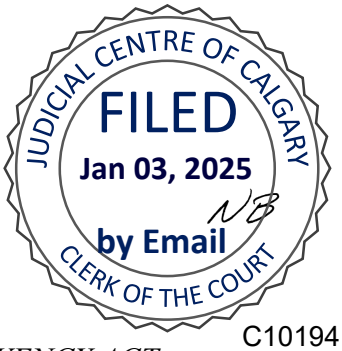

C10194

COURT FILE NO.	B301-163430
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLEO ENERGY CORP.
APPLICANT	CLEO ENERGY CORP.
DOCUMENT	BOOK OF AUTHORITIES OF CLEO ENERGY CORP.
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Gowling WLG (Canada) LLP** 1600, 421 – 7th Avenue S.W. Calgary, AB T2P 4K9 Telephone: (403) 298-1946 / (403) 298-1938 Facsimile: (403) 263-9193 Email: sam.gabor@gowlingwlg.com / tom.cumming@gowlingwlg.com File No. G10010664 **Attention: Sam Gabor / Tom Cumming**

TABLE OF AUTHORITIES

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1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to November 26, 2024

Last amended on June 28, 2024

À jour au 26 novembre 2024

Dernière modification le 28 juin 2024

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

(ii) soit commençant à la date précédant de cinq ans la date de l'ouverture de la faillite et se terminant à la date qui précède d'un jour la date du début de la période visée au sous-alinéa (i) dans le cas où le débiteur :

(A) ou bien était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(B) ou bien avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Établissement des valeurs

(2) Lorsqu'il présente la demande prévue au présent article, le syndic doit déclarer quelle était à son avis la juste valeur marchande des biens ou services ainsi que la valeur de la contrepartie réellement donnée ou reçue par le débiteur, et l'évaluation faite par le syndic est, sauf preuve contraire, celle sur laquelle le tribunal se fonde pour rendre une décision en conformité avec le présent article.

Meaning of *person who is privy*

(3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

R.S., 1985, c. B-3, s. 96; 1997, c. 12, s. 79; 2004, c. 25, s. 57; 2005, c. 47, s. 73; 2007, c. 36, s. 43.

Définition de *personne intéressée*

(3) Au présent article, ***personne intéressée*** s'entend de toute personne qui est liée à une partie à l'opération et qui, de façon directe ou indirecte, soit en bénéficie elle-même, soit en fait bénéficier autrui.

L.R. (1985), ch. B-3, art. 96; 1997, ch. 12, art. 79; 2004, ch. 25, art. 57; 2005, ch. 47, art. 73; 2007, ch. 36, art. 43.

Protected transactions

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Transactions protégées

97 (1) Les paiements, remises, transports ou transferts, contrats, marchés et transactions auxquels le failli est partie et qui sont effectués entre l'ouverture de la faillite et la date de la faillite ne sont pas valides; sous réserve, d'une part, des autres dispositions de la présente loi quant à l'effet d'une faillite sur une procédure d'exécution, une saisie ou autre procédure contre des biens et, d'autre part, des dispositions de la présente loi relatives aux préférences et aux opérations sous-évaluées, les opérations ci-après sont toutefois valides si elles sont effectuées de bonne foi :

a) les paiements du failli à l'un de ses créanciers;

b) les paiements ou remises au failli;

c) les transferts par le failli pour contrepartie valable et suffisante;

d) les contrats, marchés ou transactions — garanties comprises — du failli, ou avec le failli, pour contrepartie valable et suffisante.

Definition of *adequate valuable consideration*

(2) The expression ***adequate valuable consideration*** in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

R.S., 1985, c. B-3, s. 97; 1992, c. 27, s. 41; 1997, c. 12, s. 80; 2004, c. 25, s. 58; 2005, c. 47, s. 74.

Recovering proceeds if transferred

98 (1) If a person has acquired property of a bankrupt under a transaction that is void or voidable and set aside or, in the Province of Quebec, null or annullable and set aside, and has sold, disposed of, realized or collected the property or any part of it, the money or other proceeds, whether further disposed of or not, shall be deemed the property of the trustee.

