McMurtry C.J.O. was merely commenting that the Board should cease making orders which it knows do in fact lead to the contravention of the *Code*.

[163] I do not take issue with this comment when placed in the proper context. I simply do not see how they are applicable to the specific facts before me. The evidence in this case only shows a *possibility* that s. 347(1)(b) will be infringed in the future.

[164] Furthermore, I do not see a distinction between approving an agreement and ruling on an agreement's enforceability in assessing whether the agreement violates

s. 347, and I note that the Ad Hoc Group did not provide any authority to this effect. In either case, the court is required to determine whether amounts payable under the agreement are, in substance, “interest” payments and if so, whether these amounts exceed the permissible interest rate. I see no principled reason why the analysis in both cases should not be the same, or why the Court should stray away from the interpretive framework provided by the Supreme Court of Canada in *Degelder* and *Garland*. Accordingly, if an agreement permits, but does not require the payment of illegal interest, whether in the context of approving or upholding an existing agreement, the analysis turns to a consideration of s. 347(1)(b): *Degelder* at para. 33.

[165] As no payment has been made under the Credit Suisse DIP loan, s. 347(1)(b) clearly does not apply. Following *Degelder*, the appropriate approach in this case is to “wait and see” whether any payment is made pursuant to the GBG Inc. Guarantee or the Advisory Fee, and assuming a determination that the amount paid is “interest”, whether the interest rate permitted by s. 347 would be exceeded.

[166] I note that the Supreme Court of Canada has described s. 347 as a “deeply problematic law” whose two facets “do not comfortably co-exist” and which has given rise to a large volume of civil litigation and interpretive difficulties: *Garland* at para. 52. I am fully aware that these issues may need to be addressed by the Court at a later time.

[167] In conclusion on this issue, the requirements of s. 347(1)(a), as set out by the Supreme Court of Canada, are not met in this case. Although it appears there is a *possibility* that the GBG Inc. Guarantee and the Advisory Fee may very well constitute “interest”, and may amount to criminal interest, the evidence before me is insufficient to establish at this time that the effective annual interest rate under the Credit Suisse DIP loan exceeds 60% per annum. The actual amounts to be paid for these items, if any, and the date at which any amount is payable are both unknown. Put bluntly, too many contingencies render any calculations of an effective annual interest rate purely hypothetical.

[168] Furthermore, until any payment is actually made, the application of s. 347(1)(b) is theoretical and moot. Contrary to the Ad Hoc Group's counsel's suggestion that the Credit Suisse DIP loan is "tainted by illegality", I find that this case falls squarely into those scenarios described by Major J. in *Degelder* at para. 30, where the appropriate action is to "wait and see" whether the DIP loan offends s. 347(1)(b) of the *Code*. This approach is wholly consistent with the directions given by the Supreme Court of Canada in *Degelder* and *Garland*, as well as with the B.C. Court of Appeal's ruling in *Boyd* at para. 67.

[169] This approach is consistent with the public policy aspects behind s. 347 of the *Code*.

[170] Further, it is consistent with the public policy behind the CCAA which promotes a determination of issues that will advance the proceedings toward a successful restructuring. I see little need to embark on a consideration of issues that may well be moot, particularly where issues are raised on an urgent basis and where resources would be better directed at more pressing issues.

[171] Accordingly, I would not accede to the Ad Hoc Group's submissions that the Credit Suisse DIP loan violates s. 347 of the *Code*. However, even though it is not possible at this time to declare the Credit Suisse DIP facility as being contrary to the *Code*, the possibility of the agreement eventually providing for that result and the possibility of Credit Suisse obtaining such funds remains a factor to be considered under s. 11.2 of the CCAA.

[172] Lastly, I reject the Ad Hoc Group's submission that this Court should declare that the net proceeds from any sale of the Burnstone Property payable to Credit Suisse in respect of either the Advisory Fee or the GBG Inc. Guarantee be capped at US\$6.2 million.

[173] There appears to be some support in the case-law for "reading down" an agreement or severing specific clauses to reduce the amount of interest payable to a rate at or below the legally permissible rate: see *Transport North American Express*

at paras. 31-40; *Fawcett v. Western Canadian Coal Corp.*, 2010 BCCA 70 at paras. 47-48. Credit Suisse has indicated that the Definite Documents for its DIP loan will specifically provide that in no event will its recovery exceed an interest rate of 60%. Whether this would save the day for Credit Suisse is an open question: *Brehnan v. Outback Products Inc.*, 2003 BCSC 703.

[174] However, I agree that it is not appropriate to grant such an order at this time. Again, the Ad Hoc Group bases its calculations on uncertain figures. The termination date of the loan may occur in six months - or it may not. The amount realized from the sale of the Burnside Property may be significant; it may also be such that neither the GBG Inc. Guarantee nor the Advisory Fee is triggered. Accordingly, any cap would be grounded in arbitrarily chosen figures and conditions, the result of which may ultimately be to deny payments to Credit Suisse that do not, in the specific circumstances at that time, represent a criminal interest rate.

[175] In short, this is neither the time nor the place to engage in a determination of this dispute, particularly given the urgency and seriousness of the financial circumstances GBG currently faces.

Should the Credit Suisse DIP Loan Approval be Maintained?

[176] Even in light of my conclusions on the viability of the Ad Hoc Group's proposal as above, I must consider again the merits of the Credit Suisse DIP proposal.

[177] The Ad Hoc Group submits that the Credit Suisse proposal evidences an aggressive existing stakeholder who is using its existing leverage to extract value and secure for itself a betterment of its position to the prejudice of existing stakeholders, including the debenture holders. This is described as an "asset grab". Credit Suisse is also described as overreaching in its approach, a criticism which may have some validity given its present retreat from certain aspects of its original proposal (for example, the reduction in and cap of the Advisory Fee and the more relaxed timelines).

[178] In addition, again the Ad Hoc Group says that matters have “stabilized” since last week and that the stakeholders now have the luxury of allowing the Ad Hoc Group’s proposal to proceed without having Credit Suisse’s “gun to the head” of GBG in terms of securing approval of its proposal. I have rejected the contention that matters have stabilized.

[179] I recognize that in some restructuring proceedings, certain stakeholders may use existing leverage, to the extent that they have it, to take advantage of the chaos and uncertainty that are inherent in these situations. Strategies might be employed to secure for themselves advantages that they would not otherwise obtain. These advantages inevitably come at the expense of other stakeholders in the proceedings. These advantages are also almost always court approved so that they cannot be later revisited. In those circumstances, the court must be constantly vigilant against such strategies. While no doubt there are many examples, some circumstances which clearly invite the scrutiny of the court involve proposals for stalking horse bids where the stalking horse bidder extracts substantial break fees, but where there is no need for such a bid to adequately test the market or address other concerns within the restructuring. Other examples of situations where it is possible that such strategies may be employed are those relating to key employee retention plans or critical supplier charges sought pursuant the CCAA.

[180] In many cases, the debtor company when faced with these issues - or “demands” - simply wants to buy peace and stability. Given the company’s insolvency, management may not have sufficient leverage or negotiating power to counter such requests. I do not intend to imply generally any untoward behavior on the part of management of debtor companies, but often companies find themselves overwhelmed with issues arising from the economic crisis and acceding to these requests may be seen as simply furthering the process in difficult circumstances.

[181] Even so, the Court remains the gatekeeper in terms of ensuring that the terms of any such agreements are reasonable and appropriate in the circumstances. Input from stakeholders participating in the process will be critical although the entire

stakeholder group must be considered. Critical to the court's analysis will be evidence of the debtor company's actions in the face of these proposals. What is the underlying reason for these transactions? What due diligence was done in the face of these proposals? What negotiations took place? What are the true consequences of not obtaining this relief? What alternatives, if any, are available?

[182] Urgency is a continuing theme on many of these applications, just as it is on this application. Often materials are served on very short notice and participating stakeholders may not be afforded sufficient time to adequately consider the relief sought. Again, the court must be vigilant to ensure that it is not rushed to a decision based on an illusory sense of urgency which is not supported by the evidence. There are, no doubt, many cases where the matter is truly urgent. Issues can quickly arise from unforeseen circumstances or even perhaps due to a misstep by the management of the debtor company. In addition, once a filing takes place, many issues must be addressed quickly. The court must guard against deciding issues in the face of "manufactured" urgency, whether created by leverage from a stakeholder seeking certain relief or otherwise.

[183] In addition, it is often the case that these applications are brought on an urgent basis where the court is asked to decide the issue without a full review of the evidence before it. The court will, of necessity, seek the input of the monitor, who will have the necessary background and hopefully, knowledge and insight on these important issues. However, if the monitor is, as in this case, only recently appointed, the ability of the monitor to provide meaningful input may be limited.

[184] It is in the context of this framework and the submissions of the Ad Hoc Group concerning how the Credit Suisse DIP proposal came about that I now address that proposal.

[185] I have already referenced the evidence of GBG concerning the background of the GBG Group, and in particular, the events leading to the Board's efforts to secure appropriate DIP financing on a timely basis. The evidence sets out in detail the Board's detailed consideration of the more negative aspects of the Credit Suisse

proposal, including the GBG Inc. Guarantee. The evidence from the Ad Hoc Group indicates that they had begun communications with GBG as early as September 11, 2012 towards expressing an interest in providing DIP financing for the GBG Group. It is unclear what actions GBG took in response to those overtures in terms of flushing out the potential terms of any such financing. In any event, I note that Mr. van Vuuren has generally referenced in his affidavit that other financing proposals were considered, but that they came with “significant closing risk and delay”. That is the same response that GBG and the Monitor now make in respect of the Ad Hoc Group’s proposal after a full disclosure of the terms upon which their financing might be advanced.

[186] Of additional significance is Mr. van Vuuren's statement that the Board exercised its business judgment in respect of its decision to pursue the Credit Suisse DIP financing proposal. It is, of course, the case that courts will typically take a very deferential approach with respect to such matters given the expertise of the Board of Directors and their intimate knowledge of the business affairs of the debtor company. I would note, however, the comments of the Ontario Court of Appeal in *Re Crystallex* that while a factor, deference to the Board’s decision does not mean that the factors outlined in s. 11.2 are to be disregarded by the court:

[85] *Stelco* should not be read as authority for the principle that the recommendation of the directors of a debtor under CCAA protection is entitled to deference in evaluating whether financing should be approved under s. 11.2 of the CCAA where the factors outlined in s. 11.2(4) have not been complied with. In *Stelco*, the debtor did not seek court approval of a recommendation of the board. In the case of interim financing, the court must make an independent determination, and arrive at an appropriate order, having regard to the factors in s. 11.2(4). It may consider, but not defer to, and is not fettered by, the recommendation of the board.

[187] Finally, the Monitor has provided its first report to the court in respect of all of these issues. Following from its appointment one week ago, the Monitor has had further time to obtain further information and documentation from the stakeholders with a view to assisting the court on these very complex matters. Again, the Monitor advised during argument that in its view, the greater certainty surrounding the Credit Suisse DIP loan facility, together with the ability of Credit Suisse to quickly advance

funds into an urgent cash flow situation trumps the uncertainty, risk and potential cost associated with the Ad Hoc Group's proposal.

[188] I turn now to the specific factors set out in s. 11.2(4) of the CCAA.

[189] The first factor under s. 11.2(4)(a) relates to the period during which GBG is expected to be subject to proceedings under the CCAA. It is a matter of debate as to whether the Ad Hoc Group's proposal allows more time to GBG to complete its restructuring. I would note again that the Credit Suisse proposal allows for extensions, *albeit* at a cost. One might argue that the more rigorous timeline set out in the Credit Suisse proposal will result in an enhancement of enterprise value for the stakeholders as a whole as it will reduce restructuring costs, including the cost of the DIP financing. It is debatable which is the proper approach in these circumstances and whether these differences will, in fact, have a material effect upon the restructuring.

[190] The management of GBG and how they are to conduct the business and financial affairs of GBG during the proceedings (s. 11.2(4)(b) and (c)) have not been raised as issues on this application and are neutral factors in respect of the two competing proposals. I assume that the present management has the confidence of both Credit Suisse and the Ad Hoc Group. In addition, the nature and value of GBG's property is a matter addressed by both proposals and again does not invite any comparison (s. 11.2(4)(e)). Both proposals appear to be consistent with the DIP financing required in the context of the assets of the GBG Group.

[191] In my view, the most important factors to be considered on this application are those set out in s. 11.2(4)(d), (f) and (g).

