File No. CI 12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "APPLICANTS")

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

MOTION BRIEF OF THE MONITOR

(McNulty Motion)

DATE OF HEARING: TUESDAY, NOVEMBER 25, 2012, AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

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PART I **LIST OF DOCUMENTS TO BE RELIED UPON**

1 The Notice of Motion of Martin McNulty dated September 12, 2014;

2 The Notice of Motion of the Monitor dated October 15, 2014;

3 The Eighteenth Report of the Monitor dated October 1, 2014 ("18th Report"), including the Confidential Exhibit to the 18th Report;

4 The affidavit of Paula Render sworn October 1, 2014;

5 The affidavit of Martin McNulty sworn September 12, 2014;

6 The affidavit of Daniel A. Kotchen sworn September 12, 2014;

7 The affidavit of Daniel Low sworn October 24, 2014; and

8 Such further and other materials as counsel may advise and this Court may permit.

PART II **STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON**

Tab

1	*Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379
2	*Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96
3	*2012 Annotated Bankruptcy and Insolvency Act*, Holden, Morawetz and Sarra, Note N§143
4	*Pine Valley Mining Corp. (Re)* (2008),41 C.B.R. (5th) 43
5	*Canadian Judicial Council's Ethical Principles for Judges*
6	*State Bar of Michigan, Ethics Opinion* 3-4, 1991
7	Section 77(1) of *The Court of Queen's Bench Act*, CCSM c C280

PART III LIST OF POINTS TO BE ARGUED

1. Pursuant to a Notice of Motion dated September 12, 2014, Martin McNulty ("**McNulty**") seeks an Order:

   (a) striking the appointment of the Honourable John D. Ground as a Claims Officer (in this capacity, "**Claims Officer Ground**") in respect of the McNulty Claim; and

   (b) requiring the Monitor to consult with McNulty and Arctic Glacier in determining an appropriate process for resolving the McNulty Claim.

The McNulty Motion should be dismissed. The key points to be argued are as follows:

A. *McNulty's Counsel Did Not Follow the Court-Mandated Approach to Service*: In both Canadian CCAA proceedings and American Chapter 15 proceedings it is recognized that not all materials are served on every creditor as to do so would unnecessarily deplete debtors' assets. To address this concern, the Initial Order requires interested Persons to ask to be added to the Service List. McNulty's Counsel (as defined in the 18th Report) did not do so, even though they had clear notice of the Initial Order, participated in the Claims Process, and knew McNulty was not on the Service List. To grant credence to McNulty's argument that service ought to have been provided in any event would have wide-ranging ramifications in CCAA proceedings.

B. *Claims Officer Ground Was Properly Appointed*: Claims Officer Ground was properly appointed in accordance with the Orders of this Honourable Court. McNulty's arguments omit uncontested facts and ignore the purpose of the CCAA.

C. *McNulty's Reliance on Purported Statements by U.S. Counsel to the Arctic Glacier Parties Was Not Reasonable*: Even if U.S. counsel to the Arctic Glacier Parties made the statements alleged by McNulty – which is disputed – any reliance on such statements was not reasonable because the Monitor, not the Arctic Glacier Parties, had control of the Claims Process and who would adjudicate disputed claims.

D. *McNulty's Allegation of Bias Is Unfounded*: McNulty alleges that there is a reasonable apprehension of bias because Claims Officer Ground was affiliated with Osler before he was appointed to the Ontario Superior Court of Justice in 1991. Both the Canadian Judicial Council and the State Bar of Michigan agree that a general apprehension of bias fades after two years. Twenty-three years is more than enough time for an apprehension of bias to fade. This allegation is unfounded.

E. *Inherent Flaw in McNulty Motion*: In addition to having no basis, the McNulty Motion is conceptually flawed. McNulty seeks to require the Monitor to consult with him about who the Claims Officer should be. The Monitor has already indicated its view that this is not a case that requires a U.S. trained claims officer. McNulty's requested relief will lead to further delay and disagreement. McNulty's Motion also does not seek to change the appeal mechanisms in the Claims Officer Order, pursuant to which this Court has the jurisdiction to hear appeals from decisions of Claims Officers. The relief sought does not reflect an understanding of the Canadian CCAA process, nor does it respect the key principles of efficiency and fairness to all stakeholders that infuse the CCAA.

F. *Sealing the Confidential Exhibit*: The Confidential Exhibit should be sealed.

A. McNulty's Counsel Did Not Follow the Court-Mandated Approach to Service

1. McNulty challenges the Claims Officer Order on the ground that he did not have notice of the motion seeking the Order. In both Canadian CCAA proceedings and American Chapter 15 proceedings, there is a recognition that not all materials are served on every creditor as to do so would be prohibitively expensive and would unnecessarily deplete the Applicants' assets.[1] As is customary in Canadian CCAA proceedings, the Initial Order sets out the prescribed manner for service on interested parties. McNulty did not take the necessary steps to be entitled to service. To require the Monitor to serve a party that had not complied with the requirements for service prescribed in the Initial Order would have wide-ranging ramifications in proceedings under the CCAA.

2. The Initial Order sets out the procedure for creating and maintaining the Service List. In particular, (a) interested Persons must request, in writing, to be added to the Service List; and (b) interested Persons who do not ask to be added to the Service List "shall not be required to be further served in these proceedings". Paragraph 66 reads:

> 66. THIS COURT ORDERS that counsel for the Arctic Glacier Parties shall prepare and keep current a service list ("**Service List**") containing the name and contact information (which may include the address, telephone number and facsimile number or email address) for service to: the Arctic Glacier Parties; the Monitor; ***and each creditor or other interested Person who has sent a request, in writing, to counsel for the Arctic Glacier Parties to be added to the Service List.*** The Service List shall indicate whether each Person on the Service List has elected to be served by email or facsimile, and failing such election the Service List shall indicate service by email. The Service List shall be posted on the website of the Monitor at the address indicated in paragraph 67 herein.

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[1] 18th Report, paras. 3.5-3.6.

> ***For greater certainty, creditors and other interested Persons who have received notice in accordance with paragraph 64(b) of this Order and/or have been served in accordance with paragraph 65 of this Order, and who do not send a request, in writing, to counsel for the Arctic Glacier Parties to be added to the Service List, shall not be required to be further served in these proceedings***. [emphasis added][2]

3. Despite the clear language in the Initial Order, neither McNulty nor his counsel asked to be added to the Service List.[3] This fact is not disputed.

4. As listed below, McNulty's Counsel had notice of the Initial Order setting out the requirements in respect of the Service List and received copies of it multiple times before the Monitor sought the Claims Officer Order that McNulty now challenges:

(a) McNulty's Counsel were served with the materials for the motion seeking recognition of the Initial Order in the Chapter 15 Proceedings. These materials included a copy of the Initial Order.[4]

(b) The Arctic Glacier Parties filed a Notice of Bankruptcy Filing in the Michigan Court in McNulty's litigation against the Arctic Glacier Parties (the "**Michigan Action**"). It expressly refers to the Initial Order.[5] McNulty's Counsel was properly served with the Notice of Bankruptcy Filing.[6]

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2 Initial Order, 18th Report, Appendix B, para 66.

3 18th Report, para. 3.3.

4 18th Report, para. 3.6.

5 18th Report, para. 3.7; Notice of Bankruptcy, 18th Report, Appendix C, page 5.

6 18th Report, para. 3.8.

(c) The Initial Order is posted on the Monitor's Website. McNulty's Counsel was aware of the Monitor's Website, which is specifically referred to in the Initial Order, but chose not to monitor it.[7]

5. McNulty's Counsel also received copies of the Initial Order after the Claims Officer Order was granted. On April 30, 2013, the Arctic Glacier Parties and the Monitor filed two motions in the Michigan Court, one related to the Monitor intervening in the Michigan Action, the other, seeking amendments to certain protective orders to permit the Monitor to review the evidence in that Action. McNulty's Counsel had the opportunity to review drafts of the motion materials before they were filed and was served with both motions. The Initial Order was attached to both motions.[8]

6. Although McNulty's Counsel was aware of the Initial Order, they have not provided any explanation for failing to request that they be added to the Service List.

7. Furthermore, McNulty's Counsel knew that they were not on the Service List before the Claims Officer Order was sought. The Claims Process was created through two orders: (a) the September 2012 Claims Procedure Order, which approved the Proof of Claim Form and related documents and established the Claims Bar Date; and (b) the March 2013 Claims Officer Order, which appointed Claims Officers to decide disputed Claims.

8. McNulty objects to the second order – the Claims Officer Order – on the basis that he was not served with the material supporting that Order. However, McNulty's

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7 18th Report, para. 3.4; McNulty Submissions, para. 26 .

8 18th Report, para. 4.20-4.21.

Counsel was not served with the material seeking the first order, the Claims Procedure Order, either.[9] Nonetheless, McNulty's Counsel filed a Proof of Claim. Although they knew the Claims Procedure Order had been granted without notice to them, they did not ask to be added to the Service List at that time.[10]

9. In this case, McNulty's Counsel did not ask to be added to the Service List even though they knew that they were not on the Service List. The Initial Order expressly states that Persons who fail to request that they be added to the Service List "shall not be required to be further served in these proceedings." This Court is not required to protect McNulty from the consequences of his unexplained failure to comply with the Initial Order's requirements in respect of the Service List.

10. The simplest way to obtain procedural protections in a CCAA proceeding is to get on the Service List. In light of McNulty's failure to comply with the Initial Order's requirements in respect of the Service List, his submissions about procedural protections should be rejected. Due to the status of the McNulty Claim, the Monitor must reserve the entire amount of the McNulty Claim – more than US$14 million – and cannot distribute that amount on the anticipated Plan Implementation Date. To permit McNulty to further delay the resolution of his Claim – which has already been delayed for a year by this motion – is not consistent with the purpose and intention of the CCAA.

(**Tab 1** – *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379)

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9 18th Report, at para. 4.2.

10 18th Report, at para. 4.11.

B. Claims Offer Ground Was Properly Appointed

11. McNulty alleges that Claims Officer Ground was not properly appointed with respect to his Claim because, McNulty's Counsel states, the Monitor had an obligation to consult with McNulty before appointing Claims Officer Ground. This allegation reflects a fundamental misunderstanding of the CCAA process, this Honourable Court's Orders and the Monitor's obligations to all stakeholders.

(i) Claims Procedures in Canadian CCAA Proceedings

12. As the Monitor submitted in its Brief when seeking the Claims Procedure Order, the CCAA does not set out a formal claims administration process. The Courts therefore rely on the broad authority granted under the CCAA as well as inherent jurisdiction to establish a claims process. The Nova Scotia Supreme Court in *Re ScoZinc* acknowledged that Claims Procedure Orders are a "well accepted practice" and observed that the typical claims process should be "both flexible and expeditious". In particular:

> 23. ...The practice has arisen for the court to create *by* ***order a claims process that is both flexible and expeditious***. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred....
>
> 24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can ***present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the CCAA proceedings***.

> 30 The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s. 11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s. 11.7(3)(d)).
>
> 31 In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this, (emphasis added).
>
> (**Tab 2** – *Re ScoZinc Ltd.* (2009), 53 C.B.R. (5th) 96 (Hereinafter referred to as "*ScoZinc*") at paras. 18-31; **Tab 3** – *2012 Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, Note N§143(1); **Tab 4** – *Pine Valley Mining Corp. (Re)* (2008),41 C.B.R. (5th) 43 at paras. 8-9)

(ii) The Claims Procedure Order (September 2012)

13. The Claims Procedure Order granted by this Honourable Court on September 5, 2012 is consistent with this jurisprudence. It contemplated a process that would identify Claims and any disputes in respect of such Claims as follows:

(a) Claimants would file a Proof of Claim on or before the Claims Bar Date. McNulty complied with this requirement.[11]

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[11] Claims Procedure Order, 18th Report, Appendix E, para. 18; McNulty Proof of Claim, 18th Report, Appendix F.

(b) The Monitor would review the Proof of Claim and either settle the Claim (with all parties' consent) or revise or disallow the Claim (in consultation with the Arctic Glacier Parties).[12] After the Monitor was given access to certain sealed information related to the McNulty Claim, and in consultation with the Arctic Glacier Parties, the Monitor issued a Notice of Disallowance on September 12, 2013.[13]

(c) Claimants could dispute the Notice of Disallowance by filing a Dispute Notice.[14] McNulty filed a Dispute Notice on September 19, 2013, which was subsequently revised to provide additional information.[15]

14. As the Monitor explained in its Sixth Report dated August 29, 2012 (filed in support of the motion seeking the Claims Procedure Order):

> The draft Claims Procedure Order does not provide a specific method of adjudicating Claims that cannot be resolved on a consensual basis. To the extent that Dispute Notices are received from Creditors that cannot be resolved, the Monitor will seek further advice and direction of the Court.[16]

The Sixth Report does not suggest that the Monitor will consult about the best process to resolve such a dispute.

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12 Claims Procedure Order, 18th Report, Appendix E, para. 33(c)(d).

13 18th Report, para. 4.23; Confidential Exhibit A.

14 Claims Procedure Order, 18th Report, Appendix E, para. 41.

15 18th Report, para. 4.18; Confidential Exhibit B.

16 Monitor's Sixth Report, 18th Report, Appendix D, para. 5.13.

15. Two paragraphs in the Claims Procedure Order describe the next steps if the parties could not resolve a dispute identified in a Dispute Notice consensually: paragraph 47, which specifically requires the Monitor to appoint a special claims officer in respect of the Indirect Purchaser Claimants' Claim; and paragraph 45, which contemplates the Monitor seeking direction from the Court on an appropriate process for resolving a dispute between a Claimant and the Arctic Glacier Parties. Paragraph 47 reads:

> **47 THIS COURT ORDERS** that, notwithstanding any provision of this Order, in the event that a dispute is raised in a Dispute Notice in respect of any Class Claim made on behalf of the Indirect Purchaser Claimants in the Indirect Purchaser Litigation, the Monitor shall appoint a special claims officer for the purpose of determining such dispute, which special claims officer:
>
> (a) is a lawyer resident and licensed to practice in the United States of America;
>
> (b) has substantial experience as counsel in U.S. antitrust class actions; and
>
> (c) is acceptable to each of the Arctic Glacier Parties, the Monitor and the applicable Class Representative, provided that, should the parties fail to agree on a special claims officer within a reasonable time, the Monitor shall apply for directions pursuant to this Order to appoint a special claims officer with the qualifications set out in subparagraphs (a) and (b).[17]

In essence, paragraph 47 states that a special claims officer with a license to practice in the United States of America was contemplated *only* for disputes in respect of the Indirect Purchaser Claimants' Claim: the paragraph states "notwithstanding any provision of this Order". The Claims Procedure Order does not contemplate a special claims officer for other claims based on U.S. law or at the election of the Claimant.

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[17] Claims Procedure Order, 18th Report, Appendix E, para. 47.

16. Although McNulty complied with the Claims Procedure Order by filing a Proof of Claim, he did not ask the Monitor whether a special claims officer could be appointed for the McNulty Claim nor did he seek to appeal from the Claims Procedure Order on the ground that it did not contemplate a special claims officer for the McNulty Claim.

17. The meaning of the second relevant paragraph, paragraph 45, is disputed. McNulty's Counsel alleges that the paragraph imposes an obligation on the Monitor to consult with Claimants about the appropriate process for resolving disputes. This interpretation is not supported by the language of paragraph 45, which reads:

> **45 THIS COURT ORDERS** that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Arctic Glacier Parties and the applicable Claimant, the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute.

18. Paragraph 45 requires the Monitor to consult with the Arctic Glacier Parties and the Claimant about whether the dispute raised in the Dispute Notice is settled within a satisfactory time period and manner. If, after consultation, the Monitor is of the view that the dispute raised in the Dispute Notice has not been satisfactorily settled, then "the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute". This language does not require the Monitor to consult with the Claimant about the "appropriate process" before seeking directions from the Court.