Trustee may recover

(2) The trustee may recover the property or the value thereof or the money or proceeds therefrom from the person who acquired it from the bankrupt or from any other person to whom he may have resold, transferred or paid over the proceeds of the property as fully and effectually as the trustee could have recovered the property if it had not been so sold, disposed of, realized or collected.

Operation of section

(3) Notwithstanding subsection (1), where any person to whom the property has been sold or disposed of has paid or given therefor in good faith adequate valuable consideration, he is not subject to the operation of this section but the trustee's recourse shall be solely against the person entering into the transaction with the bankrupt for recovery of the consideration so paid or given or the value thereof.

Trustee subrogated

(4) Where the consideration payable for or on any sale or resale of the property or any part thereof remains

Définition de *contrepartie valable et suffisante*

(2) L'expression ***contrepartie valable et suffisante*** à l'alinéa (1)c) signifie une contre-prestation ayant une valeur en argent juste et raisonnable par rapport à celle des biens transmis ou cédés, et, à l'alinéa (1)d), signifie une contre-prestation ayant une valeur en argent juste et raisonnable par rapport aux bénéfices connus ou raisonnablement présumés du contrat, du marché ou de la transaction.

Compensation

(3) Les règles de la compensation s'appliquent à toutes les réclamations produites contre l'actif du failli, et aussi à toutes les actions intentées par le syndic pour le recouvrement des créances dues au failli, de la même manière et dans la même mesure que si le failli était demandeur ou défendeur, selon le cas, sauf en tant que toute réclamation pour compensation est atteinte par les dispositions de la présente loi concernant les fraudes ou préférences frauduleuses.

L.R. (1985), ch. B-3, art. 97; 1992, ch. 27, art. 41; 1997, ch. 12, art. 80; 2004, ch. 25, art. 58; 2005, ch. 47, art. 74.

Recouvrement du produit s'il a été transféré

98 (1) Lorsqu'une personne a acquis des biens du failli en vertu d'une transaction qui est nulle ou d'une transaction annulable qui est écartée, et a vendu, aliéné, réalisé ou perçu ces biens, ou une partie de ces biens, les montants d'argent ou autre produit, qu'ils soient de nouveau aliénés ou non, sont réputés être les biens du syndic.

Le syndic peut recouvrer

(2) Le syndic peut recouvrer ces biens ou leur valeur, ou l'argent ou le produit en provenant, de la personne qui les a acquis du failli, ou de toute autre personne à qui le failli peut avoir revendu, transféré ou versé le produit de ces biens, d'une manière aussi complète et efficace que le syndic aurait pu recouvrer ces biens s'ils n'avaient pas été ainsi vendus, aliénés, réalisés ou perçus.

Application du présent article

(3) Nonobstant le paragraphe (1), lorsqu'une personne à qui ces biens ont été vendus ou aliénés a payé ou donné de bonne foi à leur égard une contrepartie valable et suffisante, cette personne n'est pas assujettie à l'application du présent article, mais le syndic n'a recours que contre la personne qui a conclu cette transaction avec le failli en vue du recouvrement de la contrepartie ainsi versée ou donnée, ou de la valeur de celle-ci.

Subrogation du syndic

(4) Lorsque la contrepartie payable pour ou sur toute vente ou revente des biens, ou d'une partie de ces biens,

Certificate where proposal performed

65.3 Where a proposal is fully performed, the trustee shall give a certificate to that effect, in the prescribed form, to the debtor and to the official receiver.

1992, c. 27, s. 30.

Certificat d'exécution

65.3 En cas d'exécution intégrale de la proposition, le syndic remet, en la forme prescrite, un certificat à cet effet au débiteur et au séquestre officiel.

1992, ch. 27, art. 30.