[192] Dealing with s. 11.2(4)(g), as I have already stated, the Monitor supports the continued approval of the Credit Suisse facility on the basis that it provides certainty, not only in terms of result, but in terms of speed in meeting what it agrees are the urgent cash flow requirements of the GBG Group.

[193] The factor under s. 11.2(4)(f) relates to prejudice. It is apparent that there may be prejudice to the debenture holders in the event that there is a call on the GBG Inc. Guarantee if sufficient value is not realized from the sale of the Burnstone Property. Alternatively, the potential payment of the Advisory Fee, *if paid*, will have a negative effect on recoveries that the debenture holders might otherwise have made at the level of the unsecured debt in Southgold. On that score, I make two observations. Firstly, there remains that possibility that no amount will be paid under either the GBG Inc. Guarantee or the Advisory Fee. Secondly, the debenture holders are part of the general unsecured creditors of both GBG and Southgold and they are not particularly targeted (although I acknowledge that they will represent a large portion of both creditor groups).

[194] It would be a rare case indeed where DIP financing did not raise some element of prejudice in relation to other stakeholders. The section speaks of “material” prejudice and as such, the court must weigh that inevitable prejudice against the benefits of obtaining the DIP financing. In this case, that balancing exercise - which of necessity includes a consideration of the risks of *not* obtaining the financing - points clearly in the direction of maintaining the approval of the Credit Suisse DIP financing proposal, as amended during argument.

[195] As discussed above, I recognize that there is some element of prejudice relating to the potential argument that the Credit Suisse DIP loan will result in a criminal rate of interest. I have considered this as a factor - whether expressed by the Ad Hoc Group as a “public policy” issue or otherwise - under s. 11.2. For the reasons already expressed, I consider that the issue can be addressed at the end of the day once more facts are known. I do not consider that there is any prejudice to the stakeholders arising from this issue at this time.

[196] Last but not least, and even assuming that the Ad Hoc Group’s proposal was viable, I must consider whether each of the Credit Suisse and Ad Hoc Group proposals would enhance the prospects of a viable compromise or arrangement in

respect of GBG and as between the Credit Suisse and Ad Hoc Group proposals, which would *better* enhance the prospects of that result (s. 11.2(4)(d)).

[197] Counsel for the Ad Hoc Group submits that Credit Suisse's position in relation to its current proposal for DIP financing (particularly as it relates to the Advisory Fee and the GBG Inc. Guarantee) is a "bluff" and that I should call that bluff. He says that as the pre-existing secured lender in respect of both the Burnstone and Hollister Properties, it is more than likely that Credit Suisse would agree to fund the necessary DIP loan during these restructuring proceedings whether or not they secure these more objectionable requirements. Mr. van Vuuren stated in his affidavit that Credit Suisse was unwilling to advance any new funds without the GBG Inc. Guarantee. In addition, in argument before me on September 19, 2012, counsel for Credit Suisse confirmed that they were not prepared to fund save and except on the conditions proposed at that time. As I have earlier stated, since that time, it has become apparent that this position was not really writ in stone, in that they have bettered their offer, no doubt by reason of the objections advanced by the Ad Hoc Group.

[198] Leaving all that aside, the Ad Hoc Group's proposal remains the more uncertain of the two proposals, even if I had acceded to its application and added the U.S. subsidiaries as respondents to this proceeding. As I have said, the proposal requires certain priming charges that will no doubt be vigorously objected to by Credit Suisse. I do not wish to endorse any strategy by such a party to the point where it can create the very uncertainty and risk that works in its favour. It can equally be said here, however, that the Ad Hoc Group has created uncertainty and risk in relation to the Credit Suisse proposal in an attempt to create leverage in its favour. Nevertheless, the risk, timing and cost issues remain factors that cannot be ignored on this application.

[199] I see no basis here upon which the court should consider engaging in a game of brinksmanship with Credit Suisse towards calling their "bluff". There are significant assets that must be maintained so as to preserve enterprise value pending a

restructuring of the GBG Group. There are substantial stakeholders here, in addition to Credit Suisse and the debenture holders. Those stakeholders would include the approximately 1,275 employees of the GBG Group, the many suppliers and other unsecured creditors of the various companies and the communities in which those subsidiaries operate. Importantly, as there are mining operations involved, that necessarily means that there are substantial environmental issues potentially in play in the event that the mining operations are not maintained in a proper fashion.

[200] I accept that if the Credit Suisse DIP proposal is not allowed to go forward, there is considerable risk involved. As I have said, even the recent interim offer of financing by a member of the Ad Hoc Group in the amount of US\$5 million does not fully satisfy what I accept are the urgent cash needs of the GBG Group now and in the immediate future.

Conclusion

[201] There is no jurisdictional basis upon which I may add GBG Inc., Antler and Rodeo to these CCAA proceedings so as to allow the proposal of the Ad Hoc Group's proposal to go forward. In any event, I consider that there is substantial risk and uncertainty associated with the Ad Hoc Group's proposal.

[202] The Credit Suisse proposal, for all its negative aspects, remains the only viable financing option available to the GBG Group at this time. I therefore conclude that it is appropriate to leave the Credit Suisse DIP financing proposal in place, subject to the further concessions that were agreed to at the outset of this hearing. I order that paragraph 36 of the Initial Order be amended to refer to the document that reflects these revised terms.

[203] I have some sympathy for the position of the Ad Hoc Group in terms of the prejudice that they will potentially suffer by reason of the Credit Suisse DIP proposal. However, with respect to the potential Advisory Fee, that is a prejudice that will also be suffered by other stakeholders involved in the South African subsidiaries. In addition, with respect to the GBG Inc. Guarantee, it remains a possibility that that guarantee will never be called upon. While there is obviously some speculation

involved, the present view of the Board of Directors is that, even in the face of the present insolvency proceedings, they are optimistic that there is sufficient value in the Burnstone Property towards that result.

[204] I would not accede to the submissions of the Ad Hoc Group concerning the criminal interest rate issue. That issue need not be addressed at this time and in fact, based on a certain set of circumstances, may never need to be addressed. Pending these issues being sorted out, I order that GBG take all reasonable steps to ensure that any payment of the Advisory Fee or any payment under the GBG Inc. Guarantee be held and not paid to Credit Suisse without further order of this court. That should provide some protection for the stakeholders to preserve any amounts that would otherwise have been paid until the issues are determined.

[205] Accordingly, the application of the Ad Hoc Group is dismissed.

“Fitzpatrick J.”

Appendix "A"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120919
Docket: S126583
Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act,

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

and

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

and

In the Matter of Great Basin Gold Ltd.

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for Petitioner:	P.J. Reardon J.L. Cockbill
Counsel for Monitor:	J. McLean
Counsel for Credit Suisse AG:	P.L. Rubin K. McEachern
Counsel for Unsecured Note Holders:	J.R. Sandrelli
Place of Trial/Hearing:	Vancouver, B.C. September 19, 2012
Place and Date of Judgment:	Vancouver, B.C. September 19, 2012

[1] **THE COURT:** These are proceedings commenced pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA] by the petitioner, Great Basin Gold Ltd. The petitioner applies for an initial order.

[2] I will briefly describe the background circumstances, although I do not intend to go through them in detail given the complexity of the situation. The petitioner company is the publicly traded Canadian parent of a large number (22) of subsidiary companies. Through these subsidiaries or groups of subsidiaries, the group owns and operates two gold mines and holds other miscellaneous interests. The first gold mine is the Burnstone Mine located in South Africa. The second gold mine is the Hollister Mine located in Nevada, United States of America.

[3] The circumstances leading up to this filing are outlined in Affidavit #1 of Lourens van Vuuren sworn September 19, 2012. Mr. van Vuuren is the interim Chief Executive Officer and a director of the petitioner. His evidence indicates that through either a combination of economic circumstances or lack of revenue being realized through the mining operations, the corporate group has found itself in a severe liquidity crisis. The circumstances have not arisen just recently; it appears that the corporate group retained CIBC World Markets some months ago to attempt to either arrange a sale of the assets or a restructuring of its operations. I am advised that those efforts continue at this time.

[4] More recently, the Burnstone Mine in South Africa has just been closed down and has been placed in care and maintenance mode. In addition, the major South African subsidiary, Southgold Exploration (Pty) Ltd., filed for creditor protection in South Africa on September 14, 2012.

[5] The debt situation is somewhat complex.

[6] Credit Suisse, who is represented on this application, has various loans outstanding. Firstly, there is a loan to the petitioner with respect to the South Africa operations, namely a US\$150 million term loan with a US\$14 million hedging facility. I am told that those amounts are directly secured against the South African mine.

[7] In addition, there are loans by Credit Suisse with respect to the Hollister Mine. These are direct advances to the U.S. companies, the lead company of which is Great Basin Gold Inc., who I will address in more detail in a moment. There is a US\$43 million term loan and a US\$10 million hedging facility. That loan is guaranteed by the petitioner company.

[8] The majority of the assets, as I said, include the two gold mines. There have been various estimates with respect to the value of those mining operations, and of particular relevance to this application is that the book value of the South African mine is estimated to be in excess of \$600 million.

[9] The application for the initial order is brought pursuant to s. 11.02(1) of the CCAA. I may make an order on any terms that may be imposed. Also, under s. 11.02(3)(a) of the CCAA, the petitioner company must satisfy the court that circumstances exist that make the order appropriate.

[10] Mr. Reardon has taken me through the evidence. I am satisfied that the petitioner company meets the technical requirements of the CCAA in terms of the amounts that must be outstanding in accordance with s. 3(1) of the CCAA. Further, the petitioner company has filed the appropriate documentation, including its projected cash flow. It is beyond question here that the petitioner company is insolvent and is able, as a “debtor company”, to take advantage of the provisions of the legislation.

[11] I have the pre-filing report of the proposed Monitor, KPMG Inc., dated September 19, 2012. KPMG was just recently retained on September 18, 2012 and has provided comments on certain matters as are being considered by the court today. I would, however, note that KPMG has only limited information at this time given its recent involvement, and thus its ability to provide an independent opinion on certain issues is limited.

[12] I am satisfied that the stay of proceedings and the other ancillary relief that would typically be granted in an initial order are appropriate at this time.

[13] The more contentious issue on this application relates to the application by the petitioner company to approve Debtor-in-Possession ("DIP") financing. The proposed DIP financing is from Credit Suisse, who is, as previously stated, an existing secured creditor. The proposal is for a \$35 million facility. The intention of the petitioner company is that \$25 million would be used in respect to the South African or Burnstone mine operations and \$10 million would be used with respect to the U.S. operations at the Hollister Mine.

[14] It is apparent from the evidence that these funds are urgently needed by the South African entities for the care and maintenance program that is currently underway in respect of the Burnstone mine. I have been advised by the petitioner that it proposes to use \$7 million of the DIP proceeds to pay severance to the approximately 1,000 miners who were recently laid off. The suggestion is that recent events in South Africa with respect to other mining operations point to the volatility of the situation generally. It is submitted by Mr. Reardon that the severance payments are needed, essentially, to buy labour peace and ensure that matters are satisfactorily settled with the employee miners in South Africa.

[15] With respect to the \$10 million intended for the Hollister mining operations, similarly, it is submitted that those monies are needed for the ongoing operations in Nevada. The evidence indicates that the gold being produced by that mine would not otherwise be sufficient to generate revenue to meet its ongoing obligations.

[16] The Credit Suisse DIP facility raises various issues. There are two rather unusual aspects of the proposed DIP security which must be addressed.

[17] The first is that it is proposed that the Credit Suisse agent be entitled to a fee of 15% of net proceeds that might be realized from the South African assets. Assuming a book value of \$650 million, Mr. Rubin advises me that that could result in a fee of \$60 million. This significant fee is unusual in respect of typical DIP financing terms.

[18] The second and even more contentious and unusual aspect of the proposed DIP financing relates to Credit Suisse's requirement that, in addition to the \$35 million DIP proceeds being secured against the assets of the petitioner company, there is a further requirement that Great Basin Gold Inc. (which I earlier identified as being the American parent company) provide a direct guarantee and security for the existing facility owed to Credit Suisse in respect of the South African operations. That would include the US\$150 million term loan and the US\$14 million hedge facility.