19. McNulty Counsel's interpretation might be arguable if there was a comma between "Monitor" and "in consultation" (*i.e.*, "...is not settled within a time period or in a manner satisfactory to the **Monitor, in** consultation with the Arctic Glacier Parties and

the Applicable Claimant, the Monitor shall seek direction from the Court..."). Inserting that comma could create an ambiguity about whether consultation was required in respect of the satisfactory timing of any settlement or the seeking of directions concerning an appropriate process. However, there is no comma, there is no ambiguity, and there is no obligation on the Monitor to consult about the appropriate process for resolving a dispute on the plain language of the paragraph.

20. McNulty argues that this approach is "nonsensical" because a requirement to consult with the Claimants about whether the *Monitor* is satisfied makes no sense.[18] That is not what paragraph 45 of the Claims Procedure Order requires. Paragraph 45 requires the Monitor, the Arctic Glacier Parties and the Claimant to consult about whether the dispute is settled (a conclusion that requires the consent of all parties) or whether more time could lead to a resolution (again, a matter in which each party has a view). Consultation, however, does not bind the Monitor to the Claimant's view.

21. In the context of the CCAA, it is reasonable that the Monitor is not obliged to consult about the appropriate process for resolving disputes with every claimant. A claims process is run to identify and address multiple claims; in this case, 83 Claims. A process that requires the Monitor to consult with every claimant about the appropriate process to resolve its particular dispute is not efficient nor does it lead to resolution of claims in an expeditious manner. Requiring such consultation is not "flexible and expeditious".

(**Tab 2** – *ScoZinc* at para. 23)

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[18] McNulty Submissions, para. 8.

(iii) The Claims Officer Order (March 2013)

22. As contemplated by paragraph 45 of the Claims Procedure Order, the Monitor sought directions from the Court to appoint claims officers. The Claims Officer Order was granted by this Honourable Court on March 7, 2013. It is consistent with the Claims Procedure Order in that it also provides that in the event that a dispute raised in a Notice of Dispute is not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Arctic Glacier Parties and the applicable Creditor, the Monitor shall refer the dispute to either a Claims Officer or to the Court. Paragraph 11 reads:

> **11 THIS COURT ORDERS** that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Monitor, in consultation with the Arctic Glacier Parties and the applicable Creditor, the Monitor shall refer the dispute raised in the Dispute Notice either to a Claims Officer or to the Court (or, in the case of a Class Claim of the Indirect Purchaser Claimants, to a Special Claims Officer) for adjudication. The decision as to whether the Claim and/or DO&T Claim should be adjudicated by a Claims Officer or by the Court shall be in the sole discretion of the Monitor.

23. The language in this paragraph is not as clear as in the Claims Procedure Order because the comma omitted from the Claims Procedure Order is present in the Claims Officer Order. However, the second sentence of paragraph 11 makes it clear that the Monitor has the sole discretion to select the decision maker: "The decision as to whether the Claim and/or DO&T Claim should be adjudicated by a Claims Officer or by the Court shall be in the sole discretion of the Monitor." In combination with the Claims Procedure Order, it is clear that the Monitor does not have an obligation to consult with the Claimant about the process used to resolve a dispute.

24. Furthermore, even if this Court concludes that paragraph 11 of the Claims Officer Order creates an obligation to consult with McNulty about the process to resolve the dispute, it is this very Order that McNulty is challenging.

25. McNulty alleges that the Monitor somehow concedes that it had an obligation to consult with McNulty because, in its Brief filed when seeking the Claims Officer Order, the Monitor stated that it had consulted with the Arctic Glacier Parties.[19] The Monitor's choice to consult with the Arctic Glacier Parties about the process to resolve *all* of the disputed Claims does not create an obligation to consult with every Claimant. Such an obligation would, as set out above, be inconsistent with the purpose of the CCAA and the "flexible and expeditious" resolution of Claims.

(iv) McNulty's Argument About the Timing of Consultation

26. McNulty submits that the Monitor did not comply with section 45 of the Claims Procedure Order because the Monitor did not consult with McNulty before seeking direction from the Court about the appropriate manner in which to resolve disputes. In making these submissions, McNulty omits the relevant and uncontradicted facts contrary to his argument.

27. First, as the Monitor made clear in its Tenth Report filed in support of the Claims Officer Order, based on the documents reviewed to that date, it anticipated filing a Notice of Revision or Disallowance in respect of the McNulty Claim.[20] The statements in the McNulty submissions suggesting that the Monitor did not disclose that it would likely file

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[19] McNulty Submissions, para. 4.

[20] Monitor's Tenth Report, 18th Report, Appendix H, para. 3.18.

a Notice of Revision or Disallowance until long after the Claims Officer Order had been granted is not supported by evidence and is directly contradicted by the Monitor's Tenth Report.[21] U.S. Counsel to the Arctic Glacier Parties provides evidence that "As early as January 2013, I spoke with Mr. Low to advise that the Monitor intended to dispute the McNulty Claim and would like to talk about the process going forward."[22] Furthermore, in their own affidavit, McNulty's Counsel states that they discussed the appointment of a claims officer with U.S. counsel to the Arctic Glacier parties "in or around 2012 or early 2013".[23] Based on their own evidence, the appointment of a Claims Officer was being discussed with them more than a year before the Claim was referred to Claims Officer Ground. McNulty's "timing" argument fails on that basis.

28. Second, paragraph 7 of the Claims Officer Order permits the Monitor to appoint further Claims Officers to deal with a specific Claim, with the consent of the Arctic Glacier Parties and the Creditor asserting the Claim.[24] Despite this power, during the conversations in November 2013, which are described below and omitted from McNulty's submissions, McNulty's Counsel did not propose any other Claims Officers nor did they state that referring the Claim to a Claims Officer in the week of November 22, 2013, was premature for lack of consultation. In particular:

(a) On November 11, 2013, counsel to the Monitor contacted McNulty's "Counsel and stated: The Monitor, Richard Morawetz, and I thought it would make sense for us to have a call to discuss the status of the

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21 McNulty Submissions, paras. 10, 11(d).

22 Render Affidavit, para. 3.

23 Kotchen Affidavit, para. 2.

24 Claims Officer Order, 18th Report, Appendix I, para. 7

McNulty Claim prior to the Monitor taking steps to refer the matter to a Claims Officer pursuant to the Claims Procedure Order".[25] This fact is omitted from McNulty's description of the sequence of events.[26]

(b) On November 12, 2013, the Monitor, counsel for the Monitor, and McNulty's Counsel attended a call. During the call, the Monitor and its counsel advised that the Monitor would likely refer the McNulty Claim to Claims Officer Ground by the end of the following week (November 22). McNulty's Counsel raised the question of using a U.S.-trained lawyer as the Claims Officer for the McNulty Claim. The Monitor and its counsel explained that the circumstances of this case did not require a specialized claims officer and that the Claims Officer Order had been granted months before and would be followed. McNulty's Counsel did not state that the Monitor should not refer the matter to Claims Officer Ground.[27] These facts are omitted from McNulty's description of the sequence of events.[28]

(c) With respect to the same November 12, 2013, conversation, McNulty submits that "The Monitor did not state during that call, nor any prior phone call, that McNulty's claim had not been settled within a time satisfactory to the Monitor".[29] There is no evidence to support this assertion. There is, however, uncontradicted evidence to support the

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25 18th Report, para. 4.25.

26 McNulty Submissions, para. 11.

27 18th Report, para. 4.26.

28 McNulty Submissions, para. 11.

29 McNulty Submissions, para. 11(g).

statement that the Monitor, its counsel and McNulty's Counsel discussed referring the claim to Claims Officer Ground.[30] There is no reference to any "prematurity" concern until McNulty's Brief, which was filed almost a year after the Claim was referred to Claims Officer Ground.

(d) On November 19, 2013, McNulty's Counsel advised the Monitor that they intended to file a more detailed Dispute Notice. In response, Monitor's counsel again advised that the Monitor intended to refer the McNulty Claim to Claims Officer Ground for adjudication. Neither the Monitor nor Monitor's counsel received a response to this communication or any objection to the referral to Claims Officer Ground.[31] These facts are omitted from McNulty's description of the sequence of events.[32]

29. McNulty's argument based on the timing of events is not supported by the evidence. It also is inconsistent with the principles of efficiency inherent in the CCAA. If McNulty's argument were accepted, then the Monitor would not be able to seek a Claims Officer Order until it had (a) received and reviewed all Claims; and (b) issued Notices of Disallowance in respect of all of them. Given that there remain certain claims for which the Monitor continues to gather information, under McNulty's theory, either the Claims Officer Order is premature in its entirety or the Monitor would need to seek a Claims Officer Order for each disputed claim. Such a position is contrary to the CCAA jurisprudence, which requires a "flexible and expeditious" approach to resolving Claims.

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30 18th Report, para 4.26; December 6, 2013 Letter, 18th Report, Appendix M, page 1.

31 18th Report, para. 4.27; April 2, 2014 Letter, 18th Report, Appendix N, page 1.

32 McNulty Submissions, para. 11.

C. McNulty's Reliance on Purported Statements by U.S. Counsel to the Arctic Glacier Parties Was Not Reasonable

30. McNulty says that his counsel did not challenge the appointment of Claims Officer Ground earlier because of statements allegedly made in a discussion between his counsel and the Arctic Glacier Parties' U.S. counsel. There is a dispute about what was said and when it was said. Neither version of the disputed evidence supports the relief sought by McNulty. In any event, it was not reasonable for McNulty's Counsel to rely on statements made by Arctic Glacier Parties' U.S. antitrust counsel about the Canadian insolvency claims process without further discussion with the Monitor.

31. *What was said*: In her affidavit, Ms. Render states that McNulty's Counsel "noted that a U.S. claims adjudicator had been appointed to hear the Indirect Purchaser Claim, and asked if a U.S. claims adjudicator could be similarly appointed for the McNulty Claim." She replied that "Arctic Glacier might be amenable to the use of a U.S claims adjudicator instead of a Canadian claims officer, but that I would have to discuss it with Arctic Glacier".[33] Mr. Kotchen, on the other hand, states that Ms. Render said "it would make sense to appoint an American claims adjudicator to resolve Mr. McNulty's claim".[34] He does not dispute that Ms. Render stated that she would "have to discuss it with Arctic Glacier". Ms. Render was Arctic Glacier's U.S. antitrust counsel. Even if she had instructions from Arctic Glacier, it is clear that she was not making – and could not make – a commitment that would bind the Monitor, particularly when the claims process is governed by orders granted by a Canadian Court pursuant to a Canadian insolvency statute.

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[33] Render Affidavit, para. 5.

[34] Kotchen Affidavit, para. 2.

32. *Subsequent events*: In its December 3, 2013 letter, McNulty's Counsel told Claims Officer Ground that Ms. Render had said that the Arctic Glacier Parties "would be amenable to choosing a claims adjudicator based in the United States, just as it had agreed to do with regards to claims asserted by the Indirect Purchaser antitrust plaintiffs".[35] This description differs from what Mr. Kotchen subsequently said in his affidavit. In any event, Ms. Render immediately objected to that characterization of what she said because it omitted her statements about the Canadian process; she said: "I told you that Arctic Glacier might be amenable, but that I did not know the Canadian process and that it was not my decision to make".[36] There was a further exchange, that Ms. Render did not recall or locate in her files, in which McNulty's Counsel refused to correct the record and Ms. Render repeated her concern that the record "is not accurate and the omission is significant".[37]

33. *When it was said*: Ms. Render states that the allegedly critical conversation occurred in August 2013, after both the Claims Procedure Order and Claims Officer Order were made.[38] Mr. Kotchen states that this conversation occurred "in or around 2012 or early 2013".[39] It is not clear why Mr. Kotchen could not locate this conversation in a more precise time frame than the fourteen or fifteen months suggested.

34. To the extent that this Court needs to assess whose recollection is more accurate, the Monitor submits that the lack of precision on the timing of an allegedly critical

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35 December 3, 2013 Letter, 18th Report, Appendix L, p. 1.

36 Render Affidavit, Exhibit A.

37 Low Affidavit, Exhibit A.

38 Render Affidavit, para. 4.

39 Kotchen Affidavit, para. 2.

conversation is more troubling than forgetting a staccato email exchange that merely reiterated positions previously on the record. In addition, Ms. Render's recollection is consistent with the Orders and the description provided by McNulty's Counsel in the December 3, 2013, letter to Claims Officer Ground.

35. However, there is no need to resolve the evidentiary disputes to decide this motion. On either version, Ms. Render did not commit to the appointment of a U.S. claims adjudicator. She could not do so: as the Orders clearly set out, the Monitor and the Canadian Court have control over the claims adjudication process, not the Arctic Glacier Parties and the U.S. Court. In particular, the Orders make it clear that:

(a) "***the Monitor*** shall seek directions from the Court concerning an appropriate process for resolving the dispute."[40]

(b) "The decision as to whether the Claim and/or DO&T Claim should be adjudicated by a Claims Officer or by the Court shall be ***in the sole discretion of the Monitor***."[41]

(c) "further Claims Officers may ***be appointed by the Monitor*** to deal with a specific Claim..., with the consent of the Arctic Glacier Parties and the Creditor asserting the Claim".[42]

In this context, McNulty's Counsel's reliance on any statements without any discussion with the Monitor is not reasonable.

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40 Claims Officer Order, 18th Report, Appendix I, para. 45 (emphasis added).

41 Claims Officer Order, 18th Report, Appendix I, para. 11 (emphasis added).

42 Claims Officer Order, 18th Report, Appendix I, para. 12 (emphasis added).

36. Furthermore, U.S. Counsel to the Arctic Glacier Parties advises that she told McNulty's Counsel that "the decision was not one I could make, but would have to be made by the Monitor. I told them that if they wanted to pursue the concept of the use of a U.S. claims adjudicator further, they would need to discuss it with the Monitor".[43] In the reply affidavit, McNulty's Counsel does not dispute that this statement was made.

37. Finally, if McNulty was confused about the role of the Monitor being distinct from the role of the Arctic Glacier Parties pursuant to Canadian law, he must be presumed to know the law like everyone else. It was his choice to wait more than two years to retain Canadian counsel.[44] As with the Initial Order and Service List, on any view of the evidence, McNulty made the choice not to participate more fully in these proceedings. In the CCAA context, where expeditious and common sense resolution of disputes is the goal, McNulty should bear the consequences of his choices like all other stakeholders.

D. McNulty's Allegation of Bias Is Unfounded

38. In the Notice of Motion, McNulty objects to the appointment of Claims Officer Ground on the basis that there is an appearance of bias "created by the Monitor hand-picking [Claims Officer Ground] without proper notice to [McNulty], especially in light of [Claims Officer Ground]'s prior affiliation with Osler, Hoskin & Harcourt LLP".[45] This submission was not pursued in McNulty's Motion Brief, but nor was it abandoned.

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43 Render Affidavit, para. 5.

44 18th Report, para 4.37.

45 Notice of Motion, ground 5.

39. As the Monitor explained in its April 2, 2014, letter to Claims Officer Ground,[45] (long before the Notice of Motion was filed) pursuant to the Canadian Judicial Council's Ethical Principles for Judges, Judges are permitted to hear cases where their former firms are counsel after a cooling off period of 2, 3 or 5 years (depending on local tradition).[46] As Claims Officer Ground was appointed to the Ontario Superior Court of Justice in 1991, more than twenty-three years passed before he was appointed as a Claims Officer in this case, which is ample time for any appearance of bias to fade.