Act to apply

66 (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

Application de la présente loi

66 (1) Toutes les dispositions de la présente loi, sauf la section II de la présente partie, dans la mesure où elles sont applicables, s'appliquent, compte tenu des adaptations de circonstance, aux propositions faites aux termes de la présente section.

Assignments

(1.1) For the purposes of subsection (1), in deciding whether to make an order under subsection 84.1(1), the court is to consider, in addition to the factors referred to in subsection 84.1(3), whether the trustee approved the proposed assignment.

Cession

(1.1) Pour l'application du paragraphe (1), le tribunal, pour décider s'il rend l'ordonnance visée au paragraphe 84.1(1), prend en considération, en plus des facteurs visés au paragraphe 84.1(3), l'acquiescement du syndic au projet de cession, le cas échéant.

Final statement of receipts and disbursements

(1.2) For the purposes of subsection (1), the trustee is to prepare the final statement of receipts and disbursements referred to in section 151 without delay after

(a) the debtor files or is deemed to have filed an assignment;

(b) the trustee informs the creditors and the official receiver of a default made in the performance of any provision in a proposal; or

(c) the trustee gives the certificate referred to in section 65.3 in respect of the proposal.

État définitif des recettes et des débours

(1.2) Pour l'application du paragraphe (1), le syndic prépare l'état définitif des recettes et des débours visé à l'article 151 sans délai après :

a) le dépôt — effectif ou présumé — par le débiteur d'une cession de ses biens;

b) avoir informé les créanciers et le séquestre officiel qu'il y a défaut d'exécution d'une des dispositions de la proposition;

c) avoir remis le certificat prévu à l'article 65.3 relativement à la proposition.

Examination by official receiver

(1.3) For the purposes of subsection (1), the examination under oath by the official receiver under subsection 161(1) is to be held — on the attendance of the person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) — before the proposal is approved by the court or the person becomes bankrupt.

Interrogatoire par le séquestre officiel

(1.3) Pour l'application du paragraphe (1), l'interrogatoire prévu au paragraphe 161(1) a lieu lorsque la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) se présente devant le séquestre officiel, avant l'approbation de la proposition par le tribunal ou sa mise en faillite.

Division to be applied conjointly with other Acts

(1.4) The provisions of this Division may be applied together with the provisions of an Act of Parliament, or of the legislature of a province, that authorizes or provides for the sanction of compromises or arrangements between a corporation and its shareholders or any class of its shareholders.

Application concurrente

(1.4) Les dispositions de la présente section peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale autorisant ou prévoyant l'homologation de transactions ou d'arrangements entre une personne morale et ses actionnaires ou une catégorie de ceux-ci.

Property included for enforcement purposes

(15) For the purpose of this section, a requirement that a bankrupt pay an amount to the estate is enforceable against the bankrupt's total income.

When obligation to pay ceases

(16) If an opposition to the automatic discharge of a bankrupt individual who is required to pay an amount to the estate is filed, the bankrupt's obligation under this section ceases on the day on which the bankrupt would have been automatically discharged had the opposition not been filed, but nothing in this subsection precludes the court from determining that the bankrupt is required to pay to the estate an amount that the court considers appropriate.

R.S., 1985, c. B-3, s. 68; 1992, c. 27, s. 34; 1997, c. 12, s. 60; 2005, c. 47, s. 58; 2007, c. 36, s. 33.

Assignment of wages

68.1 (1) An assignment of existing or future wages made by a debtor before the debtor became bankrupt is of no effect in respect of wages earned after the bankruptcy.

Assignment of book debts

(2) An assignment of existing or future amounts receivable as payment for or commission or professional fees in respect of services rendered by a debtor who is an individual before the debtor became bankrupt is of no effect in respect of such amounts earned or generated after the bankruptcy.

1992, c. 27, s. 35; 1997, c. 12, s. 61; 2005, c. 47, s. 59.

Stay of Proceedings

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

Biens pouvant faire l'objet d'une exécution

(15) Pour l'application du présent article, la somme à verser à l'actif de la faillite peut être recouvrée par voie d'exécution contre le revenu total du failli.