[19] Some opposition was taken to the terms of the DIP facility by counsel acting for a portion of an unsecured note holder group, which is owed approximately \$126 million by the petitioner company. Mr. Sandrelli, who has attended here today, acts on behalf of approximately 36% of those note holders, or those holding approximately \$45 million of the overall debt. This application was brought without notice to this group, but in any event the group got wind of it and has attended and made some submissions to the court. The clients represented here today submit that the court should not approve the DIP facility as proposed, and specifically should not grant any order that would authorize the further guarantee and security intended to be granted by Great Basin Gold Inc. in respect of the existing Credit Suisse loans owed in relation to the South African operations.

[20] I am advised that the granting of the security by Great Basin Gold Inc. does not result in any breach of the covenants that were negotiated by the note holder group in their documentation. It also bears noting that the granting of the guarantee and security by Great Basin Gold Inc. is not a matter that would be prohibited under s. 11.2(1) of the CCAA on this application, which now specifically provides that security for DIP financing as against the debtor company's assets may not secure an obligation that exists before the order is made. Great Basin Gold Inc. is not a "debtor company" as contemplated by that section.

[21] Mr. Sandrelli quite rightly points out that this further guarantee and security to be provided by Great Basin Gold Inc. may have the effect of diluting the note

holders' recovery at the level of the petitioner company. That arises because if there is a call on the guarantee and security against Great Basin Gold Inc., that would essentially trap that debt amount as against the value of the U.S. assets before the value of those assets could flow upstream to the parent company, namely the petitioner company, through its shares of Great Basin Gold Inc. Accordingly, but for this new guarantee and security, the note holders would have ordinarily shared in that recovery along with Credit Suisse, who currently holds only a guarantee from the petitioner company for the existing debt.

[22] The circumstances of the DIP and these unusual features of the DIP have been addressed by Mr. van Vuuren in his affidavit. In particular, Mr. van Vuuren says that the directors have carefully considered the effect of granting Great Basin Gold Inc.'s guarantee and security. Of particular importance is his evidence, which was confirmed by Mr. Rubin's submissions, that Credit Suisse is not willing to advance this new DIP facility without this guarantee and security being in place.

[23] It is not particularly clear at this time whether this new guarantee and security by Great Basin Gold Inc. will ever be called upon, given that there does appear to be significant value in the South African mine at this time. I do, however, recognize that there is no certainty that the value of the South African mine will be sufficient to repay the existing amount owing by Credit Suisse at the end of the day.

[24] In any event, for all that these unusual features exist with respect to the DIP facility, the fact remains that without these funds there will be significant and, I would stress, deleterious consequences to the entire corporate group. The evidence is that without this additional financing there will be significant consequences with respect to the South African mine in respect to the care and maintenance program. The evidence is also uncontroverted that without this additional financing it will "likely result in an uncontrolled shutdown of the Hollister Mine". Both of those negative consequences would no doubt be detrimental to all of the stakeholders, including the note holder group, a portion of which is represented on this application.

[25] The proposed Monitor has also commented on these unusual features of the DIP facility, although again, the proposed Monitor points out that they have really not had an opportunity, given their recent involvement, to provide the court with any further background or other information that might assist in terms of assessing the appropriateness of the DIP facility at this time.

[26] Mr. van Vuuren has stated in his evidence that the petitioner company has attempted to find appropriate DIP financing, and this happens to be the only option available to the petitioner company at this time. So, for all that this particular DIP financing may have some unusual and negative features, it appears to be the only course available to the petitioner company.

[27] I am required to consider s. 11.2(1) of the CCAA and the factors set out in s. 11.2(4). I am satisfied that all of those factors have been addressed to the extent that they support the granting of the DIP facility. As Mr. Reardon has pointed out, without this DIP facility there will be extremely negative consequences to both mining operations, which are the lifeblood of this corporate group. In all, whether it is viewed from the perspective of the Canadian parent, the U.S. corporate group, or the South African corporate group, negative consequences will result if this financing is not obtained.

[28] Accordingly, I am satisfied that the DIP order is appropriate at this time and I approve that.

[29] I would hope that in the future (and that would be in the immediate future) that the parties, including the petitioner company and Credit Suisse, would sit down with the note holder group and satisfy or attempt to satisfy the note holder group in terms of the appropriateness of the DIP financing. Of course, a critical aspect of that discussion would be the value or potential value of the South African mine to the extent of assessing the risk of this guarantee by Great Basin Gold Inc. being called upon in any event. I am not making any order in that respect, but am simply suggesting, as is typical in these files, that the parties enter into some meaningful discussions concerning the situation. I appreciate that Mr. Sandrelli is, as are other

people in this courtroom, presently working with a lack of information. Hopefully, in the fullness of time after this hearing, that can be remedied towards possibly satisfying the note holders going forward.

[30] The order sought is therefore granted with some amendments.

[31] The first change is a slight reworking of para. 38 to satisfy Mr. Sandrelli's concern in respect of what exactly is being secured against the petitioner's assets. Accordingly, the following will be added to that paragraph: "For greater certainty, the DIP Lender's Charge shall not secure any obligation under the Burnstone Advisory Agreement as defined in the Term Sheet". This would relate to the 15% fee.

[32] The second change will be that any party may apply to amend or vary this order on not less than two business days' notice. I acknowledge Mr. Sandrelli's statement that there may potentially be an application to set aside the order relating to the DIP facility given the fact that this application is essentially being heard on an *ex parte* basis.

[33] Lastly, the word "defence" has been added to para. 23 such that the indemnity for the directors and officers will be clarified such that it relates to "legal defence costs" as opposed to "legal costs".

[34] The date of the comeback hearing will be 9:00 a.m. on October 10, 2012.

"Fitzpatrick J."

TAB 10

In re Tenney Village Co.

United States Bankruptcy Court for the District of New Hampshire

July 31, 1989, Decided

Bk No. 89-536 Chapter 11

Reporter

104 B.R. 562 *; 1989 Bankr. LEXIS 1336 **

In re: TENNEY VILLAGE COMPANY, INC., Debtor

Counsel: Mark W. Vaughn, Esq., for Debtor, Devine, Millimet PA, Manchester, New Hampshire.

Robert J. Keach, Esq., for Maine Bank, Verrill & Dana, Portland, Maine.

William S. Gannon, Esq., for Maine Bank, Wadleigh, Starr Offices, Manchester, New Hampshire.

Bruce A. Harwood, Esq., for Fidelity Bank, Sheehan, Phinney, et al, Manchester, New Hampshire.

Charles L. Glerum, for Bank of New England, Choate, Hall & Stewart, Boston, Massachusetts.

Judges: **[**1]** James F. Queenan, Jr., United States Bankruptcy Judge.

Opinion by: QUEENAN, JR.

Opinion

[*562] QUEENAN, JR., U.S.B.J.

Tenney Village Company, Inc. (the "Debtor") moves for approval of its Chapter **[*563]** 11 secured financing agreement (the "Financing Agreement") with Maine Savings Bank ("the Bank"). Objections have been lodged by other lienholders and the committee of unsecured creditors. The Financing Agreement proposes an additional real estate mortgage to the Bank having priority over other lienholders; it would also grant numerous procedural and substantive rights to the Bank during the reorganization. Disposition of the motion involves largely undefined principles concerning the standards for valuation of security interests and the extent to which an agreement for Chapter 11 financing **[**2]** may benefit the lender.

The Debtor operates a ski area at Tenney Mountain, New Hampshire encompassing some 1,000 acres which contain twenty-seven trails, two major lifts and three minor lifts (the "Ski Area"). The Debtor is also engaged in the construction and sale of condominium units on a tract (the "Condominium Tract") adjoining the Ski Area. On March 24, 1987, in order to finance the condominium project, the Debtor and its two principals, Robert C. Palcilli and George M. Diemer, executed as co-makers a \$ 15,650,000 construction loan agreement with the Bank whose advances were to be secured by the Condominium Tract and related personal property. Some sixty-seven condominium units have since been constructed, of which twenty-eight have been sold. The Debtor has substantially completed the sewer system. The Bank is now owed about \$ 16,500,000 under the construction loan and about \$ 100,000 under a reimbursement agreement executed in connection with a letter of credit issued for construction of the sewer system. It holds a first mortgage and security agreement covering only the Condominium Tract and related personal property.

The Debtor has financed improvements to the Ski Area through **[**3]** bonds issued by the Industrial Development Authority of the State of New Hampshire under a first trust mortgage and security interest (the "trust mortgage") covering the Ski Area and related personal property. This debt has a present balance of about \$ 1,300,000. Bank of New England, N.A. ("BNE") is the trustee of the trust mortgage; all the bonds are held by Fidelity Bank of Philadelphia ("Fidelity"). The Debtor owes Samuel G. Hall and Bernice M. Hall (the "Halls") about \$ 600,000 under its 1985 purchase of both parcels of real estate from the Halls. Securing this debt is a mortgage and security agreement (the "Hall mortgage") on both the Ski Area and Condominium Tract which is expressly subordinate to any future mortgage or security interest securing payment of funds borrowed for construction or improvement of the property. BNE also holds on its own behalf an attachment lien and a mortgage (the "BNE lien") securing loan indebtedness of about \$ 500,000 and covering both the Ski Area and Condominium Tract.

The Financing Agreement proposes an additional \$ 1 million loan from the Bank; the proceeds would be used for improvement of both the Ski Area and Condominium Tract. The Debtor **[**4]** wishes to enhance the quality of ski trails and facilitate snow-making on them through regrading and erosion control measures. Ski Area equipment is in need of repair, particularly a snow-making pipeline which is not now operational, and the pond supplying water for snow-making requires redredging. Substantial erosion control and site improvement work is also planned for the Condominium Tract. The Financing Agreement, as modified on the record at the recent hearing, would grant the Bank a mortgage upon the Ski Area and the Condominium Tract securing its entire pre-petition and post-petition debt and having absolute priority over the BNE lien covering the Condominium Tract and limited priority over the trust mortgage and the BNE lien covering the Ski Area. The latter priority would exist only with respect to the requested new advances to the extent that they are used to pay projected expenditures totaling about \$ 778,000 for general operations and improvement of the Ski Area.

I. LIEN PRIORITY

The Bank seems to suggest in its trial memorandum that approval of these priorities is not now before the Court because **[*564]** the interim order entered by another judge of this Court, which allowed **[**5]** \$ 55,800 of advances, approved the Financing Agreement and set a date for the final hearing "on the sole matter of the authority of the Debtor to borrow funds in excess of \$ 55,800 under the terms and conditions of the [Financing Agreement]" The question of priorities, and indeed all the provisions of the Financing Agreement, nevertheless remain open. The interim order, drafted by Bank counsel, was issued on one day's telephonic notice. Such financing agreements may be finally approved on no less than fifteen days' written notice, unless the Court shortens the notice period. Bankr. R. 4001(d). Here the prior judge required thirty days' notice of the final hearing because of his concern that creditors receive adequate notice. A reasonable inference from other provisions of the interim order, moreover, is that the order reserved to the court at the final hearing jurisdiction to pass on the entire Financing Agreement, including its proposed priority of liens.

A Chapter 11 debtor may obtain credit secured by a lien with priority which is senior or equal to that of an existing lien only if "(A) the [debtor] is unable to obtain such credit otherwise; and (B) there is adequate protection **[**6]** of the interest of the holder of the [other] lien" 11 U.S.C.S. § 364(d) (Law. Co-op. 1985 & Supp. 1989). The parties introduced evidence concerning both of these requirements, but I will deal only with the question of adequate protection for the other lienholders. The Debtor has the burden of proof on this issue. § 364(d).

The Debtor argues that Fidelity's trust mortgage would receive adequate protection in the proposed finding because the Ski Area should be valued under a going concern standard of valuation through a discounted cash flow method, and that this value is \$ 2,354,000, as testified to by its expert who assumed for the purpose of his opinion that the projected improvements have been made. From this amount the Debtor deducts the proposed priming lien of \$ 778,000, leaving \$ 1,576,000 in value for the \$ 1,300,000 in trust mortgage debt. The Debtor justifies use of a going concern standard of valuation by its plan to remain in operation and sell the Ski Area as a going business. Alternatively, the Debtor urges the presence of adequate protection for the trust mortgage on the theory that the projected improvements will enhance what would otherwise be its liquidation value of \$ 759,000 by at least the \$ 778,000 primary lien, and that the new going concern value could be as little as \$ 1,600,000 for this enhancement to take place. Neither the BNE lien nor the Hall mortgage, says the Debtor, is an interest worthy of protection because (i) neither has value in its coverage of the Condominium Tract due to the Bank's senior lien, and (ii) without the proposed funding the Debtor will be forced to cease operations and liquidate its Ski Area assets; both experts agree that this would pay these junior liens nothing. In this fashion the Debtor rather inconsistently applies a liquidation value to these junior interests and finds them presently valueless. The Debtor also points to the automatic subordination provision of the Hall mortgage as further reason to disregard its interest. I shall treat only the most senior lien covering the Ski Area, the trust mortgage, because I conclude that the Debtor's argument as to this lien is without merit.