> (**Tab 5** – Canadian Judicial Council's Ethical Principles for Judges, p. 52)

40. The principles in Michigan (where McNulty started his action against the Arctic Glacier Parties) are similar to those in Ontario. In an ethics opinion, the State Bar of Michigan states:

> If within the preceding two years a judge has been a member of the law firm appearing in a matter, the judge is automatically disqualified from the matter, regardless of whether the advocate was a partner or associate of the judge, regardless of whether the advocate was a member of the firm when the judge was a member, and regardless of whether the judge was a member of the firm at the time the judge took judicial office.
>
> (**Tab 6** – State Bar of Michigan, Ethics Opinion J-4, 1991)

There is no basis for an allegation of bias.

41. Second, the suggestion that Claims Officer Ground was "hand-picked" for the McNulty Claim is not accurate. As of March 4, 2013, the Monitor had received 75 Proofs

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[45] April 2, 2014 Letter, 18th Report, Appendix N.

[46] April 2, 2014 Letter, 18th Report, Appendix N, page 4.

of Claim and had the view that certain Claims, including the Indirect Purchaser Claim, the Johnson Claim, and the McNulty Claim, likely would not be resolved on a consensual basis without the assistance of a third party adjudicator.[47] Claims Officer Ground was proposed as the Ontario-based Claims Officer for any disputed Claim that was better suited to his location or experience than Claims Officer Hill; this Honourable Court appointed Claims Officer Ground for that purpose. He was not selected specifically for the McNulty Claim. This ground of challenge must fail.

E. Inherent Flaw in McNulty Motion

42. The McNulty Motion is conceptually flawed and contrary to the principles that drive the CCAA. The McNulty Motion seeks consultation between McNulty and the Monitor. The Monitor has already indicated its view that the McNulty Claim is not one that requires a U.S. trained Claims Officer.[48] As the Monitor stated in its April 2, 2014 letter, the McNulty Claim was disallowed because the evidence provided to the Monitor does not support McNulty's factual allegations.[49] In his Dispute Notice, McNulty does not allege that the Monitor misunderstands the law.[50] Furthermore, unlike the Indirect Purchaser Claim, the McNulty Claim does not require consideration of U.S. class action procedures. As a result, further consultation about the Claims Officer will lead only to further delay and a further dispute about who the Claims Officer should be.

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47 Monitor's 10th Report, 18th Report, Appendix I, para. 3.3.

48 18th Report, para. 4.26; December 6, 2013 Letter, 18th Report, Appendix M, page 1.

49 18th Report, para. 4.1.

50 Confidential Exhibit B.

43. In addition, McNulty does not seek to vary the appeal provisions in the Claims Officer Order, which give this Court jurisdiction over appeals.[52] As the Nova Scotia Supreme Court in *Re ScoZinc* pointed out, it is usual to give parties a "right of appeal to a judge of the court overseeing the CCAA proceedings." The Claims Officer Order permits impacted parties to appeal a Claims Officer's determination. The Claims Officer Order states that such an appeal is not a hearing de novo. Such an appeal would therefore be focussed on errors of law and, potentially, palpable and overriding errors of fact.

(**Tab 2** – *ScoZinc Ltd.* at para. 24)

44. This further highlights the inherent flaw in the McNulty Motion, its lack of consistency with the Canadian CCAA process, the Orders granted in this CCAA Proceeding, and the driving principle of fairness to all stakeholders.

45. This motion and the dispute underlying it has delayed the resolution of the McNulty Claim for a year. It has no foundation in the evidence, no basis in the Canadian CCAA procedure or the orders of this Court. It should be dismissed with costs to the Monitor and the Arctic Glacier Parties.

F. The Confidential Exhibit Should Be Sealed

46. Pursuant to the Notice of Motion dated October 15, 2014, the Monitor seeks an Order sealing the Confidential Exhibit. Section 77(1) of *The Court of Queen's Bench Act*, CCSM c C280 provides:

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[52] April 2, 2014 Letter, 18th Report, Appendix N, page 3. See also Notice of Disallowance.

> The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not part of the public record of proceeding.

47. Certain evidence produced in the Michigan Action was subject to two protective orders, that were subsequently modified by the Order Modifying the Discovery Protective Order.[53] That evidence is referred to in the Notice of Disallowance and the Dispute Notice, filed as part of the Confidential Exhibit. A Sealing Order is required to prevent disclosure of evidence subject to these Protective Orders of the Michigan Court. The salutatory effects of such a Sealing Order, including the effects on the rights of civil litigants to a fair trial and comity in respect of a foreign Court's orders, outweigh its deleterious effects (including the effects on the right to free expression), which in this context includes the public interest in open and accessible Court proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2014.

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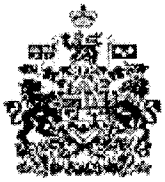
[53] Protective Orders, 18th Report, Appendix G; and Order Modifying the Protective Order, 18th Report, Appendix J.

TAB 1



SUPREME COURT OF CANADA

CITATION: Century Services Inc. *v.* Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379

DATE: 20101216
DOCKET: 33239

BETWEEN:

Century Services Inc.
Appellant
and
Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada
Respondent

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

REASONS FOR JUDGMENT: (paras. 1 to 89)	Deschamps J. (McLachlin C.J. and Binnie, LeBel, Charron, Rothstein and Cromwell JJ. concurring)
CONCURRING REASONS: (paras. 90 to 113)	Fish J.
DISSENTING REASONS: (paras. 114 to 136)	Abella J.

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.

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 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, 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.

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

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

The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

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.

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By Deschamps J.

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Ready Foods Ltd. v. Hongkong Bank of Can. (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4th) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

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

By Abella J. (dissenting)

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

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

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

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

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

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

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the

second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it

would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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

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

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

the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

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

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 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 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").

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

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

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

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

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

> **18.3** . . .
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

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

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

> **18.4** . . .
>
> . . .

> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . . .

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

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

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

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

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority

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

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

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p.

4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

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

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done

so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in

supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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

[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 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.

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

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

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

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown

submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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

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

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the

CCAA. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

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

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court

of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

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

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

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

3.4 *Express Trust*

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

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. 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) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

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

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

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

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

4. Conclusion

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

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

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*"). 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.

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
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> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .
> >
> > . . .
>
> . . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

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

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
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> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

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

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . . .

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

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

The following are the reasons delivered by

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

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

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[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

> **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:

> (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:

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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.

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

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

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

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

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). 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]

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

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

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

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

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

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

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

> 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 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 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,

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

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

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

. . .

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

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

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

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

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

is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or

withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

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

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

. . .

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

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

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

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

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

(3) [Burden of proof on application] The court shall not make the order unless

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

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

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

(i) the expiry of the order,

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

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

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

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

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

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

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

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

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

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

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

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

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

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

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

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

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the

extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

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

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

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

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

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

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

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

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

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

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

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

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by

a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

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

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

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

(*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

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

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

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

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

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

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

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

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

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

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

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

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

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

TAB 2

Case Name:

ScoZinc Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of ScoZinc Ltd., Applicant

[2009] N.S.J. No. 187

2009 NSSC 136

277 N.S.R. (2d) 251

53 C.B.R. (5th) 96

2009 CarswellNS 229

Docket: Hfx No. 305549

Registry: Halifax

Nova Scotia Supreme Court
Halifax, Nova Scotia

D.R. Beveridge J.

Heard: April 3, 2009.
Oral judgment: April 3, 2009.
Released: April 28, 2009.

(49 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Directions -- Monitors -- Powers, duties and functions -- Upon motion by monitor in proceedings under the Companies' Creditors Arrangement Act, the monitor was held to have the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims -- To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did

not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Motion by monitor in proceedings under the Companies' Creditors Arrangement Act seeking directions from the court on whether it had the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the monitor to complete its assessment of claims. On Dec. 22, 2008, ScoZinc Ltd. had been granted protection by means of a stay of proceedings of all claims against it. The determination of creditors' claims was set by a claims procedure order of Feb. 18, 2009 setting dates for the submission of claims to the monitor, and for the monitor to assess the claims. The monitor was directed to review all proofs of claim filed on or before March 16, 2009 and accept, revise or disallow the claims. In three cases, revised proofs of claim were filed after this date.

HELD: Order granted. The monitor had the necessary authority. The Act gave no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. The determination that the claims must initially be identified and assessed by the monitor, and heard first by a claims officer, was a valid exercise of the court's inherent jurisdiction. It was not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the Bankruptcy and Insolvency Act. The Feb. 18, 2009 order accomplished this. It did not matter that revised claims were submitted after the claims bar date. In essence, the monitor simply acted to revise the proofs of claim already submitted to conform with the evidence elicited by the monitor, or submitted to it. The monitor had the necessary authority to revise the claims, either as to classification or amount. To suggest the monitor did not have the authority to receive evidence and submissions and to consider them was to say it did not have any real authority to carry out its court-appointed role to assess the claims that had been submitted.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11, s. 11.7, s. 12

Probate Act, R.S.N.S. 1900, c. 158,

Counsel:

John G. Stringer, Q.C., and Mr. Ben R. Durnford, for the applicant.

Robert MacKeigan, Q.C., for Grant Thornton.

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1 **D.R. BEVERIDGE J.** (orally):-- On December 22, 2008, ScoZinc Ltd. was granted protection by way of a stay of proceedings of all claims against it pursuant to s. 11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36. The stay has been extended from time to time. Grant Thornton was appointed as the Monitor of the business and financial affairs of ScoZinc pursuant to s. 11.7 of the *CCAA*.

2 The determination of creditors' claims was set by a Claims Procedure Order. This order set dates for the submission of claims to the Monitor, and for the Monitor to assess the claims. The Monitor brought a motion seeking directions from the court on whether it has the necessary authority to allow a revision of a claim after the claim's bar date but before the date set for the Monitor to complete its assessment of claims.

3 The motion was heard on April 3, 2009. At the conclusion of the hearing of the motion I concluded that the Monitor did have the necessary authority. I granted the requested order with reasons to follow. These are my reasons.

BACKGROUND

4 The procedure for the identification and quantification of claims was established pursuant to my order of February 18, 2009. Any persons asserting a claim was to deliver to the Monitor a Proof of Claim by 5:00 p.m. on March 16, 2009, including a statement of account setting out the full details of the claim. Any claimant that did not deliver a Proof of Claim by the claims bar date, subject to the Monitor's agreement or as the court may otherwise order, would have its claim forever extinguished and barred from making any claim against ScoZinc.

5 The Monitor was directed to review all Proofs of Claim filed on or before March 16, 2009 and to accept, revise or disallow the claims. Any revision or disallowance was to be communicated by Notice of Revision or Disallowance, no later than March 27, 2009. If a creditor disagreed with the assessment of the Monitor, it could dispute the assessment before a Claims Officer and ultimately to a judge of the Supreme Court.

6 The three claims that have triggered the Monitor's motion for directions were submitted by Acadian Mining Corporation, Royal Roads Corp., and Komatsu International (Canada) Inc.

7 ScoZinc is 100% owned by Acadian Mining Corp. These two corporations share office space, managerial staff, and have common officers and directors. Acadian Mining is a substantial shareholder in Royal Roads and also have some common officers and directors.

8 Originally Royal Roads asserted a claim as a secured creditor on the basis of a first charge security held by it on ScoZinc's assets for a loan in the amount of approximately $2.3 million. Acadian Mining also claimed to be a secured creditor due to a second charge on ScoZinc's assets securing approximately $23.5 million of debt. Both Royal Roads and Acadian Mining have released their security. Each company submitted Proofs of Claim dated March 4, 2009 as unsecured creditors.

9 Royal Roads claim was for $579,964.62. The claim by Acadian Mining was for $23,761.270.20. John Rawding, Financial Officer for Acadian Mining and ScoZinc, prepared the Proofs of Claim for both Royal Roads and Acadian Mining. It appears from the affidavit and materials submitted, and the Monitor's fifth report dated March 31, 2009 that there were errors in each of the Proofs of Claim.

10 Mr. Rawding incorrectly attributed $1,720,035.38 as debt by Acadian Mining to Royal Roads when it should have been debt owed by ScoZinc to Royal Roads. In addition, during year end audit procedures for Royal Roads, Acadian Mining and ScoZinc, other erroneous entries were discovered. The total claim that should have been advanced by Royal Roads was $2,772,734.19.

11 The appropriate claim that should have been submitted by Acadian Mining was $22,041,234.82, a reduction of $1,720,035.38. Both Royal Roads and Acadian Mining submitted revised Proofs of Claim on March 25, 2009 with supporting documentation.

12 The third claim is by Komatsu. Its initial Proof of Claim was dated March 16, 2009 for both secured and unsecured claims of $4,245,663.78. The initial claim did not include a secured claim for the equipment that had been returned to Komatsu, nor include a claim for equipment that was still being used by ScoZinc. A revised Proof of Claim was filed by Komatsu on March 26, 2009.

13 The Monitor, sets out in its fifth report dated March 31, 2009, that after reviewing the relevant books and records, the errors in the Proofs of Claim by Royal Roads, Acadian Mining and Komatsu were due to inadvertence. For all of these claims it issued a Notice of Revision or Disallowance on March 27, 2009, allowing the claims as revised "if it is determined by the court that the Monitor has the power to do so".

14 The request for directions and the circumstances pose the following issue:

ISSUE

15 Does the Monitor have the authority to allow the revision of a claim by increasing it based on evidence submitted by a claimant within the time period set for the monitor to carry out its assessment of claims?

ANALYSIS

16 The jurisdiction of the Monitor stems from the jurisdiction of the court granted to it by the *CCAA*. Whenever an order is made under s. 11 of the *CCAA* the court is required to appoint a monitor. Section 11.7 of the *CCAA* provides:

> 11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.
>
> (2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.
>
> (3) The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
> (iii) at such other times as the court may order;

(c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

(d) carry out such other functions in relation to the company as the court may direct.

...

17 It appears that the purpose of the *CCAA* is to grant to an insolvent company protection from its creditors in order to permit it a reasonable opportunity to restructure its affairs in order to reach a compromise or arrangement between the company and its creditors. The court has the power to order a meeting of the creditors or class of creditors for them to consider a compromise or arrangement proposed by the debtor company (s. 4, 5). Where a majority of the creditors representing two thirds value of the creditors or class of creditors agree to a compromise or arrangement, the court may sanction it and thereafter such compromise or arrangement is binding on all creditors, or class of creditors (s. 6).

18 Section 12 of the *Act* defines a claim to mean "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." However, as noted by McElcheran in *Commercial Insolvency in Canada* (LexisNexis Canada Inc., Markham, Ontario, 2005 at p. 279-80) the *CCAA* does not set out a process for identification or determination of claims; instead, the Court creates a claims process by court order.

19 The only guidance provided by the *CCAA* is that in the event of a disagreement the amount of a claim shall be determined by the court on summary application by the company or by the creditor. Section 12(2) of the *Act* provides:

Determination of amount of claim

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the Bankruptcy and Insolvency Act, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the Bankruptcy and Insolvency Act if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, be established by proof in the same manner as an unsecured claim under the Winding-up and Restructuring Act or the Bankruptcy and Insolvency Act, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

20 The only parties who appeared on this motion were the Monitor, ScoZinc and Komatsu. No specific submissions were requested nor made by the parties with respect to the nature of the court's jurisdiction to determine the mechanism and time lines to classify and quantify claims against the debtor company.

21 Under the *Bankruptcy and Insolvency Act* the Trustee is the designated gatekeeper who first determines whether a Proof of Claim submitted by a creditor is valid. The trustee may admit the claim or disallow it in whole or in part (s. 135(2) *BIA)*. A creditor who is dissatisfied with a decision by the trustee may appeal to a judge of the Bankruptcy Court.

22 In contrast, the *CCAA* does not set out the procedure beyond the language in s. 12. The language only accomplishes two things. The first is that the debtor company can agree on the amount of a secured or unsecured claim; and secondly, if there is a disagreement, then on application of either the company or the creditor, the amount shall be determined by the court on "summary application".