Cessation des versements

(16) L'obligation du failli qui est une personne physique de faire des versements à l'actif de la faillite au titre du présent article cesse, en cas d'opposition à sa libération d'office, le jour où il aurait été libéré n'eût été l'avis d'opposition, rien n'empêchant toutefois le tribunal de reconduire l'obligation pour la somme qu'il estime indiquée.

L.R. (1985), ch. B-3, art. 68; 1992, ch. 27, art. 34; 1997, ch. 12, art. 60; 2005, ch. 47, art. 58; 2007, ch. 36, art. 33.

Cession de salaire

68.1 (1) La cession de salaires présents ou futurs faite par le débiteur avant qu'il ne devienne un failli est sans effet sur les salaires gagnés après sa faillite.

Cession de créances comptables

(2) La cession de sommes — échues ou à percevoir — à titre de paiement, de commission ou d'honoraires professionnels pour la prestation de services, faite par un débiteur qui est une personne physique avant qu'il ne fasse faillite, est sans effet sur les sommes de même provenance qui sont gagnées après sa faillite.

1992, ch. 27, art. 35; 1997, ch. 12, art. 61; 2005, ch. 47, art. 59.

Suspension des procédures

Suspension des procédures en cas d'avis d'intention

69 (1) Sous réserve des paragraphes (2) et (3) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt par une personne insolvable d'un avis d'intention aux termes de l'article 50.4 et la date du dépôt, aux termes du paragraphe 62(1), d'une proposition relative à cette personne ou la date à laquelle celle-ci devient un failli :

a) les créanciers n'ont aucun recours contre la personne insolvable ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

b) est sans effet toute disposition d'un contrat de garantie conclu entre la personne insolvable et un créancier garanti qui prévoit, pour l'essentiel, que celle-ci, dès qu'elle devient insolvable, qu'elle manque à un engagement prévu par le contrat de garantie ou qu'elle

(iii) the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial 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,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

dépose un avis d'intention aux termes de l'article 50.4, est déchue des droits qu'elle aurait normalement de se servir des avoirs visés par le contrat de garantie ou de faire d'autres opérations à leur égard;

c) est suspendu l'exercice par Sa Majesté du chef du Canada des droits que lui confère l'une des dispositions suivantes à l'égard de la personne insolvable, lorsque celle-ci est un débiteur fiscal visé à cette disposition :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui, à la fois :

(A) renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(B) prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

d) est suspendu l'exercice par Sa Majesté du chef d'une province des droits que lui confère toute disposition législative provinciale à l'égard d'une personne insolvable, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est ***une province instituant un régime général de pensions*** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un ***régime provincial de pensions*** au sens de ce paragraphe.

shall be valued by the court and shall be paid in cash on approval of the proposal.

R.S., 1985, c. B-3, s. 65; 2004, c. 25, s. 35(F).

ou contribution par les créanciers doit stipuler que la réclamation de tout créancier qui décide de ne pas participer à la proposition sera évaluée par le tribunal et payée en espèces lors de l'approbation de la proposition.

L.R. (1985), ch. B-3, art. 65; 2004, ch. 25, art. 35(F).

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Limitation de certains droits

65.1 (1) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit de résilier ou de modifier un contrat — notamment de garantie — conclu avec cette personne ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif que la personne en question est insolvable ou qu'un avis d'intention ou une proposition a été déposé à son égard.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

"(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed."

Idem

(2) Lorsque le contrat visé au paragraphe (1) est un bail ou un accord de licence, l'interdiction prévue à ce paragraphe vaut également, avec les mêmes modalités, dans le cas où la personne insolvable n'a pas payé son loyer ou ses redevances, selon le cas, ou n'a pas effectué quelque autre paiement de nature semblable à l'égard d'une période antérieure au dépôt de l'avis d'intention ou, à défaut d'avis d'intention, de la proposition.