A mortgage or security interest is to be valued "in light of the purpose of the valuation and of the proposed disposition or use of [the] property" 11 U.S.C.S. § 506(a) (Law. Co-op. 1985 & Supp. 1989). The omission from the statute of valuation standards was intentional. The House Report states:

"Value" does not necessarily contemplate forced sale or liquidation value of collateral; nor does it always imply a full going concern value. Courts will have to determine value on a case-by-case basis, taking into account the facts of each case and the competing interests in the case. H.R. Rep. No. 595, 95th Cong., 1st Sess. 356 (1977).

The factors mentioned in the statute are of little aid in determining the proper standard for valuing Fidelity's interest under § 506(a) the trust mortgage after the proposed financing. The "purpose of the valuation" seems relevant only for application of the so-called "best interest of creditors" test under § 1129(a)(7)(A) where a Chapter 7 liquidation is necessarily hypothesized. *Collier* finds guidance in the statutory phrase "proposed . . . use of such property." In discussing the impact of this phrase upon the valuation of a security interest in a Chapter 11 context, *Collier* states:

Such a value of the subject property might be characterized as its replacement value to the debtor, fair market value, its going concern value or, if a successful reorganization appears clearly assured, a value which takes into consideration not only the tangible value of the property but also the earnings to be derived therefrom. On the other hand, if prospects for a successful reorganization appear dim, the value may more appropriately be determined on the basis of the value the holder of the secured claim could obtain for the property upon a disposition after the debtor's retention and use has ended.

3 *Collier on Bankruptcy*, para. 506.04 at 506-28 (15th ed.).

Section 506(a) requires, however, a determination not of the value of the collateral but of "the value of such creditor's interest in the estate's interest in such property" This interest consists primarily of the right to foreclose and, where the Uniform Commercial Code controls, the obligation to do so in a commercially reasonable manner. U.C.C. § 9-504. That a debtor appears to be a viable business having going concern value might make foreclosure unlikely, but it has precious little to do with valuation of the security interest. A security interest is worth what it will bring at foreclosure. *In re Claeys*, 81 B.R. 985 (Bankr. D.N.D. 1987). Foreclosure upon operating business assets, moreover, will likely terminate operations, if indeed they have not previously ceased. In any event, valuation under a going concern standard is negated by the financial distress that is certain to be present at foreclosure, even if the security consists of all the assets necessary for the business to continue in operation. Some of the decisions lose sight of the distinction between the value of collateral and the value of the creditor's interest in it. See, e.g., *In re Helionetics, Inc.*, 70 B.R. 433 (Bankr. C.D. Cal. 1987) (junior security interest in all operating assets valued at going concern value of business less prior liens because of possibility that debtor's reorganization would be successful); *In re Automatic Voting Mach. Corp.*, 26 B.R. 970 (Bankr. W.D.N.Y. 1983).

("liquidation value" of real estate and equipment rejected in favor of "going concern or fair market value"); *In re QPL Components, Inc.*, 20 B.R. 342 (Bankr. E.D.N.Y. 1982) (security interest in inventory of operating Chapter 11 debtor valued at inventory's retail value rather than its cost); *In re Shockley Forest Indus., Inc.*, 5 B.R. 160 (Bankr. N.D. Ga. 1980) (real estate mortgage valued at fair market value **[**11]** of real estate with no deduction for foreclosure expenses).

In re Beker Indus. Corp., 58 B.R. 725 (Bankr. S.D.N.Y. 1986), relied upon by the Bank, permitted senior liens under § 364(d) based upon a going concern standard of valuation. Because the debtor was operating its business, the court reasoned, the obligation to foreclose in a commercially reasonable manner would require creditors holding first liens to operate the business and sell it as a going concern. The court did not explain why present operating conditions should be equated with conditions likely to be present at foreclosure. Nor did it mention the legal and practical obstacles faced by a secured creditor who wishes to operate the business at foreclosure. See, e.g., *State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc.*, 678 S.W.2d 661 (Tex. Ct. App. 1984) (secured creditor exercising control over debtor's operations held liable in tort to debtor); *Bergquist v. First Nat'l Bank of St. Paul (In re Am. Lumber Co.)*, 7 B.R. 519 (Bankr. D. Minn. 1979), *aff'd* 5 B.R. 470 (D. Minn. 1980) (subordination of claim of secured party who received a preference and operated debtor's business at foreclosure); *In re Process-Manz* **[**12]** *Press, Inc.*, 236 F. Supp. 333 (N.D. Ill. 1964) (subordination of **[*566]** claim of secured party who received fraudulent transfer and operated debtor's business at foreclosure).

The Bank also cites the pre-Code case of *Chem. Bank & First Pa. Bank, N.A. v. American Kitchen Foods, Inc. (In re American Kitchen Foods, Inc.)*, 2 B.C.D. 715 (Bankr. N.D. Me. 1976). The court there enunciated the wise principle that security interests should be valued in light of the U.C.C. requirement that foreclosure be undertaken in a commercially reasonable manner. The court in fact went further, holding that the standard of valuation of security interests should be the value obtainable by the secured party through the *most* commercially reasonable disposition of the collateral which is practical in the circumstances. It rejected forced sale value as a standard unless the debtor's circumstances, or the nature or condition of the collateral, leaves no other commercially reasonable alternative. The decision emphasizes the contradiction in using forced sale values where the debtor is operating the business as a going concern and selling the collateral (which was inventory) in normal course.

American **[**13]** *Kitchen* does not hold that a security interest in some or all assets of an operating business is to be measured by going concern value, a proposition for which it is sometimes cited. Going concern value is the value of an entire business; it is calculated based upon net profit rather than the value of individual assets, on the theory that the true value of a business, assuming no excess assets, is its ability to earn a profit. Either one of two approaches is taken. As the Bank's expert did here, the appraiser can project net income over a period of, say, ten years, and then discount that stream of income to arrive at its present value. See, e.g., *In re Wabash Valley Power Ass'n, Inc.*, 77 B.R. 991 (Bankr. S.D. Ind. 1987). The other approach concentrates upon past earnings and arrives at a future base annual earnings figure, taking into account any trend and typically giving more weight to the recent years. This sum is then multiplied by a factor which represents what is considered to reflect a reasonable capitalization multiple. See, e.g., A. Dewing, *Financial Policy of Corporations*, 287-90 (5th ed. 1953); J. Bonbright, *The Valuation of Property*, 237-38 (1937); B. **[**14]** Graham, D. Dodd and S. Cottle, *Security Analysis*, 468-538 (4th ed.). The court in *American Kitchen* did not concern itself with past or projected earnings. Nor was it attempting to value the entire business. The court did not even adopt retail value of property as the proper standard; its actual holding merely approved the values urged by the debtor, which were the cost of its inventory and the fair market value of other *individual assets*.

There is one situation where valuation of security interests under a going concern valuation standard is proper. That is where the valuation is made in the context of the sale of the debtor's business as a going concern and the secured claim is to be paid from the proceeds. Here there may be an allocation problem, but it would be ludicrous to adopt another standard or, if an actual sale has been negotiated, to use any value other than the agreed price. That seems obvious. A more difficult question is presented when the debtor is attempting to sell the business but may not be successful. Those were the circumstances of *In re Phoenix Steel Corp.*, 39 B.R. 218 (D. Del. 1984). The debtor sought priming liens for new short-term financing. **[**15]** Management's game plan was to stay in business long enough to find a buyer able to invest needed capital, and it had hired an experienced investment banker who

was busy beating the bushes for a buyer. By the time of the hearing he had attracted some preliminary inquiries but had no solid prospects. The court viewed valuation of the collateral as being largely dependent upon two critical contingencies - whether the debtor would stay in operation long enough for a buyer to be found and whether a buyer could be found at all. Because of these contingencies, the court concluded that the business was worth less than the values offered in evidence, and it discounted these values. Arriving at a total value which was less than the present secured [*567] debt, it refused to authorize the financing. This approach seems proper.

The Debtor's business plan, endorsed by the Bank, is to improve its present facilities and sell both the Ski Area and the completed condominium units. It has not yet hired a broker. No potential buyer has seen the property. The Debtor has posted consistent operating losses. The Financing Agreement would require that the proposed \$ 1 million loan and all present Bank debt be due [**16] in full at the end of this year, in the middle of the ski season. Having in mind all of these circumstances, I conclude that the Debtor has a slim chance of remaining in operation long enough to effect a sale, or of selling its business at any time at a going concern value based upon income potential. The trust mortgage should therefore be valued based upon asset valuations rather than discounted or capitalized earnings. The Debtor's own expert places this value at \$ 759,000 for equipment plus an unspecified small amount for the real estate as woodland. Rather than affording adequate protection, this value means that the proposed first lien would consume almost the entire value of the trust mortgage.

Nor has the Debtor sustained its burden of proof concerning adequate protection even if a going concern standard applied generally to operating businesses. The Debtor tried to show that the going concern value of the Ski Area exceeds \$ 2,078,000 the total of the \$ 778,000 priming lien and the \$ 1,300,000 trust mortgage debt. But its expert ignored much of the Debtor's financial history and dwelled upon a picture of the future which is rosy indeed. The expert who testified for Fidelity [**17] and BNE was more practical, relying on his greater experience. He agreed that the proper way to value a ski resort is through a discounted projection of net earnings. But he saw far less growth potential than did the Debtor's expert, and he was therefore unable to project an operating picture which differed from the deficit operations of the past. He therefore concluded that the Ski Area has no going concern value and a liquidation value of \$ 881,000. He also was of the opinion, however, that the property has some minimal worth as an amenity to the condominiums, and that this value is \$ 975,000. I find that the value of the trust mortgage covering the Ski Area is \$ 975,000, the fair market value of its assets as testified by this expert. Although this is not necessarily what the property would bring from public auction at foreclosure, the trustee of the trust mortgage has the ability to bid in and obtain fair market value through later private sales. This value obviously fails to provide adequate protection for the trust mortgage debt of \$ 1,300,000, even without considering the requested priming lien.

II. OVER-ALL EFFECT OF FINANCING AGREEMENT

The Financing Agreement, which runs [**18] to 47 pages, would give the Bank numerous rights concerning the Debtor's operations and the Chapter 11 reorganization. The Bank must first approve all specifications for the planned improvements, and the work is to be done under the direct supervision of the Bank's consultant who would have authority to stop the work at any time. The Debtor is required to hire a new chief executive officer who must be approved by the Bank; if the Debtor later fires him without the Bank's consent, the entire debt is subject to acceleration. The Debtor must obtain the Bank's prior approval of its plan to market condominium units; it also must hire a new marketing firm approved by the Bank. All sales of condominium units are to be at prices which meet specified minimum unit values, and all proceeds from unit sales, less only a broker's commission, must be remitted to the Bank. The Debtor would have to deposit other sales and rental proceeds in a collateral account at the Bank; the Bank could apply the balance in this account to its debt at any time.

The Bank's rights in the Chapter 11 reorganization are striking. The Bank is to hold \$ 50,000 of the new loan in escrow for the fees and expenses of Debtor's [**19] counsel, who received a \$ 25,000 retainer. Debtor's counsel is to be paid nothing from this account for any services devoted to claims [*568] or defenses against the Bank. Counsel agrees to give the Bank a monthly accounting of his services and expected fees, which cannot exceed \$ 150 per hour and are subject to court approval. The entire amount of the Bank debt is given the highest administrative expense priority. The occurrence of any so-called "termination event" vacates the automatic stay to permit foreclosure, without further order of court, unless during a seven day notice period the Debtor obtains a court

order preventing foreclosure. This order may issue only if no termination event has occurred or there has been a "material change in circumstances." Among the termination events are: (i) a plan of reorganization being confirmed over the Bank's objections, (ii) a third party obtaining relief from the automatic stay without the Bank's consent, and (iii) any creditor or other party in interest taking any action against the Bank. The Debtor, finally, waives all claims and defenses against the Bank, including the right to assert its preference, fraudulent transfer or other avoiding powers.