23 The practice has arisen for the court to create by order a claims process that is both flexible and expeditious. The Monitor identifies, by review of the debtor's records, all potential claimants and sends to them a claim package. To ensure that all creditors come forward and participate on a timely basis, there is a provision in the claims process order requiring creditors to file their claims by a fixed date. If they do not, subject to further relief provided by the claims process order, or by the court, the creditor's claim is barred.

24 If the Monitor disagrees with the claim, and the disagreement cannot be resolved, then a claimant can present its case to a claims officer who is usually given the power to adjudicate disputed claims, with the right of appeal to a judge of the court overseeing the *CCAA* proceedings.

25 The establishment of a claims process utilizing the monitor and or a claims officer by court order appears to be a well accepted practice (See for example *Federal Gypsum Co., (Re)* 2007 NSSC 384; *Olympia & York Developments Ltd. (Re)* (1993), 17 C.B.R. (3d) 1 (Ont. S.C.J.); *Air Canada, (Re)* (2004) 2 C.B.R. (5th) 23 (Ont. S.C.J.); *Triton Tubular Components v. Steelcase Inc.*, [2005] O.J. No. 3926 (Ont. S.C.J.); *Muscletech Research & Development Inc.,(Re)*, [2006] O.J. No. 4087 (Ont. S.C.J.); *Pine Valley Mining Corp., (Re)* 2008 BCSC 356; *Blue Range Resource Corp.*, Re 2000 ABCA 285; *Carlen Transport Inc. v. Juniper Lumber Co. (Monitor of)* (2001), 21 C.B.R. (4th) 222 (N.B.Q.B.).)

26 I could find no reported case that doubt the authority of the court to create a claims process. Kenneth Kraft in his article "The CCAA and the Claims Bar Process", (2000), 13 Commercial In-

solvency Reporter 6, endorsed the utilization of a claims process on the basis of reliance on the court's inherent jurisdiction, provided the process adhered to the specific mandates of the *CCAA*. In unrelated contexts, caution has been expressed with respect to reliance on the inherent jurisdiction of the superior court as the basis for dealing with the myriad issues that can arise under the *CCAA* (See: *Clear Creek Contracting v. Skeena Cellulous Inc.*,(2003), 43 C.B.R (4th) 187) (B.C.C.A.) and *Stelco Inc.(Re)*, [2005] O.J. No. 1171 (CA.)).

27 Sir J.H. Jacob, Q.C. in his seminal article "The Inherent Jurisdiction of the Court", (1970) Current Legal Problems 23, concluded that it has been clear law from the earliest times that superior courts of justice, as part of their inherent jurisdiction, have the power to control their own proceedings and process. He wrote:

> Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. Some of the instances of the exercise of this power have been of far-reaching importance, others have dealt with matters of detail or have been of transient value. Some have involved the exercise of administrative powers, others of judicial powers. Some have been turned into rules of law, others by long usage or custom may have acquired the force of law, and still others remain mere rules of practice. The exercise of this power has been pervasive throughout the whole legal machinery and has been extended to all stages of proceedings, pre-trial, trial and post-trial. Indeed, it is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice.
>
> p. 32-33

28 The *CCAA* gives no specific guidance to the court on how to determine the existence, nature, validity or extent of a claim against a debtor company. As noted earlier, the only reference is in s. 12 of the *Act* that if there is a dispute as to the amount of a claim, then the amount shall be determined by the court "on summary application". In *Re Freeman Estate*, [1922] N.S.J. No. 15, [1923] 1 D.L.R. 378 (en banc) the court considered the words "on summary application" as they appeared in the *Probate Act* R.S.N.S. 1900 c. 158. Harris C.J. wrote:

> [17] The words "summary application" do not mean without notice, but simply imply that the proceedings before the Court are not to be conducted in the ordinary way, but in a concise way.
>
> [18] The Oxford Dictionary p. 140 gives as one of the meanings of "summary" dispensing with needless details or formalities -- done with despatch.
>
> [19] In the case of the Western &c R. Co. v. Atlanta (1901), 113 Ga. 537, the meaning of the words "summary proceeding" is discussed at some length and the Court held at pp. 543-544:--

> "In a summary manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."
>
> [20] I cite this not because it is a binding authority, but because its reasoning commends itself to my judgment and I adopt it.

29 In my opinion, whatever process may be appropriate and necessary to adjudicate disputed claims that ultimately end up before a judge of the superior court, the determination by the court that claims must initially be identified and assessed by the Monitor, and heard first by a Claims Officer, is a valid exercise of the court's inherent jurisdiction.

30 The *CCAA* gives to the court the express and implied jurisdiction to do a variety of things. They need not all be enumerated. The court is required to appoint a monitor (s. 11.7). Once appointed, the monitor is required to monitor the company's business and financial affairs. The *Act* mandates that the monitor have access to and examine the company's property including all records. The monitor must file a report with the court on the state of the company's business and financial affairs and contain prescribed information. In addition, the monitor shall carry out such other functions in relation to the company as the court may direct (s. 11.7(3)(d)).

31 In these circumstances, it is not only logical, but eminently practical that the monitor, as an officer of the court, be directed by court order to fulfil the analogous role to that of the trustee under the *BIA*. The Claims Procedure Order of February 18, 2009 accomplishes this.

POWER OF THE MONITOR

32 The Monitor was required by the Order to publish a notice to claimants in the newspaper regarding the claims procedure. It was also required to send a claims package to known potential claimants identified by the Monitor through its review of the books and records of ScoZinc. The claims bar date was set as March 16, 2009, or such later date as may be ordered by the court.

33 The duties of the Monitor, once a claim was received by it, were set out in paragraphs 9 and 10 of the Claims Procedure Order. They provide as follows:

> 9. Upon receipt of a Proof of Claim:
>
> a. The Monitor is hereby authorized and directed to use reasonable discretion as to the adequacy of compliance as to the manner in which Proofs of Claim are completed and executed and may, where it is satisfied that a Claim has been adequately proven, waive strict compliance with the requirements of this Order as to the completion and the execution of a Proof of Claim. A Claim which is accepted by the Monitor shall constitute a Proven Claim;
>
> b. the Monitor and ScoZinc may attempt to consensually resolve the classification and amount of any Claim with the claimant prior to accepting, revising or disallowing such Claim; and
>
> ...

> 10. The Monitor shall review all Proofs of Claim filed on or before the Claims Bar Date. The Monitor shall accept, revise or disallow such Proofs of Claim as contemplated herein. The Monitor shall send a Notice of Revision or Disallowance and the form of Notice of Dispute to the Claimant as soon as the Claim has been revised or disallowed but in any event no later than 11:59 p.m. (Halifax time) on March 27, 2009 or such later date as the Court may order. Where the Monitor does not send a Notice of Revision or Disallowance by the aforementioned date to a Claimant who has submitted a Proof of Claim, the Monitor shall be deemed to have accepted such Claim.

34 Any person who wished to dispute a Notice of Revision or Disallowance was required to file a notice to the monitor and to the Claims Officer no later than April 6, 2009. The Claims Officer was designated to be Richard Cregan, Q.C., serving in his personal capacity and not as Registrar in Bankruptcy. Subject to the direction of the court, the Claims Officer was given the power to determine how evidence would be brought before him and any other procedural matters that may arise with respect to the claim. A claimant or the Monitor may appeal the Claims Officer's decision to the court.

35 The Monitor suggests that the power given to it under paragraph 9(a) and 10 is sufficient to permit it to accept the revised Proofs of Claim filed after the claim's bar date of March 16, 2009, but before its assessment date of March 27, 2009.

36 Reliance is also placed on the decision of the Alberta Court of Appeal in *Blue Range Resource Corp.* 2000 ABCA 285. As noted by the Monitor, the decision in *Blue Range* did not directly deal with the issue on which the Monitor here seeks directions. In *Blue Range*, the claims procedure established by the court set the claims bar date of June 15, 1999. Claims of creditors not proven in accordance with the procedures set out were deemed to be forever barred. Some creditors filed their Notice of Claim after the claims bar date. The monitor disallowed their claims. There were a second group of creditors who filed their Notice of Claim prior to the applicable claims bar date, but then sought to amend their claims after the claims bar date had passed. The monitor also disallowed these claims as late. What is not clear from the reported decisions is whether this second group of creditors requested amendments of their claims during the time period granted to the Monitor to carry out its assessment.

37 The chambers judge allowed the late and amended claims to be filed, [1999] A.J. No. 1308. Enron Capital Corp. and the creditor's committee sought leave to appeal that decision. Leave to appeal was granted on January 14, 2000 with respect to the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized, notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result?
>
> *Re Blue Range Resources Corp.*, 2000 ABCA 16

38 Wittmann J.A. delivered the judgment of the court. He noted that all counsel conceded that the court had the authority to allow the late filing of claims and that the appeal was really a matter of what criteria the court should use in exercising that power. Accordingly, a Claims Procedure Or-

der that contains a claims bar date should not purport to forever bar a claim without a saving provision. Wittmann J.A. set out the test for determining when a late claim may be included to be as follows:

> [26] Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> [27] In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.
>
> 2000 ABCA 285

39 The appellants claimed that they would be prejudiced if the late claims were allowed because if they had known the late claims would be allowed they would have voted differently. This assertion was rejected by the chambers judge. With respect to what is meant by prejudiced, Wittmann J.A. wrote:

> 40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd., [1995] B.C.J. No. 1600. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

40 In considering how the Monitor should carry out its duties and responsibilities under the Claims Procedure Order it is important to note that the Monitor is an officer of the court and is

obliged to ensure that the interests of the stakeholders are considered including all creditors, the company and its shareholders (See *Laidlaw Inc. Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J.).

41 In a different context Turnball J.A. in *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 commented that the monitor is an agent of the court and as a result is responsible and accountable to the court, owing a fiduciary duty to all of the parties (para. 28).

42 In my opinion, para. 9(a) is not of assistance in determining the authority of the Monitor to revise upward a claim filed after the claim's bar date but before the assessment date. Paragraph 9(a) authorizes the Monitor to use reasonable discretion as to the adequacy of compliance as to **the manner** to which Proofs of Claim are completed and executed. If it satisfied that the claim has been adequately proven it may waive strict compliance with the requirements of the order as to **completion** and the **execution** of a Proof of Claim.

43 Paragraph 10 of the Claims Procedure Order mandates the Monitor shall review all Proofs of Claim filed on or before the claims bar date. It shall "accept, revise or disallow such Proofs of Claim as contemplated herein". While normally a monitor's revision would be to reduce a Proof of Claim, there is in fact nothing in the Claims Procedure Order that so restricts the Monitor's authority. It is obviously contemplated by para. 10 that the monitor is to carry out some assessment of the claims that are submitted.

44 In my view, the Proofs of Claim that are filed act both as a form of pleading and an opportunity for the claimant to provide supporting documents to evidence its claim. In the case before me, the creditors discovered that the claims they had submitted were inaccurate and further evidence was tendered to the Monitor to demonstrate. The Monitor, after reviewing the evidence, accepted the validity of the claims.

45 Courts in a general way are engaged in dispensing justice. They do so by setting up and applying procedural rules to ensure that litigants are afforded a fair hearing. The resolution of disputes through the litigation process, including the ultimate hearing, is fundamentally a truth-seeking process to determine the facts and to apply the law to those facts. Can it be any different where the process is not in the court but under its supervision pursuant to a claims process under the *CCAA.?*

46 To suggest that the monitor does not have the authority to receive evidence and submissions and to consider them is to say that it does not have any real authority to carry out its court appointed role to assess the claims that have been submitted. The notion that the monitor cannot look at documentary evidence on its own initiative or at the instance of a claimant, and even consider submissions, is to deny it any real power to consider and make a preliminary determination of the merits of a claim.

47 The Claims Procedure Order contains a number of provisions that anticipate the exchange of information between the Monitor, the company and a creditor. Paragraph 9(b) authorizes the Monitor and ScoZinc to attempt to consensually resolve the classification and the amount of any claim with a claimant prior to accepting, revising or disallowing such claim. Paragraph 17 of the Claims Procedure Order directs that the Monitor shall at all times be authorized to enter into negotiations with claimants and settle any claim on such terms as the Monitor may consider appropriate.

48 In my opinion, it does not matter that revised claims were submitted after the claims bar date. In essence, the Monitor simply acted to revise the Proofs of Claim already submitted to con-

form with the evidence elicited by the Monitor, or submitted to it. The Monitor had the necessary authority to revise the claims, either as to classification or amount.

49 If a claimant seeks to revise or amend its claim after the assessment date set out in the Claims Procedure Order, different considerations may come into play. The appropriate procedure will depend on the provisions of the Claims Procedure Order. In addition, the court, as the ultimate arbiter of disputed claims under s. 12 of the *CCAA*, should always be viewed as having the jurisdiction to permit appropriate revision of claims.

D.R. BEVERIDGE J.

TAB 3

N§143 — Claims of Creditors

Previously, s. 19 specified that ss. 65 and 66 of the *Winding-up and Restructuring Act* did not apply to a compromise or arrangement under the *CCAA*. When the amendments were proclaimed in force, the current s. 19 was repealed and the new provision set out in s. 41 (2007, c. 36, in force September 18, 2009). See N§204 "Sections 65 and 66 of *Winding-up and Restructuring Act* Do Not Apply".

Section 19 contains provisions in respect of compromise of claims that align with provisions under the *BIA*. Claims that may be dealt with by a compromise or arrangement in respect of a debtor company are claims that relate to debts or liabilities, present or future, to which the company is subject or may become subject on commencement of *CCAA* proceedings or proposal proceedings under the *BIA*: s. 19(1) (in force September 18, 2009). If the company filed a notice of intention under s. 50.4 of the *BIA* or commenced proceedings under the *CCAA* with the consent of inspectors referred to in s. 116 of the *BIA*, claims dealt with are from the date of the initial bankruptcy event within the meaning of s. 2: s. 19(1) (2007, c. 36, in force September 18, 2009). The plan may deal with claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the same dates: s. 19(2) (2007, c. 36, in force September 18, 2009). There is an exception for specified claims.

For the purposes of the *CCAA*, "claim" means indebtedness, liability or obligation that would be provable under the *BIA*. The amount represented by a claim of any secured or unsecured creditor is determined as the following. Where a company is being wound up under *WURA* or liquidated under the *BIA*, proof is in accordance with those statutes: s. 20(1) and see N§145 "Determination of Amount of Claims".

The debtor can admit the amount. If not, the court can determine the value of the claim on summary application by either the company or a creditor. Nothing in the *WURA* or *BIA* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted. The 2009 amendments renumbered and clarified the language of the provisions, as well as adding specified claims that are not compromised by a plan, in order to align the *CCAA* with the *BIA*. However, the cases below referring to former section 12 are still relevant in most instances. A debtor company may admit the amount of a claim for voting purposes and reserve its right to contest liability on the claim for other purposes: s. 20(2). Section 20(2) specifies that nothing prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be: s. 21 (2007, c. 36, in force September 18, 2009).

The Alberta Court of Queen's Bench denied the debtors' motion authorizing interim distribution of funds to a major secured creditor. Romaine J. held that while orders allowing interim distributions to creditors are not without precedent, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. Here, it appeared that the debtors' right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless all indebtedness to the lenders was paid in full and it appeared that the right to contribution from other members of the enterprise group may be limited under U.S. law. Romaine J. held that an interim distribution would give rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighed the benefits of an early payment on the guarantee to the lenders. It is not necessarily the case that

a distribution of funds from the Canadian estate must await the resolution of the Chapter 11 proceedings, as *CCAA* proceedings may advance at a different pace if the court is satisfied by the evidence before it that it is appropriate to do so. The application was adjourned *sine die* with leave to the applicants and the lenders to reapply with more current information if it became apparent that the potential prejudice identified by the unsecured creditors was unlikely to materialize or could be avoided by other measures or that the balance of prejudice and benefit had shifted: *Re SemCanada Crude Co.* (2009), 2009 CarswellAlta 167, 52 C.B.R. (5th) 131 (Alta. Q.B.); leave to appeal refused (2009), 2009 CarswellAlta 972, 55 C.B.R. (5th) 48 (Alta. C.A. [In Chambers]).