Idem

(3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

Idem

(3) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès de cette personne au seul motif qu'elle est insolvable, qu'un avis d'intention ou une proposition a été déposé à son égard ou qu'elle n'a pas payé certains services rendus, ou du matériel fourni, avant le dépôt de l'avis d'intention ou, à défaut d'avis d'intention, de la proposition.

Certain acts not prevented

(4) Nothing in subsections (1) to (3) shall be construed

Exceptions

(4) Les paragraphes (1) à (3) n'ont pas pour effet :

Tab

2

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to November 26, 2024

Last amended on April 27, 2023

À jour au 26 novembre 2024

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

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.

la *Loi sur la faillite et l'insolvabilité*, établi par preuve de la même manière qu'une réclamation non garantie sous le régime de l'une ou l'autre de ces lois, selon le cas, et, s'il s'agit de toute autre compagnie, il est déterminé par le tribunal sur demande sommaire de celle-ci ou du créancier.

Admission of claims

(2) 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.

R.S., 1985, c. C-36, s. 20; 2005, c. 47, s. 131; 2007, c. 36, s. 70.

Admission des réclamations

(2) Malgré le paragraphe (1), la compagnie peut admettre le montant d'une réclamation aux fins de votation sous réserve du droit de contester la responsabilité quant à la réclamation pour d'autres objets, et la présente loi, la *Loi sur les liquidations et les restructurations* et la *Loi sur la faillite et l'insolvabilité* n'ont pas pour effet d'empêcher un créancier garanti de voter à une assemblée de créanciers garantis ou d'une catégorie de ces derniers à l'égard du montant total d'une réclamation ainsi admis.

L.R. (1985), ch. C-36, art. 20; 2005, ch. 47, art. 131; 2007, ch. 36, art. 70.

Law of set-off or compensation to apply

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

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

Compensation

21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas.

1997, ch. 12, art. 126; 2005, ch. 47, art. 131.

Classes of Creditors

Company may establish classes

22 (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

Catégories de créanciers

Établissement des catégories de créanciers

22 (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

a) la nature des créances et obligations donnant lieu à leurs réclamations;

b) la nature et le rang de toute garantie qui s'y rattache;

c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

Tab

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2015 BCSC 1382
British Columbia Supreme Court

North American Tungsten Corp., Re

2015 CarswellBC 2287, 2015 BCSC 1382, [2015] B.C.W.L.D. 6414, 257 A.C.W.S. (3d) 766, 28 C.B.R. (6th) 147

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of North American Tungsten Corporation Ltd. Petitioner

Butler J.

Heard: July 27, 30, 2015
Judgment: July 30, 2015 *
Docket: Vancouver S154746

Counsel: John R. Sandrelli, Jordan D. Schultz for Petitioner
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William E.J. Skelly for Callidus Capital Corporation
H. Lance Williams for Government of Northwest Territories
Angela L. Crimenim, David Brown for Wolfram Bergbau and Hütten AG
Kieran E. Siddall, Scott Boucher for Global Tungsten and Powders Corp.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.v Set-off
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Set-off
Initial order was made under Companies' Creditors Arrangement Act (CCAA) concerning company, NATC — NATC entered into supply agreement and loan agreement with company GTP, with indebtedness under loan agreement being secured by security agreement on all property connected with mine — GTP gave notice to NATC that it would set off amounts owing under loan agreement against payments due as result of post-filing deliveries of material — NATC brought application for declaration that GTP was in breach of stay provisions of amended initial order, and for injunction to permanently restrain GTP from exercising rights of set off — GTP brought application for declaration that it has valid rights of set off — NATC's application granted in part; GTP's application dismissed — Case law determined that enforcement of set off rights should await outcome of restructuring process, and that temporal stay of rights could be granted to further purpose of initial order and purposes of CCAA — Temporal stay of GTP's set off rights was to continue as long as stay granted by initial order continued.
Table of Authorities
Cases considered by *Butler J.*:
Air Canada, Re (2003), 2003 CarswellOnt 4016, 45 C.B.R. (4th) 13, 39 B.L.R. (3d) 153 (Ont. S.C.J. [Commercial List]) — considered
Tucker v. Aero Inventory (UK) Ltd. (2009), 2009 CarswellOnt 7007 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 21 — considered

APPLICATION by company under creditor protection for declaration that creditor was in breach of stay provisions of amended initial order, and for injunction to permanently restrain creditor from exercising rights of set off; APPLICATION by creditor for declaration that it had valid rights of set off.