[20]** Under the guise of financing a reorganization, the Bank would disarm the Debtor of all weapons usable against it for the bankruptcy estate's benefit, place the Debtor in bondage working for the Bank, seize control of the reins of reorganization, and steal a march on other creditors in numerous ways. The Financing Agreement would pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the Bank and the Debtor's principals who guaranteed its debt. It runs roughshod over numerous sections of the Bankruptcy Code. Under its rights of approval and supervision, the Bank would in effect operate the Debtor's business. The Code permits this to be done only by a debtor or trustee. § 1108. All proceeds and rents would go to the Bank or to a collateral account it controls. The bankruptcy estate is supposed to receive all proceeds and rents from estate property, subject to cash collateral rights of secured parties. §§ 541(a)(6), 363. And the Bank would have the ultimate say over the very goal of this Chapter 11 case, a confirmed plan of reorganization. No longer could a plan be confirmed over **[**21]** the Bank's objection under the cram-down provisions of § 1129(b)(2)(A). Such a confirmation is a "termination event" which gives the Bank the right to foreclose upon all the Debtor's property without further order of court, assuming "no material change in circumstances," whatever that means. The automatic stay against foreclosure, and all questions concerning the Bank's adequate protection, become irrelevant despite the strictures of § 362.

Equally shocking is the Bank's attempt to disarm the representative of the bankruptcy estate. Its existing liens would become unassailable even before appointment of counsel to the creditors' committee, and it is given iron-clad defenses to all claims that might be asserted on the estate's behalf, whether they pertain to preference, fraudulent transfer, lender liability, subordination or any other matter. Surely no such right could be "burdensome" so as to qualify for abandonment under § 554. Nor has there been any attempt to demonstrate that these rights are of "inconsequential value," another ground for abandonment. If they have such little value, the Bank does not need the protection.

Not content with this, the Bank would close the purse strings **[**22]** to payment of Debtor's counsel for services devoted to any claim or defense against the Bank, except for the \$ 25,000 retainer. Once this retainer is consumed, and retainers seem to go quickly these days, counsel could not expect to be paid in any contest with the Bank, whether it involves claims against the Bank for monetary recoveries or such matters as contesting the Bank's right to foreclose following a "termination event." There is no other source for payment of fees. Counsel therefore has an economic incentive to concentrate his efforts elsewhere, perhaps on matters less fruitful for the estate, even though his intentions may be pure. This temptation makes him doubly disqualified under § 327(a). He holds "an interest adverse to the estate" and he is not "disinterested." See, e.g., *In re Martin*, 817 F.2d 175 (1st Cir. 1987) (debtor's **[*569]** mortgage securing counsel's fee may constitute an adverse interest depending upon the circumstances); *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 325 (E.D. Pa. 1982) (firm which had represented a 50% owner of debtor in attacking a plan of reorganization proposed by other owner held to have materially adverse interest and thus could **[**23]** not represent Chapter 11 trustee, even though the firm had resigned from the prior representation, because its advice was likely to be unconsciously colored by its prior representation, and because of appearance of impropriety under Canon 9); *In re Roberts*, 46 B.R. 815 (Bankr. D. Utah 1985), *rev'd. on other grounds* 75 B.R. 402 (D. Utah 1987) (law firm which represented individuals in their bankruptcy case denied all fees in representation of individuals' corporation in its Chapter 11 case by reason of cross liabilities between individuals and corporation); *In re Guy Apple Masonry Contractor, Inc.*, 45 B.R. 160 (Bankr. D. Ariz. 1984) (materially adverse interest present where counsel for Chapter 11 debtor also represented debtor's landlord, to whom the debtor owed substantial back rent; court relied in part upon Canon 9 concerning appearance of impropriety).

It is said that a Chapter 11 lender should not be required to finance the prosecution of claims and defenses against it. That is true. If the lender believes that this will occur, it can elect not to make the loan. It cannot expect, however,

to change the rules of a Chapter 11 case. We have here much more than the common **[**24]** provision giving counsel to a creditors' committee a limited period to object to a lender's liens.

Fidelity and BNE argue that the Debtor's agreement to these provisions violates the Debtor's fiduciary obligations owed the bankruptcy estate and its creditors. As the representative of the bankruptcy estate, the Debtor does assume many of the fiduciary obligations of a Chapter 11 trustee, such as the duty to account to creditors, to file a Chapter 11 plan, to avoid for the benefit of the estate preferences, fraudulent transfers or liens inferior to a judgment lien, and to assert for the estate all of the Debtor's causes of action. 11 U.S.C.S. §§ 1106, 1107, 704, 541, 544, 547, 548 and 551 (Law. Co-op. 1985 & Supp. 1989). The Debtor's board of directors also continues to owe fiduciary obligations to the stockholders, and for this purpose the Debtor may act in some degree for its own benefit. It may, for example, negotiate a plan of reorganization having in mind its own interests. A prime function of a creditors' committee is to represent creditors against the debtor in these negotiations. § 1103(c)(3). But the general mandate of the Bankruptcy Code is clear. The Debtor's pervading obligation **[**25]** is to the Bankruptcy estate and, derivatively, to the creditors who are its principal beneficiaries. This is in accordance with the principle that the interests of creditors outweigh those of stockholders when a corporation is insolvent or on the brink of insolvency. See, e.g., *McCandless v. Furlaud*, 296 U.S. 140, 80 L. Ed. 121, 56 S. Ct. 41 (1935) (state court receiver of insolvent corporation permitted to enforce fiduciary obligations of controlling shareholder - promoter notwithstanding shareholder consent to transaction in question). I conclude that the execution of the Financing Agreement violates the Debtor's fiduciary obligations to the estate. *In re Roblin Indus., Inc.*, 52 B.R. 241 (Bankr. W.D.N.Y. 1985).

The Financing Agreement would also enhance the Bank's lien rights beyond the priorities previously discussed. For the first time, the Ski Area would become security for the Bank's entire pre-existing debt, not just security for the new \$ 1 million advance. No suggestion is made that the Bank is now adequately secured by the Condominium Tract. As stated by Judge Friendly in the leading decision, only euphemistically can such a provision be called "cross-collateralization;" it is a post-petition **[**26]** preference for which no statutory authority can be found. *Otte v. Mfrs. Hanover Commercial Corp. (In re Texlon Corp.)*, 596 F.2d 1092 (2d Cir. 1979). Although the *Texlon* court ultimately rested its decision on the absence of adequate notice to creditors, the court seemed to view cross-collateralization as impermissible under either the prior Bankruptcy Act **[*570]** or the present Bankruptcy Code, without regard to the question of notice, and the decision has been so interpreted. See, *In re Monach Circuit Indus., Inc.*, 41 B.R. 859 (Bankr. E.D. Pa. 1984). Section 364(d) speaks only of the granting of liens as security for new credit authorized by the Court. The *Monach* decision interprets this to prohibit the grant of additional security for pre-petition debt. See also, *In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, 601 (6th Cir. 1988), *cert. denied*, 488 U.S. 817, 109 S. Ct. 55, 102 L. Ed. 2d 33 (1988) ("The express language of this subsection suggests that the priority or lien granted thereunder is limited to securing the newly incurred debt authorized by that provision.")

Other courts read *Texlon* differently, stressing the court's choice to rest its holding upon notice deficiencies. These courts **[**27]** have permitted cross-collateralization, but they have done so where no party objected or the lender's pre-petition debt was clearly well secured, hardly the situation here, or in order to continue a pre-petition security interest in receivables. See, e.g., *In re Beker Indus. Corp.*, 58 B.R. 725 (Bankr. S.D.N.Y. 1986) (creditors' committee consented); *In re Vanguard Diversified, Inc.*, 31 B.R. 364 (Bankr. E.D.N.Y. 1983) (no objection); *In re Gen. Oil Distribs., Inc.*, 20 B.R. 873 (Bankr. E.D.N.Y. 1982) (pre-petition interest in receivables continued post-petition); *Borne Chem. Co., Inc. v. Lincoln First Commercial Corp. (In re Borne Chemical Co., Inc.)*, 9 B.R. 263 (Bankr. D.N.J. 1981) (pre-petition debt fully secured). At least one court has allowed cross-collateralization in the context of new financing despite objection by other creditors and the possibility that the pre-petition debt was undersecured. *In re FCX, Inc.*, 54 B.R. 833 (Bankr. E.D.N.C. 1985). This court saw a benefit to the estate through preservation of the going concern value of assets, without attempting to measure that benefit against the detriment from the "preference." See, *In re Roblin Indus., Inc.*, **[**28]** *Inc.*, 52 B.R. 241 (Bank. W.D.N.Y. 1985). Decisions refusing to disturb cross-collateralization provisions on appeal are of course distinguishable. They rely upon that mandate of § 364(e) that liens and priorities rights granted in bankruptcy court financing orders shall not be altered on appeal, absent a stay, if the lender has already extended credit in good faith. See, e.g., *In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599 (6th Cir. 1987); *In re Adams Apple, Inc.*, 829 F.2d 1484 (9th Cir. 1987).

One writer contends that because cross-collateralization is linked to new financing designed to rehabilitate a debtor, a court may approve the transaction under its § 105(a) power to "issue any order . . . necessary or appropriate to carry out the provisions of [title 11.]" See, Bohm, *The Legal Justification for the Proper Use of Cross-Collateralization Clauses in Chapter 11 Bankruptcy Cases*, 59 Am. Bankr. L. J. 289 294-301 (1985). This position glosses over the apparent conflict with § 364(d). It also seems to assume something which is certainly not present here, that the ultimate intangible benefit to the bankruptcy estate from the proposed financing exceeds the immediate **[**29]** detriment it suffers from the cross-collateralization. Here only one party will benefit from the proposed reorganization - the Bank. And even if that were not so, there would have to be a clear likelihood of successful reorganization and an obviously equivalent intangible benefit to the estate from the financing before this Court would be tempted to use its § 105(a) powers. That is not the case here.

The Financing Agreement is also objectionable in its attempt to give administrative expense priority to the unsecured portion of the Bank's pre-petition debt. There is no authorization in § 364 for a court doing this, nor any a court change the priorities set forth in § 507. *In re FCX, Inc.*, 54 B.R. 833 (Bankr. E.D.N.C. 1985).

III. STATUS OF INTERIM LOAN

The amount loaned under the interim order shall continue to be secured by the Condominium Tract and the Ski Area. The Bank's lien on the Ski Area is limited to securing that amount. Pursuant to the express terms of the interim order, the Bank's lien on the Ski Area is subordinate **[*571]** to the trust mortgage. The Bank stipulated at the most recent hearing that the priority which it seeks is limited to \$ 778,000 with respect to the BNE **[**30]** lien, even though the Financing Agreement provides that the limitation applies only to the trust mortgage. In view of this grouping of the trust mortgage with the BNE lien, I interpret the stipulation also to mean that the Financing Agreement has been amended to provide that pending the final order the new mortgage is subordinate to the BNE lien as well. In any event, the entire matter of priority necessarily remained open due to lack of fifteen days notice under B.R. 4001. The Bank's lien on the Ski Area for its interim advance is therefore subordinate also to the BNE lien and any other liens on the Ski Area, except for the Hall mortgage which has its own subordination provision.

There may indeed be some question of whether the interim loan should now be considered a valid debt at all, or whether, if valid, it should be subordinated due to the Bank's overreaching. I leave the question of subordination, but not debt existence, open. See *In re Clark Pipe & Supply Co., Inc.*, 870 F.2d 1022 (5th Cir. 1989). Neither question appears to be of consequence in view of the Ski Area's low value and the apparent absence of unencumbered assets.

A separate order denying the motion has issued.

[31]** July 31, 1989

FINAL ORDER ON FINANCING AGREEMENT

Upon the motion of the Debtor for approval of a Chapter 11 financing agreement with Maine Savings Bank (the "Bank"), the Court having held a hearing thereon and having today issued a separate opinion containing findings of fact and conclusions of law, it is hereby

ORDERED, that the motion is DENIED.

FURTHER ORDERED, that

1. The amount loaned under the interim order shall continue to be secured by the Condominium Tract and the Ski Area, as both are defined in the separate opinion.
2. The Bank's lien on the Ski Area is limited to securing the sum loaned under the interim order.
3. The Bank's lien on the Ski Area is subordinate to all previously perfected liens thereon, except for the the Hall mortgage, so-called, which contains its own subordination provision.