The creditor has the burden of proving its claims: *Re Pine Valley Mining Corp.* (2008), 2008 CarswellBC 579, 41 C.B.R. (5th) 43; additional reasons at (2008), 2008 CarswellBC 712, 41 C.B.R. (5th) 49 (B.C. S.C.).

Two parties that were judgment creditors moved for directions as to whether the terms of the "release," which was part of a *CCAA* plan sanction order of the Ontario Superior Court, was part of the approval of a plan. The Ontario Superior Court held that the Ontario Court did not have the jurisdiction to deal with the real issue as between the parties, namely whether the bailiff was authorized or negligent in turning property proceeds in a Québec proceeding into asset-backed commercial paper, as that was a matter for the Québec court. It was, however, appropriate that the Ontario Court address the narrow issue of whether the parties were covered by the release terms in the ABCP plan sanction order. The parties who had bargained for ABCP releases were those who could be sued by noteholders. Neither judgment creditor had had any dealings with the company that purchased the ABCP and Campbell J. held that it would be inequitable to preclude them from pursuing a claim against the bailiff for failure to pay over amounts owing on a court-ordered process: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5255, 46 C.B.R. (5th) 195 (Ont. S.C.J. [Commercial List]). In another judgment, Campbell J. considered the monitor's report, which calculated the vote both on the basis previously approved and on the basis of dollar value and was satisfied that a reclassification would not alter the strong majority voting in favour of the plan: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]); affirmed (2008), 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163 (Ont. C.A.); leave to appeal to S.C.C. refused (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

The onus is on any claimant to prove its claim. Where a contingent claimant seeks to prove its claim, it must show that the claim is not speculative or remote; however, it need not establish that success is probable: *Re Air Canada (CUPE contingent claim appeal)* (2004), 2004 CarswellOnt 3320, 2 C.B.R. (5th) 23 (Ont. S.C.J. [Commercial]).

The amendments specify that the court has the authority to fix a deadline for creditors to file claims, often referred to as a claims bar date for the purposes of voting and for distribution under a compromise or arrangement: s. 12 (2007, c. 36, in force September 18, 2009).

A claim determined to be valid under Part III of the *Canada Labour Code* becomes a judgment debt and will be determined at an amount of 100% of the claim. The judgment creditor in turn becomes an unsecured debt holder and may determine whether or not, in a *CCAA* procedure, it wishes to support or reject the plan. If the plan is rejected, then Part III creditors will be free to pursue whatever remedies they may have to collect their judgment debt: *Re Air Canada (Canada Labour Code Claims)* (2004), 2004 CarswellOnt 2946, 2 C.B.R. (5th) 18 (Ont. S.C.J. [Commercial]).

The court can determine the valuation of claims summarily, but in an appropriate case, the court can direct the trial of an issue in which production and discovery would be available: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449 (C.A.). In

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, Farley J. (Ont. Gen. Div.) held that the holder of a guarantee given by the debtor company could prove a claim for the full amount of the debt owing by the principal debtor. The holder of the guarantee need not, however, file a claim but can proceed against the principal debtor without being affected by a plan made under the *CCAA*.

In *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10, 2003 CarswellOnt 1104 (Ont. S.C.J.), under the *CCAA* plan of arrangement, the debtor entered into a trust indenture pursuant to which what were called residue certificates were issued to creditors in satisfaction of their claims. The holders of the certificates were paid in full together with accrued interest. Certain certificate holders had not proved their claims. After payment of the claims of creditors, there remained a substantial surplus. The Public Guardian and Trustee of Ontario contended that all residue certificates not claimed by the holders were escheated and forfeited to the Crown as *bona vacantia*. The court held that the unclaimed moneys were not *bona vacantia*, since property that is undistributed under a trust is not *bona vacantia*. The debtor company did not wish to receive the surplus funds. The court amended the trust indenture to distribute the surplus funds between the holders of residue certificates and the professional advisors who had worked on the plan. The professional advisors, the court said, had achieved a highly successful result beyond all reasonable expectations and were entitled to a premium.

The Tax Court of Canada has exclusive jurisdiction to determine a disputed tax liability assessment, even where the debtor is operating under *CCAA* protection: *Re CCI Industries Ltd.* (2005), 2005 CarswellAlta 1261, 15 C.B.R. (5th) 180 (Alta. Q.B.).

In *Re Cage Logistics Inc.* (2002), 50 C.B.R. (4th) 169, 2002 CarswellAlta 1896 (Alta. Q.B.); leave to appeal refused (2003), 2003 CarswellAlta 123, 40 C.B.R. (4th) 165 (Alta. C.A.), a credit agreement provided for the payment of "breakage costs" in the event of the pre-payment of a loan. The court found that the debtors were not obliged to pay those costs where the creditors were paid the principal owed, plus interest and other applicable charges under the credit arrangement as part of a plan of arrangement. The obligation to pay the breakage fee did not arise, pursuant to the contract, unless the pre-payment was with the tacit consent of the debtor.

Products liability actions had been stayed in both the *CCAA* and U.S. Chapter 15 proceedings, and there was a claims process set up that involved a first assessment of claims by the monitor; a process for resolving disputed claims; and a claims bar date. The court held that the *CCAA* process and notice adequately protected the interests of the potential claimants and they chose not to utilize the process. The court declined to exercise its discretion to allow the representative claims or lift the stay to permit certification motions to proceed in the U.S. The court held that changing and increasing the landscape of claimants after the claims bar date and after the settlement of thirty claims could cause prejudice to the eventual success of the *CCAA* process. The process gave adequate opportunity for anyone with a claim to file a proof of claim; the forms were accessible and in plain language; the products liability claimants all managed to make individual claims, even where they were involved in class actions; and hence the court concluded that to allow representative or class claims at this date would be prejudicial to the entire claims process and would impair the integrity of the *CCAA* process: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 4929, 25 C.B.R. (5th) 218; additional reasons at (2006), 2006 CarswellOnt 5484, 25 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

A monetary penalty under the *Aeronautics Act* issued against Air Canada prior to its *CCAA* proceedings was a claim in the *CCAA* proceedings and was thus a compromised debt after

the plan had received court sanction: *Re Air Canada* (2006), 2006 CarswellOnt 8175, 28 C.B.R. (5th) 317 (Ont. S.C.J. [Commercial List]).

Where debtors in a *CCAA* proceeding had obtained an order permitting them to market debentures they owned with provisions requiring them to identify and process claims purporting to differentiate rights, privileges and entitlements associated with the debentures ("bond differentiation claims"), the court dismissed an application by U.S. debtors to vary the order. The court held that the amendments proposed by U.S. debtors were not refinement or clarification, but would result in real change in effect and scope of the order by exempting from its application any defences the U.S. debtors may have to any proof of claim in U.S. court proceedings. The court held that it had jurisdiction to make determinations relating to bond differentiation claims and there was no evidence before it that a jurisdictional issue had arisen and the court held that it must necessarily make determinations regarding the status and enforceability of the principal claims outstanding in the *CCAA* proceeding: *Re Calpine Canada Energy Ltd.* (2006), 2006 CarswellAlta 1313, 26 C.B.R. (5th) 77 (Alta Q.B). See Howard Gorman, "Calpine: Cross-Border Review and Approval of Inter-Debtor Claims", in J. Sarra, ed. *Annual Review of Insolvency Law, 2007* (Carswell, 2008).

A franchisor that was a subsidiary of a group of companies that filed under the *CCAA* had a general security agreement (GSA) over the assets of its franchises. The franchisor's parent corporation in the same proceeding had a subordination agreement with the bank, but the franchisor itself had never made an agreement. During the *CCAA* proceeding, the debtor parent sold the franchise agreements and the GSA to a purchaser pursuant to approval and a vesting procedure free and clear of any security interests. The court granted a motion by the purchaser for a declaration that the GSA had priority over the bank's GSA on the basis that the order was clear, the bank was party to the proceedings two years' prior and had failed to claim priority at the time, and the matters resolved by the order were *res judicata*. The court held that the *CCAA* objective of providing a mechanism for the efficient restructuring of insolvent companies would be seriously undermined if parties that fail to assert their rights at the time are permitted to subsequently return to court to undo past transactions: *Extreme Retail (Canada) Inc. v. Bank of Montréal* (2007), 2007 CarswellOnt 5520, 37 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]).

In a *CCAA* proceeding, the Québec Superior Court held that the debtor companies could satisfy the claims of a strategic buyer of distressed debt by paying the distressed debt buyer the sums that the distressed debt buyer had paid to acquire the distressed debt. The court has jurisdiction to take into account the circumstances under which distressed debt is acquired in insolvency proceedings, especially in situations where the purchaser of such distressed debt is pursuing a hidden agenda, is acting in bad faith, or "tramples on the rights and expectations of others". The debtors had sought a "white knight" to buy out the bank's interest at a steep discount in order to allow the debtor to fund a plan of arrangement. A falling out among the principals resulted in the white knight purchasing claims in order to control the class of creditors and defeat the debtor's restructuring efforts. In finding that the distressed debt buyer was a "rogue white knight", the court held that "threatening to hijack the project and frustrate a plan intended to bring a measure of relief to many creditors, including the purchasers of units, does not square with the good faith conduct required of contracting parties by article 1375 C.C.Q." Based on the particular facts, the court decided to treat the claims of the white knight as if they were "litigious rights" because that was what the parties intended at the time that the bank debt was acquired at a discount. In Québec, the person from whom litigious rights are claimed is fully discharged by paying to the buyer of such rights the sale price, the costs related to the sale, and interest on the price computed from the day on which the buyer paid it. Consequently, the court ordered that the debtor could satisfy

and discharge all claims owing to the white knight by paying it, in the context of its plan of arrangement, the amount that the white knight had itself paid to acquire the subject debt claims. On such payment, the white knight would be deemed to have accepted the debtor's plan of arrangement: *Minco-Division Construction Inc. v. 9170-6929 Québec Inc.* (2007), 2007 CarswellQue 420, 29 C.B.R. (5th) 165 (Que. S.C. [Commercial Div.]); leave to appeal to C.A. refused (29 January 2007), Montréal 500-09-017423-070 and 500-09-017419-078 (Que. C.A.). For a discussion of this judgment, see article by Mark Meland, "Rogue White Knights and Strategic Buyers of Distressed Debt in Canadian Insolvency Proceedings" and Janis Sarra, "Distressed Debt Purchasers in Canadian Restructuring Proceedings — The Québec Court's Recent Consideration of Rogue White Knights", INSOL Newsletter, July 2007.

The Ontario Court of Appeal held that a pre-*CCAA* claim for arrears of rent under a lease may be asserted in full against the reorganized *CCAA* company following its emergence from *CCAA* proceedings where the lease in question was not repudiated as part of the *CCAA* proceedings; the claimant never received notice of the *CCAA* proceedings or of a claims procedure order; and the provisions of the order sanctioning the debtor company's plan of reorganization and the plan itself make it clear that: (1) a real property lease that has not been repudiated or terminated and in respect of which there has been no written agreement to allow a claim is an "unaffected obligation" under the plan; (2) the debtor company is deemed to have ratified each unexpired lease to which it is a party, unless such lease was previously repudiated or terminated or previously expired or terminated pursuant to its own terms; and (3) any agreement to which the debtor company is a party as at the effective date of the plan shall be and remain in full force and effect unamended: *Ivorylane Corp. v. Country Style Realty Ltd.* (2005), 2005 CarswellOnt 2516, 11 C.B.R. (5th) 230 (Ont. C.A.).

In the context of a *CCAA* plan, the British Columbia Court of Appeal held that an employment contract was an executory contract and therefore a "claim" that was compromised in the plan of arrangement. Levine J.A. held that the first step in determining whether a claim for damages for breach of an employment contract represented a contingent liability was to consider the meaning of that term. The Supreme Court of Canada in *McLarty v. R.* (2008), 2008 CarswellNat 1380, 2008 CarswellNat 1381, [2008] 2 S.C.R. 79 referred to the "well-accepted test for a contingent liability" as described by Lord Guest in *Winter v. Inland Revenue Commissioners* (1961), [1963] A.C. 235, [1961] 3 All E.R. 855 (U.K. H.L.), as an event that may or may not occur, and the contingent liability is a liability that depends for its existence on an event that may or may not happen. Levine J.A. concluded that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. Until there is a breach of contract, there is no legal basis for any claim or any corresponding liability. Levine J.A. concluded that the liability to pay damages if an employment contract was breached for failing to give reasonable notice of termination was not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there was no injury. Justice Levine also held that the applicant's employment contract was, at the filing date, an executory contract that fell within the definition of "claim" in the plan: *Re West Bay SonShip Yachts Ltd.* (2009), 2009 CarswellBC 139, 49 C.B.R. (5th) 159 (B.C. C.A.).

Where parties entered into an agreement for a shareholder to pay USD 20 million to purchase USD 10 million of the debtor company's income tax refund, the agreement required the debtor to hold the tax refund in trust for the shareholder. The debtor did not deliver the transfer document, in breach of the agreement, and then filed under the *CCAA*. The shareholder successfully argued that the funds were held in trust; and on appeal, the appellate court held that the circumstances of the case made it appropriate to apply the equi-

table maxim that "equity looks on that as done which ought to be done". It would be inequitable for the debtor to take advantage of its own breach of agreement by contending that its failure to deliver the transfer excused it from its contractual obligation. It was not inequitable to require secured creditors to live with the agreement they helped make and that they influenced the debtor company to breach: *Re Grant Forest Products Inc.* (2010), 2010 CarswellOnt 3001, 101 O.R. (3d) 383, 67 C.B.R. (5th) 23 (Ont. C.A.).

(1) — Claims Barring Procedure

In *CCAA* proceedings, a claims bar order can be made by the judge in charge of the proceedings. The purpose of the order is, amongst other things, to enable creditors to meaningfully assess and vote on a plan of arrangement and to ensure a timely and orderly completion of the *CCAA* proceedings.

Under a claims bar order, creditors are required to file their claims by a fixed date. The debtor company is directed to send notice of the order to all creditors. The court may also order publication in a newspaper.

It is usual to appoint a claims officer who will be given power to adjudicate disputed claims with the right of appeal to the judge administering the *CCAA* proceedings. In some orders, a creditor is given the right to by-pass the claims officer and to apply directly to the judge for a ruling on its claim.

In *Re Blue Range Resource Corp.* (2000), 15 C.B.R. (4th) 192, 2000 CarswellAlta 30 (C.A. [In Chambers]) a claims bar order was made by the court. Two creditors did not file their claims in the time period fixed by the order. The creditors applied for and were granted an extension of time for filing their claims. A large creditor applied for leave to appeal. A judge of the Alberta Court of Appeal granted leave to appeal on the issue whether the lower court judge had erred in exercising the discretion to extend the time for creditors to file their claims. The Court of Appeal dismissed the appeal: see *Re Blue Range Resource Corp.* (2000), 2000 CarswellAlta 1145 (C.A.); additional reasons at (2001), 2001 CarswellAlta 1059 (C.A.); leave to appeal refused (2001), 2001 CarswellAlta 1209, 2001 CarswellAlta 1210 (S.C.C.). The Court of Appeal held that in determining whether or not to grant permission for late filing of claims, the court should apply the following tests:

> 1. Was the delay in filing caused by inadvertence and if so, was the creditor acting in good faith? Inadvertence includes carelessness, negligence and accident but the conduct must be unintentional.
>
> 2. What is the effect of extending the time for filing in terms of the existence and impact of any relevant prejudice caused by the late filing? The test for prejudice is: did the creditors who filed on time lose as a result of the late filing a realistic opportunity to do anything that they might otherwise have done? The fact that the amount available for distribution to creditors has been reduced does not constitute prejudice.
>
> 3. If the late filing has caused relevant prejudice, can it be alleviated by attaching appropriate conditions to the order permitting the late filing?
>
> 4. If relevant prejudice has been caused, which cannot be alleviated, are there any other consideration which could nonetheless warrant an order for late filing?