Butler J. **(orally):**

1 I am ruling on the applications I have heard on July 27 and today. As always, if anyone should order the transcript, I reserve the right to amend it. In this case, I also reserve the right to add to it as, unfortunately, I have not been able to include all of the information and case references that have been advanced in argument.

2 There are two competing applications before me dealing with a claimed right of set-off in favour of Global Tungsten and Powders Corp. ("GTP"). The applications are brought in the context of the orders I have made in this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, dealing with the company, North American Tungsten Corporation ("NATC"). In particular, the applications concern the terms contained in the amended and restated initial order.

3 The relevant facts are well-known to the parties, but I will summarize them briefly. NATC produces tungsten from its Cantung Mine and sells the product to two purchasers, one of which is GTP. Pursuant to a supply agreement, NATC annually supplies a specified quantity of tungsten concentrate to GTP. At the same time the parties entered into the supply agreement, they entered into a loan agreement. The indebtedness under the loan agreement is secured by a security agreement on all property connected with the Mactung Mine. As of filing, the indebtedness under the loan agreement was well in excess of $4 million. It is approximately $4.4 million.

4 Since the filing, NATC has continued to supply GTP with tungsten pursuant to the supply agreement. The payment terms require payment within 30 days. For a period after filing, GTP continued to make payments when due. On July 22, it gave notice to NATC that it would set off amounts owing under the loan agreement against payments due as a result of post-filing deliveries of tungsten. NATC then brought this application for a declaration that GTP was in breach of the stay provisions of the amended initial order, and for an order that GTP pay amounts due. It also sought an injunction to permanently restrain GTP from exercising rights of set-off.

5 GTP opposes that application and brought an application in response seeking a declaration that it does have a valid right of set-off with respect to amounts it owes NATC under the supply agreement against amounts owed by NATC to GTP under the loan agreement.

6 On July 27, 2015, I heard part of the application by telephone. I made an order declaring that GTP was in breach of the stay provisions of the amended initial order and required it to pay for tungsten delivered to it after June 9, 2015. I found that GTP was not in contempt of the amended original order as asserted by NATC, and I indicated that I would hear more fulsome argument on both applications today. I have done that, and have also considered the application brought by GTP today asking that I reconsider the order of July 27, 2015.

Ruling

27 In my view, that is an illusory prejudice. GTP's position post-filing has not been prejudiced in any way. It is able to purchase tungsten for which it must pay the going rate. Its financial situation, by having to pay for purchases, is exactly what it would be if it had to go to another source for tungsten. In other words, if NATC had ceased production, rather than the initial order being made, GTP's situation would be no different than it is under the temporal stay. This is not a prejudice which, in my view, has any significance.

28 GTP also argues that I cannot grant a temporal stay now that the set-off claims have been determined in the sense that I have concluded that mutuality is not affected by the initial order. I see no reason in principle on a reading of s. 21 of the *Act* as to why there cannot be such a stay. All creditors' claims are stayed, subject to the exceptions set out in s. 11.02. Section 21, as I read it, does not exempt set-off claims from stays, determined or not. It merely confirms the rights of set-off. Exempting set-off claims would not accord with the policy of the *Act*. Sections 11 and 11.02 of the *Act* give the Court a very broad discretion which must be exercised in furtherance of *CCAA* purposes. Quite simply, it would be illogical if the Court had the discretion to broadly stay claims and proceedings and make relevant ancillary orders necessary to further the purpose of the *Act* and the purpose of the initial order, but could not do so with regard to set-off claims.