TAB 11



Neutral

As of: April 19, 2021 9:45 PM Z

In re DEFENDER DRUG STORES

United States Bankruptcy Appellate Panel of the Ninth Circuit

March 19, 1992, Argued and Submitted at Phoenix, Arizona ; October 2, 1992, Filed

BAP No. AZ-91-1253-PVAs, AZ-91-1271-PVAs

Reporter

145 B.R. 312 *; 1992 Bankr. LEXIS 1609 **; Bankr. L. Rep. (CCH) P74,980

In re DEFENDER DRUG STORES, INC., an Arizona corporation, SUPERX OF ARIZONA, ALABAMA & GEORGIA CORP., a Delaware corporation, MEDICARE-GLASER CORP., a Missouri corporation, Debtors. RESOLUTION TRUST CORPORATION Receiver for Lincoln Savings and Loan Association, F. A., Appellant, v. OFFICIAL UNSECURED CREDITORS COMMITTEE, LANDMARK COMMERCIAL CORPORATION, DEFENDER DRUG STORES, INC., SUPERX OF ARIZONA, ALABAMA & GEORGIA CORPORATION, MEDICARE-GLASER CORP., Appellees.

Prior History: **[**1]** Appeal from the United States Bankruptcy Court for the District of Arizona. Honorable Robert G. Mooreman, Bankruptcy Judge, Presiding. BK. Nos. 90-4885, 90-4886, 90-4887. Adv. No. 91-128-PHX-RGM.

Disposition: AFFIRMED

Counsel: Edward P. Ballinger Jr., Phoenix, AZ, counsel for Resolution Trust Corporation. Bret Maidman, Phoenix, AZ, counsel for Unsecured Creditors' Committee.

Carl J. Spector, St. Louis, MO, counsel for Landmark Commercial Corporation.

Judges: Before: PERRIS, VOLINN, and ASHLAND

Opinion by: PERRIS

Opinion

[*313] *OPINION*

PERRIS, Bankruptcy Judge:

As a condition for extending the maturity date of postpetition financing, the debtor agreed to pay Landmark Commercial Corporation a 10% contingent enhancement fee over and above the amount of its indebtedness to Landmark. The bankruptcy court approved the agreement but reserved the rights of certain parties to challenge the validity of the enhancement fee. We AFFIRM the bankruptcy court's order denying the Resolution Trust Corporation's motion to disallow the enhancement fee.

FACTS

The debtor, Medicare-Glaser Corp.,¹ which operated a chain of drug stores, filed its Chapter 11 petition on May 10, 1990. At that time, the debtor owed Landmark approximately \$ 6 million, **[**2]** which was secured by various liens on the debtor's assets, including the debtor's inventory and accounts receivable ("the Landmark Collateral"). Lincoln Savings and Loan held a junior lien in the Landmark collateral, securing indebtedness of approximately \$ 14.6 million.

On May 11, 1990, the bankruptcy court authorized the debtor to obtain postpetition secured financing from Landmark. Landmark agreed to provide financing for a term of six months at an interest rate of 2 1/2% over the prime rate.² In return, Landmark would receive, *inter alia*, a first priority lien on most of the debtor's assets and a release of the debtor's claims against Landmark.

[3]** By November of 1990, the debtor's attempts at reorganization had failed. The debtor had defaulted under the financing arrangement. Landmark notified the debtor **[*314]** that it would not extend the November 10, 1990, maturity date of the arrangement and that it would foreclose upon the debtor's assets shortly thereafter.

Before the financing arrangement expired, however, Landmark agreed to extend the arrangement so that the debtor could continue to use cash collateral in the operation of its business. Under the agreement, Landmark would extend the financing arrangement to March 10, 1991, if the debtor obtained a letter of credit for the benefit of Landmark in the amount of \$ 6.3 million by November 13, 1990.³ If such a letter of credit was not timely posted, Landmark agreed to extend the financing for 30 days so that the debtor's assets could be sold as a going concern at an auction under 11 U.S.C. § 363. If the debtor's assets were so sold, Landmark would receive the following "enhancement fee":

an additional payment equal to ten percent (10%) of the gross consideration received and/or realized by the Debtor or its estate in excess of the amount necessary **[**4]** to pay in full the then outstanding Landmark Indebtedness (as such term is used in the Interim Order), which additional payment shall be added to the Landmark Indebtedness and shall be paid to Landmark in cash concurrent with the payment in full of the Landmark Indebtedness.

The Official Unsecured Creditor's Committee ("the Committee") and the Resolution Trust Corporation ("RTC"), receiver for Lincoln Savings and Loan, objected to the terms of the extension agreement and to the enhancement fee in particular. At the hearing on the extension, the bankruptcy court determined that the extension agreement, including the enhancement fee, was appropriate and reasonable under the circumstances. During a discussion **[**5]** with the parties, however, the court indicated that it would revisit the issue of whether, as a matter

¹ The debtors in these jointly administered bankruptcy cases are Medicare-Glaser, Defender Drug Stores, Inc., and SuperRX of Arizona, Georgia and Alabama Corporation. The matters raised in this appeal concern only Medicare-Glaser.

² The financing arrangement provided that the debtor would deliver all cash collateral to Landmark for application to the prepetition debt and Landmark would advance to the debtor up to \$ 8 million, with each day's loan limited to an amount measured by 60% of the value of eligible inventory, for the payment of certain designated expenses.

³ The deadline for the letter of credit was subsequently extended to November 15, 1990. Under this arrangement, investors with whom the debtor was then negotiating would purchase Landmark's rights under its loan agreement with the debtor and would post the letter of credit to ensure the payment of the purchase price.

of law, the Bankruptcy Code authorized the approval of such an enhancement fee. The court then entered an order authorizing the extension of the financing arrangement, including the enhancement fee (the "extension order"). Pursuant to the parties' stipulation, the court subsequently amended the extension order (the "stipulated amendment") consistent with its statements at the hearing by adding the following paragraph:

Notwithstanding any provision to the contrary in this Order, in the event that there is a sale under 11 U.S.C. Section 363(b) of the Debtor's business, [RTC] or the Creditors' Committee shall have the right to challenge the validity of [the enhancement fee] at a subsequent hearing on the limited ground that no authority exists under the Bankruptcy Code for the entry of an order approving such premium.

Excerpt of Record ("E.R.") at 426-27.

The debtor failed to obtain a letter of credit and no other lender agreed to provide alternative financing. The court conducted an auction sale of the debtor's assets. The sale realized sufficient **[**6]** consideration to pay the entire Landmark indebtedness in full and to trigger an enhancement fee payment to Landmark in the amount of \$ 372,609.

RTC filed a motion to disallow the enhancement fee. The bankruptcy court denied RTC's motion by a minute order. The ruling indicated that the court revisited the enhancement fee because of its prior concern over its power to approve the fee. The ruling further indicated that the court ratified and approved the fee because it was appropriate for the risk involved and was not a penalty or otherwise an unreasonable cost of financing. Pursuant to the court's direction, Landmark lodged an order and separate written findings on March 13, 1991. The court signed and entered Landmark's proposed order and findings on March 14, 1991, *In re Defender Drug Stores, Inc.*, 126 Bankr. 76 (Bankr. D. Ariz. 1991), before RTC filed its objection to the order and the findings. RTC filed these **[*315]** timely appeals from the under advisement ruling and the order denying its motion to disallow the enhancement fee.

4

[7] ISSUES**

1. Whether, and to what extent, issues surrounding the approval of the enhancement fee are moot or otherwise beyond the scope of this appeal.
2. Whether the bankruptcy court correctly determined that the Bankruptcy Code authorized the payment of the enhancement fee to Landmark.
3. Whether the bankruptcy court committed reversible error in adopting Landmark's proposed findings without providing RTC an adequate opportunity to object.

STANDARD OF REVIEW

The bankruptcy court's statutory authority to approve the enhancement fee presents a question of law. We review questions of law *de novo*. *E.g.*, *In re Tuma*, 916 F.2d 488, 490 (9th Cir. 1990).

DISCUSSION

1. Mootness and the Scope of this Appeal.

A. Mootness.

Landmark contends that the RTC's failure to obtain a stay combined with the fact that Landmark extended credit in good faith in reliance on the extension order renders this appeal moot under 11 U.S.C. § 364(e) ⁵ and paragraph 19

⁴ The Committee did not appeal the bankruptcy court's order. RTC did, however, name the Committee as an appellee. On December 18, 1991, the Panel entered an order realigning the Committee as an appellant for purposes of briefing only. The Committee has filed a brief supporting RTC's position.

of the extension order.⁶ RTC contends that the stipulated amendment to the extension order carved out an exception to section 364(e) **[**8]** which preserves challenges to the legal validity of the enhancement fee. We agree with RTC. The parties expressly contemplated and the court expressly ordered that, notwithstanding section 364(e) and contrary provisions in the order, the court could later determine that it lacked authority to approve the enhancement fee.

[9]** B. *The Scope of this Appeal.*

An issue related to mootness is whether the stipulated amendment and the context in which this appeal arises limits the issues that may be raised in challenging the approval of the enhancement fee. Landmark contends that this appeal is limited to the narrow legal issue of the existence of authority under the Bankruptcy Code to approve the enhancement fee. Landmark therefore contends that factual issues such as the reasonableness of the fee and adequate protection are beyond the scope of this appeal. RTC contends that the bankruptcy court's legal authority cannot be separated from the facts of the case and necessarily involves a review of the findings underlying the bankruptcy court's approval of the fee.

We agree with Landmark. At the November 13, 1990, hearing on the extension order, the court had extensive discussions with counsel for all parties addressing the extent to which the enhancement fee issue would be revisited. Excerpts of Record ("E.R.") at 592-94, 635-37. These discussions indicate that the court and the parties contemplated that the court would revisit **[*316]** only the legal question of whether it had authority or jurisdiction under **[**10]** the Bankruptcy Code to approve such an enhancement fee. Similarly, the stipulated amendment to the extension order reserves

. . . the right to challenge the validity of [the enhancement fee] at a subsequent hearing on the limited ground that no authority exists under the Bankruptcy Code for the entry of an order approving such premium.

E.R. at 426-27. The record reflects that neither the parties nor the court contemplated revisiting factual or discretionary questions involved in the approval of the enhancement fee. It follows that the scope of the issues properly raised in the motion to disallow the enhancement fee and properly raised in this appeal are limited to legal issues pertaining to the court's authority. Since there is such a limitation, the discretionary determinations and factual findings underlying the exercise of the court's authority are beyond the scope of this appeal.⁷

[11]** 2. *The Bankruptcy Court's Authority to Approve the Enhancement Fee.*

The bankruptcy court determined that it had authority to approve the enhancement fee under section 364.⁸ RTC and the Committee dispute this determination and further contend that, in any event, the enhancement fee could

⁵ Section 364(e) provides as follows:

The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

All section references are to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, unless otherwise indicated.

⁶ Paragraph 19 of the extension order basically tracks the language of section 364(e) and preserves any extensions of credit or advances made pursuant to the order or any priorities created by the order in the event that any provisions of the order are modified, vacated or reversed by subsequent order of the bankruptcy court or any other court.

⁷ We are not, as the RTC contends, determining the bankruptcy court's authority in a factual vacuum. Rather, we are accepting the bankruptcy court's factual findings as true and discretionary determinations as correct. The question then becomes, given such factual findings and discretionary determinations, whether the bankruptcy court had authority to authorize the enhancement fee.

not be allowed because it was part of a sub rosa plan of reorganization that did not comply with the requirements for confirmation of a plan.

A. Section 364.

Section 364 allows bankruptcy courts to authorize postpetition financing for a Chapter 11 debtor in possession and expressly allows courts to authorize certain protections designed to assure repayment of postpetition lenders. Bankruptcy courts, however, have regularly authorized postpetition financing **[**12]** arrangements containing lender incentives beyond the explicit priorities and liens specified in section 364. Although section 364 does not specifically refer to the payment of interest on postpetition debt, courts have implicitly held that section 364 authorizes interest on postpetition loans as compensation for the use of the lender's money and for the risk of nonpayment. Bankruptcy courts have also authorized postpetition credit arrangements containing cross collateralization provisions in certain circumstances, whereby a security interest in postpetition collateral is granted to secure prepetition indebtedness.⁹ See, e.g., *In re Beker Industries* **[*317]** Corp., 58 Bankr. 725, 741-42 (Bankr. S.D.N.Y. 1986); *In re FCX, Inc.*, 54 Bankr. 833 (Bankr. E.D.N.C. 1985); see also *In re Adams Apple, Inc.*, 829 F.2d 1484 (9th Cir. 1987); *In re Ellingsen MacLean Oil Co.*, 834 F.2d 599 (6th Cir. 1987). Courts have further allowed a debtor in possession that obtains postpetition financing from a prepetition lender to waive, as part of the financing arrangement, any objections to **[**13]** the validity of the lender's prepetition security interest. See, e.g., *Ellingson MacLean Oil Co.*, *supra*; *FCX, Inc.*, *supra*.