Leave to file a late dispute notice may be granted where it will not cause hardship to any interested party or prejudice the debtor's reorganization; which is not to say that an extension will usually be granted. Corrective action must be taken forthwith to address delays upon the error being realised, and lying in the weeds is not an option: *Re Air Canada [Late Dispute Notice]* (2004), 49 C.B.R. (4th) 175, 2004 CarswellOnt 1843 (Ont. S.C.J. [Commercial]).

The Alberta Court of Appeal held that to further the goal of enabling a company to deal with creditors in order to carry on business, the *CCAA* proceedings seek to resolve matters and obtain finality without undue delay, and a claims bar date is one means of bringing disputed claims to an end and allowing a company to move forward: *Hurricane Hydrocarbons Ltd. v. Komarnicki* (2007), 2007 CarswellAlta 1521, 37 C.B.R. (5th) 1 (Alta. C.A.).

In considering whether claims could be considered when they were submitted after a claims bar date, the Newfoundland and Labrador Supreme Court extended the time for filing of certain claims on the basis that the trustee had not set out any real prejudice that would arise if the claims were allowed; the proposal itself contemplated that there would be additional claimants; there was evidence of an overall intent to determine and assess the claims of unknown victims of abuse; there was no inordinate delay by each of the applicants that could prejudice the process; and the trustee had not pointed to anything greater than the inadvertence claimed by the claimants that would minimize the existence of good faith on their behalf: *Re Roman Catholic Episcopal Corp. of St. George's* (2007), 2007 CarswellNfld 198, 32 C.B.R. (5th) 302 (N.L. T.D.).

The court has the jurisdiction to admit late-filed, or otherwise irregular, claims in a previously approved *CCAA* plan. Pursuant to a *CCAA* plan, a trust was established for the purpose of holding, administering and distributing an "HIV Fund" in satisfaction of claims of persons ("HIV Claimants") who were infected with the HIV virus from receiving blood supplied by the debtor. As a result of problems and litigation, no distributions had been made from the HIV Trust in the eight years since the plan had been approved. Late applications were received from persons who were either infected persons, or persons with derivative claims as members of the families of infected persons, where they did not receive notice. The court's considerations in the exercise of its jurisdiction in this case were: the structure of the *CCAA* plan with its provision of a separate fund for HIV Claimants; the fact that no distributions had been made; the absence of prejudice that would be suffered by the debtor and other claimants; the uncertainty created by the limitations issues; the circumstances of the claimants that distinguish them from commercial creditors; the fact that adequate notice to them was essential if the plan was to be effective; the application forms provided to the HIV Claimants were not clear; and the methods of disseminating notice of the deadline may have been affected, and unduly limited, by a misapprehension as to the number of potential claimants: *Re Canadian Red Cross Society/Société Canadienne de la Croix-Rouge* (2008), 2008 CarswellOnt 6105, 48 C.B.R. (5th) 41 (Ont. S.C.J.). See Vern W. DaRe, "Risks Inherent in the Settlement of Tort Claims: Recent Direction from the Red Cross Case", in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009).

The monitor brought a motion seeking directions as to whether it has the necessary authority to allow a revision of a claim after the claims bar date but before the date set for the monitor to complete its assessment of claims. The monitor was of the view that errors in the proofs of claim were due to inadvertence and for all of the claims it issued a notice of revision, allowing the claims as revised if the court determined that it had the power to do so. The court held that the monitor as an officer of the court, is obliged to ensure that the interests of the stakeholders are considered, including all creditors, the company and its shareholders; and the monitor had the necessary authority to revise the claims, either as to classification or amount: *Re ScoZinc Ltd.* (2009), 2009 CarswellNS 229, 53 C.B.R. (5th) 96 (N.S. S.C.).

The British Columbia Court of Appeal upheld two decisions in proceedings under the *CCAA* involving pre-sale purchasers of residential condominiums, who argued that they had certain remedial rights under the *Real Estate Marketing and Development Act (REMDA)* that were sufficient to give them status as creditors in the *CCAA* proceeding. The Court held that there was nothing in the *REMDA* that suggested that the legislature intended that the "identity of

the developer" changes if corporate ownership and control change. Levine J.A. held that the appellants had no rights of rescission or to return of their deposits because their pre-sale agreements were unenforceable under the *REMDA*; thus, there was no basis for them to claim that they were creditors in the *CCAA* proceeding. The appellate court affirmed the supervising judge's approval of an extension of the completion date of the pre-sale agreements because of construction delays, observing that the customary way of determining delay claims is after the project has been completed. In this case, there was not that luxury, and the court proceeded to decide them and ordered the extension: *Re Jameson House Properties Ltd* (2009), 2009 CarswellBC 1904, 57 C.B.R. (5th) 21 (B.C. C.A.).

An issue arose during *CCAA* proceedings as to whether a document constituted a promissory note within the meaning of the *Bills of Exchange Act*. The Alberta Court of Appeal held that it was not a promissory note as it was not unconditional in nature; and the provision that was titled "promissory note" was included as part of a contract, the terms of which conditioned payment of obligation. The provision could not be construed independently from other provisions of the purchase contract. Hence the chambers judge was correct in her determination that the document did not contain an unconditional promise to pay: *Re Fairmont Resort Properties Ltd.* (2009), 2009 CarswellAlta 1589, 60 C.B.R. (5th) 55 (Alta. C.A.).

The Ontario Superior Court of Justice declined to establish a claims bar date in respect of claims made under special purpose provincial legislation. The court reviewed the basis for establishing such a process and concluded, in this case, that there would be no prejudice to the claimant if the motion was dismissed on a without prejudice basis to the claimant to request similar relief at a time in the future. The Attorneys General for Canada, the MRQ and six provincial Crowns had filed notices of claim in respect of this claims bar order, the aggregate Crown smuggling claims against the debtor company totalled many billions of dollars. British Columbia had enacted the *Tobacco Damages and Health Care Cost Recovery Act* (*TDHCCRA*) and delivered a notice of claim to the debtor company and the monitor, seeking the present value of the past and future costs of government health care benefits on an aggregate basis provided for its population resulting from tobacco related disease as a result of smoking cigarettes. The proposed order would fix a claims bar date. Justice Cumming held that those provinces that have enacted and proclaimed in force TDHCCRA-type legislation have a cause of action and consequently, have claims "provable in bankruptcy". Justice Cumming held that it was inappropriate to attempt to determine "provable claims" at this early stage. He did acknowledge the provinces' submission that all provisions of the TDHCCRA-type legislation operated retroactively, including the section of each statute that creates a cause of action. Justice Cumming concluded that the claims arising out of allegations of smuggling of contraband tobacco products were distinguishable from the situation with the putative health care cost recovery (HCCR) claims. Each cause of action existed at the time the claims bar order was sought. The existing claims bar order relating to the Crown smuggling claims did not impair or challenge the jurisdiction of any legislature to enact legislation in the future. Rather, the claims bar order simply required that any such existing smuggling claims of governments be filed by a fixed date, so as to give notice to preserve their existing claims for purposes of the *CCAA* proceedings. Justice Cumming concluded that there was no prejudice to B.C., or to any other province that may choose to advance an HCCR claim. The existing HCCR claims were proceeding having been unaffected (with the stay lifted) by these *CCAA* proceedings. There are no limitation of action issues in respect of the HCCR claims. Justice Cumming went on to note that the existing and anticipated HCCR claims would involve multiple defendants, both domestic and foreign, and would necessarily have to proceed in the civil courts. It might well unnecessarily complicate and delay the HCCR proceedings, as well as the *CCAA* proceeding, to make a Crown HCCR claims bar order at this time relating to HCCR claims against the company. It was premature to set a bar

date and establish a procedure for the determination of HCCR claims. The existing B.C. claim was proceeding before the Supreme Court of British Columbia and was being case managed. It was obvious that it would be both efficient and expeditious to have a single trial in respect of all HCCR claims rather than one in each province: *Re JTI-MacDonald Corp.* (2009), 2009 CarswellOnt 6614, 61 C.B.R. (5th) 117 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench denied the motion of a creditor to have a late amended proof of claim accepted in a *CCAA* proceeding. The issue was whether the creditor, having initially filed a claim that it characterized as fully secured, was entitled to file a late amended claim alleging that a large portion of its claim was unsecured. The criteria to accept late claims include: (a) was the delay caused by inadvertence and if so, did the claimant act in good faith; (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay; (c) if relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing; (d) if relevant prejudice is found that cannot be alleviated, are there any other considerations that may nonetheless warrant an order permitting late filing? In this case, the creditor filed a late revised claim after months of relative lack of diligence with respect to the value of its security, at a time when it had become apparent that the distribution to unsecured creditors under a proposed plan would be substantial. The court concluded that, on the facts, it would not be fair or equitable to accept the late amended claim: *Re BA Energy Inc.* (2010), 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.).

The Québec Superior Court declined to grant a *CCAA* claims bar order in respect of a bankrupt debtor who was no longer under *CCAA* protection. The court held that there was no jurisdiction under the *CCAA* to make such an order as the *BIA* now applied. Justice Gascon held that the most appropriate approach to determine a court's authority during a *CCAA* proceeding is a hierarchical one, where courts must first rely on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction. Applying these guidelines, Gascon J. was of the view that there were simply no provisions in the *CCAA* that would support the court's authority to issue a claims procedure order solely aimed at potential claims that may be raised against the beneficiaries of *CCAA* charges affecting the property of an entity no longer under *CCAA* protection. The claims covered by s. 12 of the *CCAA* concerned the creditors of the debtor company under *CCAA* protection, nothing more. Justice Gascon held that the mere fact that these *CCAA* charges existed, were valid, and may entail potential claims as secured creditors, was not sufficient to justify the court exercising any alleged statutory jurisdiction, discretionary power or inherent jurisdiction to grant the claims procedure and the bar orders: *Re AbitibiBowater inc.* (2011), 2011 CarswellQue 1645, 2011 QCCS 766 (Que. S.C.).

See N. MacParland, "How Close is Too Close? The Treatment of Related Party Claims in Canadian Restructurings", *Annual Review of Insolvency Law, 2004* (Carswell, 2005) 355–398.

(2) — Proof of Claim

In the context of a *CCAA* proceeding, the Alberta Court of Queen's Bench held that a secured creditor's interest secured under the British Columbia *PPSA* that had lapsed ranked behind that of another secured creditor that registered its security after the lapse and before the security was reregistered. To determine priorities, the court must determine which party holds the earliest perfected interest. The only way that the secured creditor could have priority was if it had perfected its possession before the second creditor filed under the *PPSA*. Here the creditor gave up actual physical possession to another company to secure credit advances and thus was not in possession at the relevant time: *Re Fairmont Resort Properties*

Ltd. (2009), 2009 CarswellAlta 1210, 56 C.B.R. (5th) 235 (Alta. Q.B.); leave to appeal refused (2009), 2009 CarswellAlta 1725, 59 C.B.R. (5th) 233 (Alta. C.A.).

(3) — Negotiation and Mediation of Claims

An experienced mediator under a *CCAA* proceeding should be given the highest degree of flexibility in his or her approach to and handling of a mediation between all stakeholders of an insolvent corporation; and if the monitor feels it appropriate, it may recommend a third party's proposal for the stakeholders' consideration, in addition to the monitor's proposal. If any stakeholder does not voluntarily participate in the mediation, then the monitor, at the mediator's request, may move for an order that such participation be directed and ordered by the court: *Re Stelco Inc.* (2005), 2005 CarswellOnt 2010, 11 C.B.R. (5th) 163 (Ont. S.C.J. [Commercial List]).

N§144 — Claims that Cannot be Comprised under a Plan

Unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for acceptance of the compromise or arrangement, a compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any fine, penalty, restitution order or similar order imposed by a court in respect of an offence; any award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted, sexual assault, or wrongful death; any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Québec, as a trustee or an administrator of the property of others; any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim: s. 19(2) (2007, c. 36, in force September 18, 2009).

20. (1) Determination of amount of claims — For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

(a) the amount of an unsecured claim is the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the

amount is to be determined by the court on summary application by the company or the creditor.

(2) **Admission of claims — Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.**

(3) [Repealed 2007, c. 36, s. 70.]

2005, c. 47, s. 131; 2007, c. 36, s. 70

N§145 — Determination of Amount of Claims

The amount represented by a claim of any secured or unsecured creditor is to be determined as follows. The amount of an unsecured claim is the amount in the case of a company in the course of being wound up or liquidated under the *WURA* or the *BIA* is proof in accordance with those statutes. The secured claim is the amount, proof of which might be made under the *BIA* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *WURA* or the *BIA*, to be established by proof in the same manner as an unsecured claim under those statutes, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor (2007, c. 36, in force September 18, 2009). The secured creditor is not prevented from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim.

N§146 — Debtor Right to Reserve Right to Contest Claim

The debtor company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes: s. 21(2) (2007, c. 36, in force September 18, 2009).

21. Law of set-off or compensation to apply — The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

1997, c. 12, s. 126; 2005, c. 47, s. 131

N§147 — Set-Off

The cases and commentary on set-off were moved to this section when the 2009 amendments coming into force. The set-off provision became s. 21 of the *CCAA* and s. 18.1 was repealed. Section 21 specifies that the law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant (2007, c. 36, in force September 18, 2009).

The Supreme Court of Canada set out the principles applicable to equitable set-off: 1) the party relying on a set-off must show some equitable ground for being protected against its adversary's demands; 2) the equitable ground must go to the very root of the plaintiff's claim; 3) a cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into

TAB 4

Case Name:

Pine Valley Mining Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Business Corporations Act, R.S.B.C. 2002, c. 57, as amended
IN THE MATTER OF Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation, Petitioners

[2008] B.C.J. No. 510

2008 BCSC 356

41 C.B.R. (5th) 43

2008 CarswellBC 579

165 A.C.W.S. (3d) 842

Docket: S066791

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

N.J. Garson J.

Oral judgment: March 14, 2008.

(20 paras.)

[Editor's note: Supplementary reasons for judgment were released April 14, 2008. See [2008] B.C.J. No. 637.]

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not en-

titled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

Insolvency law -- Claims -- Priorities -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

Insolvency law -- Receivers, managers and monitors -- Duties and powers -- Directions issued in this proceeding under the Companies' Creditors Arrangement Act to the effect that the creditor Pine Valley Mining Corporation bore the burden of proving its claim for a debt of $37,692,218, and that the matter would proceed to a summary trial -- The monitor's report confirming a debt was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- A summary trial was mandated by s. 12 of the Act -- Companies' Creditors Arrangement Act, s. 12.

The petitioners in this proceeding under the Companies' Creditors Arrangement Act sought directions respecting the process for determining the amount of the Pine Valley Mining Corporation's claim against Fall Mountain Coal (FMC) -- In the present application, the court was asked to determine (a) who bore the onus of proof of the amount and character of PVM's claim, and (b) whether the trial ought to be a summary trial or a conventional one with viva voce witnesses, or some combination of both -- PVM claimed that FMC, its wholly-owned subsidiary, owed it $37,692,218 -- The other major creditors disputed the amount on the grounds that advances to FMC were properly characterized as capital investment, not debt, with the result that PVM would rank behind the other unsecured creditors in the distribution of FMC assets -- The court-appointed monitor had reviewed the accounts and determined $27,070,166 was properly owed to PVM by FMC -- HELD: PVM bore the onus of proving its claim in the summary trial to follow -- The Monitor's process was in no way akin to an adversarial process -- He was not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant -- It followed that PVM had the burden of proving its claim -- Either party was at liberty to use the monitor's report or part of it at the trial as an expert report, provided the necessary notice was given to the other party -- Section 12 of the Act required a summary trial -- The court was not persuaded that the claim could not be tried summarily on the date reserved -- Either party had leave to apply to convert this summary trial to a conventional trial, but the parties were expected to make their best efforts to manage this generally as a summary trial.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.B.C. 2002, c. 57,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 12(2)

Counsel:

Counsel for Pine Valley Mining Corporation: J.R. Sandrelli, O. Jones.