29 Of course, the application here is made in the context of the amended initial order. That order must be considered in relation to all of the facts and circumstances. I ruled, on July 27, 2015, that the purported set-off was in breach of that order. As I indicated, the terms of para. 16 of the amended initial order are broad enough to include a stay of the remedy of set-off.

30 GTP relies in part on para. 10(d) of the amended initial order and that reads as follows:

> 9. Except as specifically permitted herein the petitioner is directed until further Order of this Court
>
> (d) to not grant credit except in the ordinary course of the Business only to its customers for goods and services actually supplied to those customers, provided such customers agree that there is no right of set-off in respect of amounts owing for such goods and services against any debt owing by the Petitioner to such customers as of the Order Date.

31 I do not read that term as supportive of GTP's position. NATC could not grant credit to GTP without its agreement. GTP says that it was up to NATC to either come to it and get agreement or go to the court and get agreement, but I take a different view. Given the stay provision of para. 16 of the initial order, the remedy of set-off was stayed. If there was any ambiguity in light of the provisions of para. 10(d), there was an obligation on the part of GTP to get the approval or consent of the petitioner and the monitor to apply the set-off or, alternatively, to come to court. Of course, this is precisely what para. 16 of the initial order requires GTP to do.

32 Finally, I have concluded that I will exercise my discretion to continue the stay with respect to the set-off claims. I am doing so because:

> 1. In order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential.
>
> 2. The amended initial order and the extension order were based on a detailed program. I need not highlight all of the aspects of it, but these included a reduction in the underground mining, cost cutting, disposal of equipment, and an orderly closure and maintenance of the Cantung Mine, all of which was predicated on cash flow. The cash flow was based on the continuation of the two supply agreements. Obviously, that would be thrown into disarray if the stay was not continued.
>
> 3. GTP had notice of all steps which had been taken along the way and was indeed actively consulted. It never raised any issue about set-off for 45 days following the initial order. Indeed, its only position was that assets should be put up for sale. It said nothing about exercising its right of set-off with respect to pre-filing debt.
>
> 4. Great prejudice to the other stakeholders would flow if GTP was now permitted to exercise its set-off. The status quo would be significantly altered and the restructuring would effectively be at an end. I accept that Callidus would very likely not extend any further credit at this point.

Tab

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2021 ONSC 1793
Ontario Superior Court of Justice [Commercial List]

Re Just Energy Corp.

2021 CarswellOnt 3724, 2021 ONSC 1793, 331 A.C.W.S. (3d) 418

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGYMASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUSTENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT. (Applicants)

Koehnen J.

Heard: March 9, 2021
Judgment: March 9, 2021
Docket: CV-21-00658423-00CL

Counsel: Marc Wasserman, Michael De Lellis, Jeremy Dacks, Shawn Irving, Waleed Malik, David Rosenblatt, Justine Erickson, for Applicants
Robert Thornton, Rebecca Kennedy, Rachel Bengino, Puya Fesharaki, Paul Bishop, Jim Robinson, for Proposed Monitor
Scott Bomhof, for Term Loan Lenders
Heather Meredith, James D. Gage, for Credit Facility Lenders
Ryan Jacobs, Jane Dietrich, Michael Wunder, for DIP Lender
Howard Gorman, for Shell
Robert Kennedy, Kenneth Kraft, for BP
Paul Bishop, Jim Robinson — Proposed Monitor
Brian Schartz, Mary Kogut Brawley (US counsel), for Applicants
Chad Nichols, David Botter (U.S. counsel), for DIP Lender
Kelli Norfleet (U.S. counsel), for BP