[14]** Our research has uncovered no cases specifically dealing with an enhancement fee paid to a postpetition lender, such as the fee at issue in this case. We, therefore, consider the legality of the enhancement fee by examining the legal principles under which lender incentives are judged. A bankruptcy court's discretion to authorize incentives to postpetition lenders is not unfettered. Debtors in possession generally enjoy little negotiating power with a proposed lender, particularly when the lender has a prepetition lien on cash collateral. As a result, lenders often exact favorable terms that harm the estate and creditors. See *In re Ames Department Stores, Inc.*, 115 Bankr. 34, 38 (Bankr. S.D.N.Y. 1990); *In re Tenney Village Company*, 104 Bankr. 562, 567-570 (Bankr. D. N.H. 1989).

While certain favorable terms may be permitted as a reasonable exercise of the debtor's business judgment, bankruptcy courts do not allow terms in financing arrangements that convert the bankruptcy process from one designed to benefit all creditors to one designed for the unwarranted benefit of the postpetition lender. *Id.* Thus, courts **[**15]** look to whether the proposed terms would prejudice the powers and rights that the Code confers for the benefit of all creditors and leverage the Chapter 11 process by granting the lender excessive control over the

⁸ Because we determine, as discussed below, that the bankruptcy court properly authorized the enhancement fee pursuant to section 364, we need not and do not address the alternative grounds of sections 105(a) or 506(b), relied upon by the bankruptcy court and Landmark.

⁹ The validity of cross collateralization provisions is not without dispute. At least one Circuit has held that cross collateralization provisions are not authorized by the Bankruptcy Code. See *In re Saybrook Manufacturing Co.*, 963 F.2d 1490 (11th Cir. 1992). The Ninth Circuit has indicated that a cross collateralization provision approved by the bankruptcy court falls within the protection of 364(e), but has left open the question of whether such provisions are illegal per se. *In re Adams Apple, Inc.*, 829 F.2d 1484, 1488-89, n. 6 (9th Cir. 1987). *In re Sun Runner Marine, Inc.*, 945 F.2d 1089 (9th Cir. 1991), casts doubt on the validity of such cross collateralization provisions when the prepetition claim is not fully secured by holding that section 364 does not authorize the payment of a prepetition unsecured claim as a condition precedent to postpetition financing. *Sun Runner* further determined that the debtor may not use the mechanism of curing defaults and assuming an executory contract under section 365 to avoid this limit of authority under section 364.

We need not determine whether cross collateralization provisions are authorized by the Bankruptcy Code because the enhancement fee at issue in this case does not, as do cross collateralization provisions, violate the fundamental priority scheme of the Code by allowing additional assets to be used to secure the payment of prepetition claims that may otherwise be unsatisfied. Unlike a cross collateralization provision or the financing arrangement at issue in *Sun Runner*, the enhancement fee at issue in this case does not alter Landmark's rights on its prepetition claim. Rather, the fee is postpetition compensation for forbearance in collecting postpetition debt.

debtor or its assets as to unduly prejudice the rights of other parties in interest. *Id.* The bankruptcy court cannot, under the guise of section 364, approve financing arrangements that amount to a plan of reorganization but evade confirmation requirements.¹⁰ **[**16]** See *In re Chevy Devco*, 78 Bankr. 585, 589-90 (Bankr. C.D. Cal. 1987). Finally, section 364(d) specifically sets forth the additional standards requiring that the debtor must demonstrate that it is unable to make less burdensome credit arrangements and that the interests of existing lienholders are adequately protected where, as in this case, the postpetition credit is secured by a superior lien on encumbered assets. Thus, to the extent the enhancement fee was paid from assets in which RTC held a lien interest,¹¹ an additional requirement is that the interest of RTC in the collateral must be adequately protected.

The provision for the enhancement fee allowed Landmark to share in any increased value that might be obtained by virtue of the one month extension of the credit arrangement. Also, similar to an interest provision, the fee was a premium for the forbearance of Landmark's rights to proceed against the collateral upon the expiration of the initial financing arrangement and the risk of reduced payment by virtue of the extension.

The bankruptcy court determined that the debtor was unable to obtain credit on more favorable terms and the credit arrangement, including the enhancement fee, was reasonable and necessary in light of the risks involved to enable the debtor to continue its operation and have the opportunity to **[**17]** realize potential value in excess of that which would be obtained in a foreclosure sale. The bankruptcy court also **[*318]** found that RTC's interest in the collateral was adequately protected.¹² For the reasons discussed above, the bankruptcy court's factual findings on the issue of reasonableness and adequate protection are beyond the scope of this appeal and must be assumed to be correct.

As discussed below, this is not a case where the bankruptcy court, under the guise of section 364, approved financing arrangements that amounted to a plan of reorganization. Similarly, neither the extension order nor the enhancement fee, by themselves, enable Landmark **[**18]** to control the actions of the debtor nor prevent other parties from exercising their rights.¹³ Given these circumstances, and the fact that the reasonableness and adequate protection findings are beyond the scope of this appeal, we conclude that the bankruptcy court correctly relied upon section 364(d) as authority for including the enhancement fee as part of the postpetition financing arrangement.

B. The Enhancement Fee as Part of a Sub Rosa Plan.

RTC and the Committee contend that, in any event, the enhancement fee cannot be authorized because it is part of a plan for the liquidation of all of the debtor's assets and as such, it is part of a sub rosa plan of reorganization which must comply with the confirmation requirements. They further contend that the fee violates confirmation requirements because it allows a senior creditor to be paid more than **[**19]** the full amount of its claim to the detriment of junior creditors. Landmark contends that the extension order at issue simply extended the financing which allowed the debtor to conduct an auction sale pursuant to a separately noticed section 363 action.

We agree with Landmark. When preconfirmation transactions, such as the sale of substantially all of the debtor's assets, have the effect of or dictate the terms of a future reorganization plan, some courts have required the debtor

¹⁰ The issue of whether the enhancement fee is prohibited on this basis will be separately addressed below.

¹¹ Although the record is unclear, part of the enhancement fee may have been paid from assets in which no party held a perfected security interest -- the debtor's leasehold interests. See Committee's Brief at p. 2 and the evidence cited therein. To the extent the enhancement fee was paid from unencumbered assets, the requirements of adequate protection arguably do not apply.

¹² In the extension order, the bankruptcy court adopted the findings from the original prepetition financing order, which included a finding that the interest of RTC was adequately protected. In its findings issued in connection with the order denying RTC's motion to disallow the enhancement fee, the bankruptcy court also found that RTC's interest was adequately protected.

¹³ Rather, the extension order expressly contemplated that other financing arrangements could be made, in which case, the enhancement fee would not be paid.

to provide creditors with the protection they would have received in the confirmation process. See, e.g., *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1226-28 (5th Cir. 1986). The extension order in this case, however, did not have such an effect. It simply extended the postpetition financing to allow the debtor to either obtain alternative financing or sell its assets as a going concern at an auction sale. While the sale itself may have had the effect of a reorganization plan, the order authorizing the sale was entered after a separately noticed hearing and is not the subject of this appeal.

3. *The Adoption of the Proposed Findings.*

RTC contends that the bankruptcy court erred in adopting wholesale the proposed findings submitted by Landmark without providing RTC an adequate opportunity to object to the findings. RTC is correct that the bankruptcy court's actions did not comply with local rules because it did not wait five days from the filing of the proposed findings to allow RTC the opportunity to submit its objection. See Rule 47, Rules of Practice of the United States District Court for the District of Arizona. Any error in this regard would not, by itself, support reversal of the bankruptcy court's decision.

Federal R. Civ. P. 61, as made applicable by Fed. R. Bankr. P. 9005, allows the Panel to disregard any error that does not affect the substantial rights of the parties. The bankruptcy court's error in adopting the proposed findings verbatim without providing an opportunity for objection does not affect RTC's substantive rights. The fact that a court adopts proposed findings verbatim does not, by itself justify reversal or the application of a different standard of review. See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 567 (9th Cir. 1990).

CONCLUSION

For the reasons set forth above, we determine that this appeal is not moot. We also determine that the scope of this appeal is limited to the legal question of the bankruptcy court's authority to approve the enhancement fee. The bankruptcy court correctly determined that it had authority to allow the enhancement fee as part of a postpetition financing arrangement pursuant to section 364(d). We, therefore, AFFIRM the bankruptcy court's order denying the motion to disallow the enhancement fee.

TAB 12



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As of: April 19, 2021 9:47 PM Z

In re Plabell Rubber Products, Inc.

United States Bankruptcy Court for the Northern District of Ohio, Western Division

February 13, 1992, Filed

Case No. 91-34578

Reporter

137 B.R. 897 *; 1992 Bankr. LEXIS 237 **

In Re Plabell Rubber Products, Inc. Debtor

Counsel: **[**1]** Thomas J. Schank, Atty. for Debtor, 5403 Summit St., Toledo, OH 43611.

Kenneth C. Baker, Atty. for Mr. White, 800 United Savings Bldg., Toledo, OH 43604.

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Jeffrey Julius, Atty. for Teamsters Local Union No. 20, 3161 N. Republic Blvd., P.O. Box 7417, Toledo, OH 43615-7417.

Judges: Krasniewski

Opinion by: WALTER J. KRASNIEWSKI

Opinion

[*897] Judge Walter J. Krasniewski

OPINION AND ORDER DENYING MOTION FOR AUTHORITY TO OBTAIN CREDIT SECURED BY A SENIOR LIEN

This matter came on for hearing upon Debtor's motion for authority to obtain credit secured by a senior lien pursuant to 11 U.S.C. § 364(d) to which objections were filed by Harry White and the United States of America.

Upon consideration of the evidenced adduced at the hearing, and the oral arguments of the parties, the court finds that said motion should be denied.

FACTS

On November 22, 1991, Debtor filed its chapter 11 petition. On November 25, 1991, Debtor filed an emergency motion for authority to use cash collateral, pay wages claims and request for immediate preliminary hearing. The motion **[**2]** reflected that Fifth Third Bank (hereinafter the bank) held a security interest in all of Debtor's accounts, inventory, real estate and general **[*898]** intangibles; the bank claims a debt due it, as of the date of Debtor's petition, in the amount of \$ 947,456. The IRS also claimed an interest in the property by virtue of duly recorded tax liens and has filed a proof of claim in the amount of \$ 283,208.61. As a result of a hearing held upon said motion, an order was entered on November 26, 1991, authorizing Debtor to use cash collateral up to a maximum of \$ 125,000. The terms of that order included that adequate protection would be provided to the Internal Revenue Service and the bank by extending a replacement postpetition lien to the same extent and priority as existed prepetition upon all cash collateral. Additionally, Mr. Harry E. White, president and sole shareholder of WIS, Inc., the sole shareholder of the Debtor, agreed to provide additional adequate protection by granting a lien upon six unencumbered residential lots, appraised at \$ 175,000.

On December 5, 1991, Debtor moved to increase the cap of \$ 125,000 previously placed on Debtor's use of cash collateral to \$ 275,000 for total **[**3]** use of cash collateral. On December 9, 1991, as a result of an emergency motion, the court permitted Debtor's use of cash collateral up to an additional \$ 42,000. On December 19, 1991, a second order permitting the use of cash collateral up to the amount of \$ 275,000 was entered providing that Mr. Harry E. White should no longer be employed by, or receive compensation from, Debtor; that sales and purchases should be in accordance with a fixed budget; and that the replacement liens granted the IRS and the bank, in the November 26, 1991 order for use of cash collateral, shall be continued.

On January 27, 1992, Debtor filed the instant motion for authority to obtain credit secured by a senior lien, pursuant to 11 U.S.C. § 364, stating that the bank had been its primary lender for operating loans and that although it met projections required by the December 19, 1991 order, it foresaw the need for additional funds to remain viable. The bank and Debtor, in order to meet this need, negotiated the terms of a postpetition financing arrangement, the terms of which include a postpetition lien for any advances made in an amount equal to 2.25 times the outstanding balance of any advances, which **[**4]** lien would be senior and prior to the prepetition and postpetition liens recorded against Debtor's assets, pursuant to 11 U.S.C. § 364(d)(1). Furthermore, Debtor and the bank agreed that the bank's postpetition financing arrangements would have the highest priority as expenses of administration, pursuant to §§ 503, 507 and 364.