Counsel for Tercon Mining PV Ltd.: B.G. McLean, C. Armstrong.

Counsel for the Monitor: W. Kaplan, Q.C.

Counsel for Petro-Canada: D.A. Garner.

Counsel for CN Rail: R.D. Watson.

Reasons for Judgment

1 **N.J. GARSON J.** (orally):-- This is an application for directions respecting the process for the determination of the amount of Pine Valley Mining Corporation's ("PVM") claim against Falls Mountain Coal Inc. ("FMC") within a proceeding under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended, (the "CCAA Proceeding"), in which both PVM and FMC are related parties and petitioners.

2 FMC is a wholly-owned subsidiary of PVM. PVM claims that FMC owes PVM $37,692,218. The other major creditors of FMC dispute that amount largely on the basis that the advances made to FMC are properly characterized as capital investment in FMC, not debt, and therefore PVM should rank behind the other unsecured creditors in the distribution of FMC assets. The Monitor appointed by this Court in the CCAA Proceeding has reviewed the accounts of PVM and FMC and determined that $27,070,166 is properly owed to PVM by FMC as debt.

3 On this application the Court is asked to determine two issues:

1. Who bears the onus of proof of the amount and character of PVM's claim?
2. Should the trial be a summary trial or a conventional trial with *viva voce* witnesses, or some combination of those two procedures?

4 The relevant factual background to the matter may be stated as follows:

* FMC is the wholly-owned subsidiary of PVM.
* FMC operated the Willow Creek Coal Mine.
* On October 20, 2006, PVM and FMC petitioned this Court for a general stay of proceedings under the ***CCAA***. The order they sought was granted, and extended from time to time since the initial order.
* The Petition did not disclose an inter-company debt as between the two petitioners. All financial reporting was done on a consolidated basis. When the Monitor requested unconsolidated financial statements for each of the petitioners the inter-company debt was revealed. In recounting this history I make no adverse finding of fact on this point. That is a matter for the trial judge.
* On January 19, 2007, PVM filed a claim with the Monitor stating that FMC was indebted to PVM in the amount of $41,658,441.
* On March 16, 2007, the Monitor issued its Fourth Report to the Court. That report contained a detailed review of the transactions underlying the PVM claim.

As already noted, as a result of his investigations the Monitor "[proposed] to allow a revised PVM Claim against FMC in the amount of $27,070,166".

* Some of the creditors objected to the claim, including the revised claim, and agreed that the counsel for the largest creditor, Tercon, would have standing to defend the PVM claim and to raise all defences available to FMC and to creditors of FMC. The other main creditors have maintained - if I may describe it thus - an active watching brief.

5 A ten-day trial has been reserved for May of this year. The parties have reached an impasse on the two issues mentioned above. Mr. Sandrelli, counsel for PVM, says that "deference is owed to the Monitor's ... conclusions ... in [his] Fourth Report, such that the onus to challenge the Monitor's findings lies on the party appealing the Monitor's findings; and if deference is owed to the Monitor's findings, what standard of review applies to those findings".

6 I understood Mr. Sandrelli to use the term "appeal" in a loose sense. He acknowledged that this is not an appeal because Tercon did not participate in the original decision making process of the Monitor. He said in submissions that the process is more akin to a review on a correctness standard of review. He concluded his submissions by contending that Tercon should bear the onus of displacing the finding of the Monitor that PVM is owed $27 Million by FMC, and that PVM bears the onus of displacing the Monitor's finding that PVM is not entitled to the additional approximate $11 million it claims.

7 Mr. McLean, counsel for Tercon, contends that "the burden of proof lies upon the party who substantially asserts the affirmative of the issue": *Phipson on Evidence*, 14th ed. He says that PVM seeks to prove that it is a creditor of FMC and it must carry the burden of proof of that whole claim.

8 Mr. Sandrelli argues that in the special context of a ***CCAA*** proceeding the Monitor, who is appointed by the court, should be accorded deference and that the review of his decision is akin to a review of a ***CCAA*** claims officer's decision in a ***CCAA*** proceeding. He relies for this proposition on dicta in ***Olympia & York Developments Ltd. (Re)*** (1993), 17 C.B.R. (3d) 1; ***Air Canada (Re.)*** (2004), 2 C.B.R. (5th) 23; ***Canadian Airlines (Re)***, 2001 ABQB 146; ***Matte v. Roux***, 2007 BCSC 902; ***Triton Tubular Components Corp v. Steelcase Inc.***, [2005] O.J. No. 3926 (S.C.J.); and ***Muscletech Research & Development Inc.*** (2006), 25 C.B.R. (5th) 231.

9 In ***Olympia & York***, the decision under review was that made by a claims officer. The claims officer is akin to a judicial officer. The proceeding before him is an adversarial one and naturally he should be granted some deference. That decision is distinguishable on the grounds that the court appointed Monitor in this proceeding, while undoubtedly an impartial agent of the court, reviews the claim but is in no way engaged to conduct a hearing or any type of adversarial or quasi-judicial type proceeding. Similarly, ***Air Canada*** involved an appeal from a decision of a claims officer appointed in the ***CCAA*** proceeding in which the claims officer had dismissed a contingent claim. The appeal was dismissed. The ***Air Canada*** case is distinguishable for the same reasons as the ***Olympia & York*** case. In ***Canadian Airlines***, the decision under review was also that of a claims officer appointed to determine disputed claims within a ***CCAA*** proceeding. Paperny J., as she then was, held that the review was a trial *de novo*, but that was because the law in Alberta differed from Ontario. The ***Matte*** case involved the standard of review of a master's decision and for the same reasons, I find it unhelpful and distinguishable. ***Triton*** also involved the review of a claims officer's decision. The court determined that the standard of review was correctness but, for the same reasons as above, the case is distinguishable. The ***Muscletech*** case is similarly distinguishable.

10 In none of the cases cited above was the decision under review one of a monitor, not engaged in an adversarial process.

11 Paragraph 17 of the Claims Procedure Order pronounced December 8, 2006, provides:

> Where a Creditor delivers a Dispute Notice in accordance with the terms of this Order, such dispute shall be resolved as directed by this Court or as the Creditor in question, the Petitioners and Monitor may agree.

12 Section 12(2) of the ***CCAA*** provides in part as follows:

> For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:
>
> (a) the amount of the unsecured claim shall be the amount
>
> (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor;

13 I conclude from the ***CCAA*** and the Claims Procedure Order that the function of the Monitor, that is relevant to this application, is to determine the validity and amount of a claim on the basis of the evidence submitted. The Monitor's process in doing so is in no way akin to an adversarial process. Although his findings and opinion should be respectfully considered, he is not entitled to deference in the sense that would alter the burden of proof ordinarily imposed on the claimant. Counsel have not called my attention to any authority for either of the following propositions, either that the CCAA claim process alters substantive law that would otherwise apply to the determination of such a claim, or that a monitor appointed on the terms here is entitled to the deference accorded a quasi-judicial officer like a court appointed claims officer. It follows that PVM has the burden of proving its claim. PVM shall file a statement of claim. Tercon, with standing to defend on behalf of FMC, shall file a statement of defence.

14 I turn next to the procedural questions.

15 The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

16 The second issue I have been asked to determine is the question of the format of this trial. Section 12 of the ***CCAA*** requires a summary trial. I recognize that in some cases, courts have held that that does not preclude a conventional trial. (See ***Algoma Steel Corporation v. Royal Bank of Canada*** (1992), 8 O.R. (3d) 449 (C.A.). I do not understand Mr. McLean to object in principle to an order that this matter be determined in a summary way but, rather, I think he reserves his right to object to the suitability of such a procedure depending on how the evidence unfolds. It is my view

that s. 12 of the ***CCAA*** informs any decision the court must make as to the format of a trial and that trial must surely be as the section dictates, a summary trial, unless to do otherwise would be unjust, or there is some other compelling reason against a summary trial. I am not persuaded that this claim cannot be tried summarily on the date reserved in May of this year. The parties have one week to work out an agreement as to a time line for the necessary steps to prepare for that trial, including the exchange of pleadings, disclosure of documents as requested by Tercon, agreed facts, delivery of affidavits, expert reports (including notice of reliance on all or part of the Monitor's reports), delivery and responses to notices to admit, examination for discovery if consented to, and delivery of written arguments. I acknowledge that many of these steps are underway.

17 Mr. Sandrelli says he will now have to marshall all the evidence to prove his claim from ground zero as opposed to simply relying in the first instance on the Monitor's report. As I have said, he may rely on all or part of the Monitor's report. I am not persuaded yet that he cannot marshall his evidence in the time remaining before the May trial date. I will hear submissions on the trial schedule if, by March 21, 2008, the parties have been unable to reach agreement on it. The parties may contact the registry to arrange such a hearing prior to ordinary court hours. Either party has leave to apply to cross-examine the deponent of an affidavit out of court or in court. Either party has leave to apply to convert this summary trial to a conventional trial but I expect the parties to make their best efforts to manage this generally as a summary trial.

18 The parties have each proposed somewhat differing forms of order, concerning various procedural matters relevant to the conduct and hearing of the inter-company claim. Also Mr. Watson, for CN, objects to the following clause proposed by PVC:

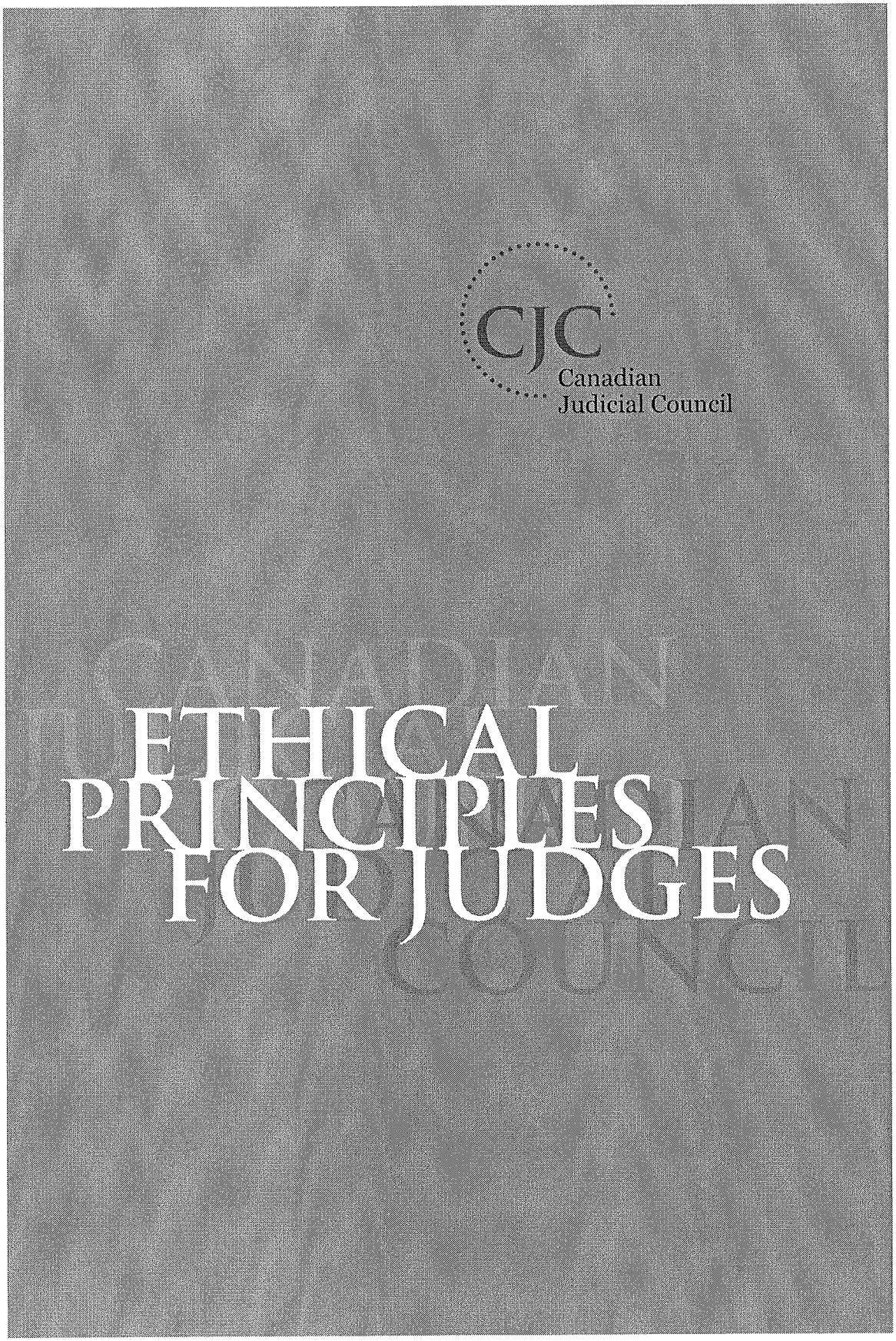
> No other creditor, claimant or counsel therefore shall be entitled to participate by having representation in the proceedings concerning the determination of the Issues and in relation to the claim of PVM against FMC without leave of the Court, which application for leave,if any, shall be made on 4 days' notice to PVM and Tercon by no later than March 31, 2008.

19 Mr. Watson, counsel for CN, one of the creditors, contends that his client should be exempted from the limitation imposed on all other creditors contemplated by this last mentioned clause in the draft order. I agree with Mr. Sandrelli that it is necessary for the orderly conduct of the resolution of the claim that PVM and Tercon have some certainty as to what counsel are involved. On the other hand, CN and Petro-Canada have maintained what I earlier described as an active watching brief on the progress of the inter-company claim resolution. They should have the ability to continue to do so. Their submissions have generally been helpful and consequently I see no prejudice in permitting them to continue in that role, at least until shortly before the hearing. I will leave it to counsel to work out a date by which those two creditors will be barred from seeking leave to participate. I have in mind something like two weeks before the hearing but if counsel cannot agree they may make further submissions on this point.

20 I will leave it to the parties to work out the balance of the terms of the order. They have leave to speak to the matter if those terms cannot be agreed upon.

N.J. GARSON J.

TAB 5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Catalogue Number JU11-4/2004E-PDF
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The following are some general guidelines which may be helpful:

(a) A judge who was in private practice should not sit on any case in which the judge or the judge's former firm was directly involved as either counsel of record or in any other capacity before the judge's appointment.

(b) Where the judge practised for government or legal aid, guideline (a) cannot be applied strictly. One sensible approach is not to sit on cases commenced in the particular local office prior to the judge's appointment.

(c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "cooling off period," often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge and subject to guideline (a) above concerning former clients.

(d) With respect to friends or relatives who are lawyers, the general rule relating to conflicts of interest applies, i.e., that the judge should not sit where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge would not be impartial.

Related issues, requiring similar approaches, may arise in relation to overtures to the judge while still on the bench for post-judicial employment. Such overtures may come from law firms or prospective employers. There is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable, fair minded and informed person considering the matter. A judge should examine such overtures in this light. It should also be remembered that the conduct of former judges may affect public perception of the judiciary.