Mr. White opposes Debtor's motion stating that the proposed financing is not necessary for Debtor's continued business operations; that the 2.25 factor, permitting a postpetition lien, is impermissible; and that the prior cash collateral orders permitting replacement liens to the bank and the IRS may be jeopardized by the granting of a § 364(d) lien to the bank. The IRS also objected to Debtor's motion stating that it holds a secured claim against all property of Debtor; that as a result of Debtor's inability to maintain a balance of cash collateral, Debtor has defaulted under the terms of the December 19, 1991 order, and termination of the use of cash collateral is necessary; that Debtor has failed to demonstrate under § 364, its inability to obtain credit otherwise than by the granting of a superpriority lien, or that IRS is adequately protected.

At the hearing, **[**5]** Debtor's counsel orally amended its motion, requesting authorization to obtain \$ 35,000 from the bank, granting the bank a lien in the amount of 2.25 times any outstanding advances, reviewable in 60 days. That is, if the bank were dissatisfied with Debtor's performance within the 60 day period, no further extensions of credit would be given. Mr. Larry Friedeman, vice president and CEO of Debtor corporation, testified that after it became apparent that Debtor needed additional funds with which to continue operating, he contacted the bank requesting \$ 70,000. After serious negotiations between Mr. Friedeman and personnel at the bank, spanning two days, the bank agreed to lend Debtor \$ 35,000 if it were granted a senior superpriority lien in an amount of 2.25 times the outstanding amount advanced; the original factor offered to Debtor was **[*899]** 3.33. The negotiated terms also required Debtor to institute, within 30 days, appropriate adversary proceedings to recover property of

Debtor presently in the possession and control of companies related by common ownership to the Debtor. Mr. Gregory Kosch, employed in the commercial lending department of the bank, corroborated Mr. Friedeman's testimony [**6] concerning the discussions between Debtor and the bank.

Mr. Friedeman also stated that he had a breakfast meeting with a branch manager of National Bank of Detroit at which time he discussed Debtor's financial needs and NBD's position regarding extension of credit. The branch manager informed Mr. Friedeman that he was not authorized to make such a loan, but would pass the information on to the appropriate individual at NBD. Based upon his business experience, Mr. Friedeman was unaware of the availability of other financing arrangements, due to Debtor's present financial posture. Mr. Friedeman opined that Debtor, if not permitted to borrow the monies at issue, would cease doing business within 60 days.

Mr. Friedeman projected that the infusion of \$ 35,000 would generate revenues of approximately three times that amount. Since entry of the December 19, 1991 cash collateral order, Mr. Friedeman stated, Debtor has increased its cash position by \$ 80,000; however, since the date of Debtor's petition, Debtor has experienced a loss of \$ 10,000 in its cash position.

DISCUSSION

Debtor's motion is brought pursuant to 11 U.S.C. § 364 and by the terms of the proposed financing arrangement, is [**7] governed by subsection (d) of that section, which provides:

(d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if--

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

Furthermore,

Section 363(d)(1)(B) requires the movant to prove that the lender who is subject to being primed will be adequately protected in the face of the loan transaction.

* * *

. . . The important question, in determination of whether the protection to a creditor's secured interest is adequate, is whether that interest, whatever it is, is being unjustifiably jeopardized.

In Re Aqua Associates, 123 Bankr. 192, 196 (Bkrtcy. E.D. Pa. 1991) (citations omitted). In Re Sky Valley, Inc., 100 Bankr. 107, 113, 21 Collier Bankr. Cas. 2d (MB) 1 (Bkrtcy. N.D. Ga. 1988) [**8] (pursuant to § 364(d), Debtor must show (1) the Debtor is unable to obtain credit otherwise; and (2) the senior lienholder, which will be supplanted, or "primed," by the superpriority lienholder, is adequately protected).

Initially, the court is not persuaded that Debtor has established that it was unable to obtain credit otherwise. Mr. Friedeman testified that he had a breakfast meeting with a branch manager from NBD; although that individual told Mr. Friedeman that NBD would contact him if it was interested in extending Debtor credit, Mr. Friedeman did not contact NBD again. Mr. Friedeman also testified that based on his experience, he believed it futile to contact other financial institutions. The court is not convinced that Mr. Friedeman's assessment is accurate. Minimally, Debtor should have contacted other institutions in an effort to obtain a factor less than the 2.25 presented to the court. The court cannot find that:

it is patently clear that the credit sought to be obtained is not otherwise available. The repeated attempts to find other lenders, the intractability of the Banks and [Debtor's] having to litigate with them to obtain the use of cash collateral, the onerous **[**9]** **[*900]** negotiations and the Banks' unwavering insistent on a lien . . . if loan proceeds were to be utilized to operate or maintain it all amply demonstrate the unavailability of the credit sought except upon [these terms]

In Re Beker Industries Corp., 58 Bankr. 725, 736 (Bkrtcy. S.D. N.Y. 1986). See also In Re Snowshoe Co., Inc., 789 F.2d 1085 (4th Cir. 1986) (record clearly indicates that the trustee contacted other financial institutions in the immediate geographic area and was unsuccessful); In Re Antico Mfg. Co., Inc., 31 Bankr. 103, 105, 10 Bankr. Ct. Dec. (CRR) 1085 (Bkrtcy. E.D. N.Y. 1983) (Debtor demonstrated that its attempts to secure other means of financing were unsuccessful). That is,

Debtor contends that the statute fails to explicitly provide how extensive the Debtor's efforts to obtain credit must be; therefore, the court must make its decisions on a case by case basis. We agree. The Debtor [argues] that "there is no duty to seek credit from every possible lender." Again, we agree. Given the "time is of the essence" nature of this type of financing, we would not require this or any Debtor to contact a seemingly infinite **[**10]** number of possible lenders. We do, however, require the Debtor to make an effort to carry the burden established in Section 364(d).

In Re Reading Tube Industries, 72 Bankr. 329, 332, 15 Bankr. Ct. Dec. (CRR) 927, 16 Collier Bankr. Cas. 2d (MB) 815 (Bkrtcy. E.D. Pa. 1987) (citation omitted). Debtor's one contact is insufficient. Id.

Section 361 provides three non-exclusive methods of providing adequate protection, which provisions apply to § 364. Sky Valley, Inc., 100 Bankr. at 113 . Debtor has the burden of proving adequate protection. 11 U.S.C. § 364(d)(2). These alternatives include requiring Debtor to make a cash payment or periodic cash payments to the extent of a decrease in the value of the property. 11 U.S.C. § 361(1). Alternatively, the Debtor may provide an additional or replacement lien to the extent of a decrease in the value of the property. 11 U.S.C. § 361(2). Lastly, adequate protection may be provided by granting other relief that will result in the indubitable equivalent of the interest in the property. 11 U.S.C. § 361(3).

In determining adequate protection, the court must consider

the nature of the creditor's interest in **[**11]** the property, the potential harm to the creditor as a result of the property's decline in value and the method of protection

Matter of Braniff Airways, Inc., 783 F.2d 1283, 1286 (5th Cir. 1986) (citation omitted). See also In Re Bohne, 57 Bankr. 461, 463 (Bkrtcy. D. N.D. 1985) (in assessing an offer of adequate protection the court must determine the value of secured creditor's interest; the risks to that value that will result from the debtor's use of the property; and most importantly, whether the proposed adequate protection truly provides protection from that risk). That is, Debtor

does not allege that an equity cushion exists. The Debtor has not offered the protection of a third party guaranty in this matter. The Debtor has, however, provided the objectors with a replacement lien on the Debtor's net current assets in order to protect against the diminution in value of the bank's interest. In order for the court to find that the Debtor's proposed replacement lien affords adequate protection, the Debtor must prove that the value of the replacement lien is greater or equal to the difference between the value of the bank's liens on Debtor's **[**12]** property and the value of the liens after being primed. We find that the debtor did not present sufficient evidence to place a value on the bank's present interest in Debtor's property; nor did Debtor present sufficient evidence to place a value on the proposed second lien on net current assets.

Reading Tube, 72 Bankr. at 333 .

Conceivably, although "an increase in the value of the collateral generated by the improvements resulting from the superpriority financing could constitute adequate protection Sky Valley, 100 Bankr. at 114 , the court is not persuaded by the testimony that such an improvement is realistic. Mr. Friedeman testified that with the \$ 35,000 cash infusion, within the next 60 days, cash [*901] collateral may increase, from \$ 496,000 at the time of the hearing, to between \$ 510,000 and \$ 570,000, calculated by using Mr. Friedeman's figures of \$ 60,000 to \$ 65,000 for raw materials, \$ 100,000 to \$ 110,000 for finished goods and \$ 350,000 to \$ 400,000 for accounts receivable. If the court approved the proposed financing arrangement, the \$ 35,000, to be adequately protected by the 2.25 factor, must result [**13] in an improvement of \$ 78,750 ($\$ 35,000 \times 2.25$). This improvement would total \$ 574,750 ($\$ 496,000 + \$ 78,750$). Again, using Debtor's highest projections do not permit Debtor to gain any ground in its fight against financial losses.

Furthermore, Debtor failed to present projections or other documentation establishing these figures. Rather, Mr. Friedeman testified from his own recollection and some hand written notes. No documentation, which may have included an accounts receivable aging table and an inventory of raw materials and finished goods, was presented to the court in support of these projections. See Snowshoe Co., 789 F.2d at 1089 (predictions of any variety are never totally reliable but when they are made by a professional operating within his area of competence and supported by data, such predictions are worthy of some deference); Reading Tube, 72 Bankr. at 333 (Debtor relied solely upon its own personal projections to demonstrate the existence of adequate protection).

Nothing tangible has been proffered to the court, justifying the subordination of IRS' interest to the bank except that Debtor was offering the [**14] six residential lots owned by Mr. White, which lots were previously provided as adequate protection to the IRS and the bank by granting a lien in the same priority and extent as their prepetition liens on cash collateral. Order for Use of Cash Collateral at 3 (November 26, 1991); Second Order Permitting the Use of Cash Collateral at 4 (December 19, 1991). However, the availability of this real estate as additional adequate protection is nebulous. If the proposed financing arrangement were approved, the IRS' position would be primed by that of the bank. Furthermore, even without being impressed with yet another borrowing order, it is conceivable that the property may not ultimately be sufficient to satisfy the protection previously provided should there be any further erosion of the cash collateral. Thus, Debtor has failed to establish adequate protection of IRS' position.

Finally, Debtor failed to present evidence regarding a plan. Although this case was filed only three months ago, Debtor must demonstrate a plan in the making, for which the incurring of the priority debt will be beneficial. That is,

we have adopted a holistic approach, . . . the issue of adequate protection, . [**15] . . is measured by 'an analysis of all of the relevant facts, with a particular focus upon the value of the collateral, the likelihood that it will depreciate or appreciate over time, the prospects for successful reorganization of the Debtor's affairs by means of the Plan, and the Debtor's performance in accordance with the Plan.'

Aqua Associates, 123 Bankr. at 196-97 (citations omitted).

Debtor cites several cross collateralization cases in support of its position. The court finds these cases inapposite as they represent extensions of credit under § 364(c), dealing with the effect upon unsecured creditors. In, the instant case, Debtor's motion effects the rights of a secured creditor, to-wit: the IRS.

Finally, considering the terms of the financing arrangement, in toto, appears to "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the Bank." In Re Tenney Village Co., Inc., 104 Bankr. 562, 568 (Bkrtcy. D. N.H. 1989).

The Debtor had two burdens to carry before this court could authorize the use of a superpriority loan under Section 364(d). **[**16]** First, the Debtor had to prove there was no other available financing. Second, the Debtor had to demonstrate the existence of adequate protection.

[*902] Reading Tube, 72 Bankr. at 334 . In light of the foregoing, the Debtor having failed to meet its burden of proof, it is therefore

ORDERED that Debtor's motion for authority to obtain credit secured by a senior lien be, and it hereby is, denied.

Walter J. Krasniewski

United States Bankruptcy Judge

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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
LAURENTIAN UNIVERSITY OF SUDBURY**

Court File No.: CV-21-656040-00CL

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**BOOK OF AUTHORITIES OF
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