TAB 6

SBM STATE BAR OF MICHIGAN

NOTE: Various references in this ethics opinion to portions of the Michigan Code of Judicial Conduct are no longer accurate due to amendments effective August 1, 2013. Click here to review language added to (which is underlined) and language stricken from (which is indicated by strikethrough) Canons 2, 4, 5, and 7.

J-4

March 8, 1991

SYLLABUS

A. If within the preceding two years a judge has been a member of the law firm appearing in a matter, the judge is automatically disqualified from the matter, regardless of whether the advocate was a partner or associate of the judge, regardless of whether the advocate was a member of the firm when the judge was a member, and regardless of whether the judge was a member of the firm at the time the judge took judicial office.

When assigned to preside over a matter in which the advocate for a party was a member of a law firm of which the judge was a member within the preceding two years, but which advocate is no longer a member of that firm, the judge shall disclose the former relationship on the record, and recuse from the matter unless the parties and counsel request that the judge proceed to hear the matter. This disqualification is not imputed to other members of a law firm with which the judge has never been associated, and with whom the judge has never been associated.

B. Regular, periodic, or one-time disbursements to a judge from a lawyer or law firm appearing as an advocate in a matter before the judge do not require the judge's automatic disqualification, unless the matter over which the judge presides is a matter which affects the disbursement. The judge should disclose the relationship on the record, and recuse unless the parties ask the judge to proceed.

C. A judge is not automatically disqualified from hearing a case conducted by an unrelated lawyer simply because a relative of the judge within the third degree of consanguinity is a member or employee of the law firm appearing in the case. However, the judge should disclose the relationship on the record, the law firm should disclose whether the judge's relative has participated personally and substantially in the matter, and the judge is recused unless the parties ask the judge to proceed.

D. A judge who is a former city commissioner is disqualified in all matters which came before the city commissioners while the judge served as commissioner, and from matters which arise after the judge resigns as commissioner, if the judge participated personally and substantially in the matters.

References: MCJC 1, 2, 3A(4), 3A(6), 3C, 3D, 5C; MCR 2.003(B); MRPC 1.8(i); JI-6, JI-34; R-3, R-4; RI-11, RI-47; C-216.

CI-282, CI-260, and CI-1095 are superseded; CI-293, CI-890, CI-1079, and C-228 are superseded to the extent that they require automatic disqualification for financial interests.

TEXT

A lawyer who has been elected circuit court judge seeks advice concerning the judge's disqualification from matters in which members of the judge's former law firm appear as advocates for parties, as follows:

1. Is the judge disqualified from presiding over matters in which an *associate* of the judge's former law firm appears, when the associate joined the law firm *after* the judge departed?
2. The judge was a partner in a *predecessor* law firm two months before the judicial election, which law firm "divided" with the judge and other lawyers creating a new firm, while certain partners and associates merged with another existing firm [merged firm]. Is the judge disqualified from presiding over matters in which members of the *predecessor* firm appear, even though the appearing member joined the predecessor firm after the judge departed?
3. Is the judge disqualified from presiding over matters in which members of the merged law firm, of which the judge was never a member, appear?
4. The judge will receive a retirement benefit from the current law firm partners, to be paid out over three years; will the judge be disqualified from presiding over matters in which members of the firm appear for the entire pay-out period?
5. The judge and certain partners of the judge's predecessor law firm, some of whom are current partners of the judge and some of whom joined the merged firm, are partners in a real estate venture which owns the building in which both the judge's current firm and the merged firm are located. Is the judge disqualified from presiding over matters in which the real estate partners appear? In which members of firms of the real estate partners appear?
6. If the real estate interest of the judge is purchased through an agreement whereby the judge will receive payments over time, is the judge disqualified from presiding over matters in which the real estate partners appear during the time the judge is receiving payments? Is the judge disqualified from presiding over matters in which other members of the real estate partners' firms appear?
7. Although the judge is disqualified from presiding over matters in which relatives of the judge within the third degree of consanguinity appear, is the judge disqualified from presiding over cases of other members of the relatives' firms?
8. As a former city commissioner, is the judge disqualified from presiding in pending matters, in which the city is a party, which were pending or impending while the judge was commissioner? Is the judge disqualified from presiding over future matters in which the city is a party and in which the judge had personal and substantial participation as a commissioner?

I. THE DISQUALIFICATION RULE

MCR 2.003(B) states:

> "A judge is disqualified when the judge cannot impartially hear a case, including a proceeding in which the judge
>
> > "(1) is interested as a party;
> >
> > "(2) is personally biased or prejudiced for or against a party or attorney;
> >
> > "(3) has been consulted or employed as an attorney in the matter in controversy;
> >
> > "(4) was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years;
> >
> > "(5) is within the third degree (civil law) of consanguinity or affinity to a person acting as an attorney or within the sixth degree (civil law) to a party;
> >
> > "(6) or the judge's spouse or minor child owns a stock, bond, security, or other legal or equitable interest in a corporation which is a party . . .;
> >
> > "(7) is disqualified by law for any other reason."

MCJC 3C states: "A judge should raise the issue of his disqualification whenever he has cause to believe that he may be disqualified under [MCR 2.003(B)]."

II. DISQUALIFICATION AS MEMBER OF A LAW FIRM REPRESENTING A PARTY WITHIN THE PRECEDING TWO YEARS

1. Is the judge disqualified from presiding over matters in which an *associate* of the judge's former law firm appears, when the associate joined the law firm *after* the judge departed?

2. The judge was a partner in a *predecessor* law firm two months before the judicial election, which law firm "divided," with the judge and other lawyers creating a new firm, while certain partners and associates merged with another existing firm [merged firm]. Is the judge disqualified from presiding over matters in which members of the *predecessor* firm appear, even though the appearing member joined the predecessor firm after the judge departed?

MCR 2.003(B)(4) makes no distinction between partners and associates, between persons who are firm members at the time the judge takes office and those who join the judge's firm later. The prohibition is against the judge presiding over matters brought by a *firm* of which the judge had been a member within the preceding two years.

Therefore, if within the preceding two years the judge has been a member of the law firm appearing in a matter, the judge is automatically disqualified, regardless of whether the advocate was a partner or associate of the judge, regardless of whether the advocate was a member of the firm when the judge was a member, and regardless of whether the judge was a member of the firm at the time the judge took judicial office. See, *e.g.*, CI-282, CI-1079.

Although MCJC 3D allows for remittal of disqualification as provided by court rule, there are no exceptions permitted for this disqualification. In accord, JTC A/O 49.

3. Is the judge disqualified from presiding over matters in which members of the merged law firm, of which the judge was never a member, appear?

In CI-282, a former partner of a judge who had dissolved the partnership prior to the judge's election asked whether the disqualification rule applied. The Committee, applying the existing court rule "The judge shall be deemed disqualified to hear the action when the judge . . . was a partner of a party or attorney within two years next preceding the hearing of the cause . . .," reasoned that the former partner could not appear before the judge within the two year period, since the lawyer had been the judge's law partner. Under the current language of MCR 2.003(B)(4), there is no prohibition for the judge having been *a partner* of a lawyer appearing before the judge; rather the rule seems to apply only to the *law firm of record*. Under the prior court rule it was apparent that a judge could not preside in cases in which a former partner appeared. The phrasing of the current court rule leads to the conclusion that the judge is disqualified if the judge was a partner of a party or if the judge was the lawyer for a party, but not if the judge was a partner of a lawyer for a party. Because of the change in the rule, there appears to be no automatic disqualification of a judge when a former partner appears.

Although there is no automatic disqualification, the judge and the former partners were in fact associated, albeit under a different legal entity, within the preceding two years. The purpose of the two-year disqualification rule is to avoid requiring a party to prove actual bias in cases in which the judge has been recently personally and professionally closely associated with counsel for a party. It is unrealistic to conclude that a judge who recently, *i.e.*, within the preceding two years, shared ethics and malpractice responsibility for the acts and omissions of the advocate, and who benefitted directly or indirectly from the client's business, could put those considerations aside to adequately and impartially hear a matter in which the advocate appears.

The disqualification rule cannot be a tool or strategy that is applied merely on the name of the firm or structural entity, without regard to the actual members of the firm. Thus, a judge should not be able to avoid disqualification under MCR 2.003(B)(4) when the judge's former firm reorganizes, changes names, merges, or divides. On the other hand, the rule was never intended to apply a blanket disqualification tainting every lawyer with whom the judge was professionally connected within the preceding two years. Therefore, when a reorganized or renamed firm is essentially the alter ego of the judge's former firm, the disqualification rule will apply. When the reorganization, dissolution, or other movement of lawyers between firms fundamentally changes the liabilities, obligations, client base, and payment structure from the judge's former firm, the automatic disqualification rule should not apply.

In R-4 we discussed the presumption that partners are privy to confidential information and firm management decisions. The presumption can be rebutted in a particular matter if the partner, in this case the judge, proves that he/she did not have access to confidential information and was screened from participation in the matter.

When assigned to preside over a matter in which the advocate for a party was a member of a law firm of which the judge was a member within the preceding two years, but which advocate is no longer a member of that firm, the judge should disclose the former relationship on the record, and recuse from the matter unless the parties and counsel request that the judge proceed to hear the matter. This disqualification is not imputed to other members of a law firm to which the judge has never been associated, and with whom the judge has never been associated.

CI-282, CI-260, and CI-1095 are hereby superseded as inconsistent with the current rule.

III. DISQUALIFICATION FOR FINANCIAL INTEREST

4. The judge will receive a retirement benefit from the current law firm partners, to be paid out over three years; will the judge be disqualified from presiding over matters in which members of the firm appear for the entire pay-out period?

5. The judge and certain partners of the judge's predecessor law firm, some of whom are current partners of the judge and some of whom joined the merged firm, are partners in a real estate venture which owns the building in which both the judge's current firm and the merged firm are located. Is the judge disqualified from presiding over matters in which the real estate partners appear? In which members of firms of the real estate partners appear?

6. If the real estate interest of the judge is purchased through an agreement whereby the judge will receive payments over time, is the judge disqualified from presiding over matters in which the real estate partners appear during the time the judge is receiving payments? Is the judge disqualified from presiding over matters in which other members of the real estate partners' firms appear?

These questions deal with a judge's disqualification for financial interest. MCJC 5C states in part:

> "(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality or his judicial office, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.
>
> "(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as director, officer, manager, advisor or employee of any business . . . .
>
> "(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that require frequent disqualification."

The periodic payments to the judge from the law firm clearly place the judge in frequent transactions with persons whose interest come before the judge. Therefore, the Committee has consistently held that a judge is precluded from hearing cases involving members of the former firm as long as the judge is receiving payments from the firm on stock, CI-293, purchase of the judge's interest in the firm, CI-1079, or fees for casework, C-228, CI-1079. If the judge is receiving payments from a third party, and not directly from the law firm, the judge would not be disqualified, JI-20.

Thus, if the judge is still receiving buy-out payments after the end of the two year period in MCR 2.003(B)(4), the judge will continue to be disqualified from matters of the firm until the final buy-out payments are paid.

A different approach has traditionally been taken concerning real estate investments, which MCJC 5C(2) explicitly allows as long as the judge does not participate as director or manager. The building ownership is a continuing financial interest of the judge. To the extent that the judge receives income from the real estate venture, the judge would be disqualified from matters in which the real estate partners and their firms appear, CI-890.

As to the law firm/tenants who are not real estate partners, the continuing landlord-tenant relationship clearly involves transactions with lawyers likely to come before the judge's court. In JI-6 we noted that a landlord-tenant relationship between a lawyer and a judge creates the appearance of impropriety, MCJC 2, and reflects adversely on the judge's partiality and the

fairness of the administration of justice, MCJC 1. Although there might not be any actual bias resulting in disqualification under MCR 2.003(B)(2), the relationship casts doubt over the judge's decisions which affect the lessees' ability to regularly pay their lease obligation. For such cases, the reasoning was that the judge should disclose the relationship with the lessee lawyer and recuse unless the parties and their counsel request that the judge continue in the matter, JI-6. This applied to every tenant, not just the lawyer-tenants who share building ownership with the judge. If the landlord-tenant relationship results in frequent disqualification of the judge, the judge must divest the interest, MCJC 5C.

We believe that automatic disqualification for every continuing financial interest, although traditional, is not required under the current Code or court rules. MCR 2.003(B)(6) disqualifies a judge when a member of the judge's immediate family has more than a *de minimis* economic interest in a party; clearly, then the judge's economic connection to an advocate must be more than *de minimis* before automatic disqualification is required. Where the agreement for the financial interest is a contract with the amount due the judge established as a set amount, not subject to contingency or discretion of the judge or the payor, and neither the amount nor the terms of payment are in dispute, the fact of the agreement to pay the judge is not presumptively prejudicial. Regular, periodic, or one-time disbursements to the judge from a lawyer or law firm are not prejudicial unless the matter over which the judge presides is the matter which affects the disbursement.

This approach is consistent with the Committee's approach when the judge's personal counsel appears in an unrelated matter before the judge. In such cases we have considered it sufficient for the judge to disclose the relationship on the record, and to recuse unless the parties ask the judge to proceed. That is the appropriate result in these cases. Further, since the judge's real estate partnership in this case is with individual members of certain tenant law firms, and not with the law firms themselves, disqualification should not be imputed to members of the real estate partners' firms.

Therefore in matters in which the judge has a financial interest with an advocate appearing in the matter, the judge should disclose the relationship on the record and recuse unless the parties ask the judge to proceed.

CI-293, CI-890, CI-1079, and C-228 are superseded to the extent that they require automatic disqualification for financial interests.

IV. DISQUALIFICATION FOR PERSONAL RELATIONSHIP

7. Although the judge is disqualified from presiding over matters in which relatives of the judge within the third degree of consanguinity appear, is the judge disqualified from presiding over cases of other members of the relatives' firms?

MCR 2.003(B)(5) requires automatic disqualification whenever the presiding judge is within the third degree of consanguinity or affinity to a person acting as lawyer for a party. C-216 held that a judge is not automatically disqualified from hearing a case conducted by an unrelated lawyer simply because a relative of the judge within the third degree is a member or employee of the law firm appearing in the case. In accord, R-3; MRPC 1.8(i). However, the judge should disclose that the relative is a member or employee of the law firm appearing in the matter, and the law firm should disclose whether the judge's relative has participated personally and substantially in the matter. The judge is recused unless requested by the parties and their counsel to proceed.

V. DISQUALIFICATION FOR FORMER PUBLIC POSITION

8. As a former city commissioner, is the judge disqualified from presiding in pending matters in which the city is a party which were pending or impending while the judge was commissioner? Is the judge disqualified from presiding over future matters in which the city is a party and in which the judge had personal and substantial participation as a commissioner? For purposes of this issue it is assumed that the judge did not act as lawyer for the city or the city council, but sat on the decision-making board.

MCR 2.003(B)(2) requires disqualification whenever a judge is biased for or against a party. As a member of the city governing board which authorizes litigation, settlements, and sets procedures which may be subject to challenge, a commissioner not only has knowledge but also has been an integral part of the process by which the matters are brought before the courts. While a member of the city governing board, a commissioner is privy to information, advice of counsel, procedures, and other evidence involving matters which come before the courts.

A judge is required to make rulings based solely on the information presented in the matter, and may not rely on information outside the record or become predisposed to a particular position. MCJC 1, 3A(4), 3A(6). In this case the judge would be presiding not only over matters of the city board of which the judge had been a member, but would be asked to review decisions which the judge participated in making. See, RI-47. The judge is clearly disqualified in all matters which came before the city commissioners while the judge served as commissioner.

The judge would also be disqualified from matters which arise after the judge resigns as commissioner, if the judge participated personally and substantially in the matters. See JI-34 and RI-11 for a discussion of "personal and substantial participation" as a public official. Without specific examples of matters which may come before the judge, we cannot provide more explicit guidance.