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.d Miscellaneous
Judges and courts
XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Circumstances facing applicant were precisely sort for which CCAA was appropriate, namely, sudden, unexpected liquidity crisis, brought on by action of others, which actions may still be rescinded — Without stay applicant faced almost certain bankruptcy with loss of approximately 1,000 jobs and possibility that good part of debt it owed would not be repaid — Those catastrophic consequences may be avoidable if applicant succeeded in its appeal of Texas price increases and if all players were given adequate time to find solutions in more orderly fashion than weather crisis allowed them to — Ontario was centre of main interest (COMI) for CCAA proceeding as its registered office was in Toronto, and no other evidentiary factors displaced presumption of registered office being COMI — Applicant met insolvency requirements of CCAA as its liabilities exceeded $5 million, its liabilities exceeded value of its assets, it would imminently cease to be able to meet its obligations as they became due, and it would run out of liquidity soon — Proposed DIP financing was approved as although amount was high, it was necessary for applicant to remain viable, and its secured creditors did not oppose DIP — Commodity suppliers and ISO service providers who signed qualified service agreements would benefit from charge — Administrative, financial advisor and directors and officers charges were granted as applicant's business was large and complex, and no CCAA proceeding could advance without monitor or counsel, and addition of financial advisor appeared to be prudent step — Bonus payments were not approved on initial order.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Applicant was acting in good faith and with diligence — Granting 10-day stay against regulatory conduct was consistent with remedial purpose of CCAA to avoid social and economic losses resulting from liquidation of insolvent company — CCAA automatically stayed enforcement of any payments of money ordered by regulator, but it did not automatically stay other steps that regulator may take against regulated entity — Court may stay such other steps if it was of view that failure to stay those other steps meant that viable compromise or arrangement could not be made, as long as additional stay was not contrary to public interest — It was appropriate to stay exercise of other regulatory powers against applicant for at least interim 10- day period — It would be unjust to take regulatory steps that might shut down entire business when financial concerns that prompted those steps may turn out to be unjustified if Texas regulators adjusted some or all of price increases imposed during storm —

Foreign regulator was not "regulatory body" within plain meaning of s. 11.1(1) of CCAA, it did not benefit from same exemption from stay as Canadian regulator, and foreign regulator was presumptively subject to stay with respect to matters that fell within jurisdiction of Canadian CCAA court — Set off rights of banks which may allow them to sweep accounts were stayed, as that would give them preferred position over other creditors and deprive applicant of working capital, which was contrary to remedial purposes of CCAA — On its face CCAA applied to corporations, but where operations of partnerships were integral and closely related to applicant, court had jurisdiction to extend protection of stay to partnerships to ensure purposes of CCAA could be achieved — It would be illusory here to grant stay in favour of applicant's corporate entities but not extend its benefit to its partnership entities, and non-corporate entities were captured by stay .

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Applicant met test for sealing order — Materials contained commercially sensitive information and/or personal information — Order was necessary to prevent serious risk to important personal or commercial interest, and benefits of sealing order outweighed rights of others to fair determination of issues — No one advanced any need to see information that was proposed to be sealed, and there was no need for anyone to access such information in order to assert their rights fully within proceeding.

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Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — referred to

Clover Leaf Holdings Company, Re (2019), 2019 ONSC 6966, 2019 CarswellOnt 20001, 75 C.B.R. (6th) 124 (Ont. S.C.J. [Commercial List]) — referred to

Laurentian University of Sudbury (2021), 2021 ONSC 659, 2021 CarswellOnt 1224, 87 C.B.R. (6th) 278 (Ont. S.C.J.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Lydian International Limited (Re) (2019), 2019 ONSC 7473, 2019 CarswellOnt 21645, 75 C.B.R. (6th) 314 (Ont. S.C.J. [Commercial List]) — considered

Massachusetts Elephant & Castle Group Inc., Re (2011), 2011 ONSC 4201, 2011 CarswellOnt 6610, 81 C.B.R. (5th) 102 (Ont. S.C.J.) — referred to

Miniso International Hong Kong Limited v. Migu Investments Inc. (2019), 2019 BCSC 1234, 2019 CarswellBC 2208, 71 C.B.R. (6th) 250 (B.C. S.C.) — referred to

Mountain Equipment Co-Operative (Re) (2020), 2020 BCSC 1586, 2020 CarswellBC 2639, 83 C.B.R. (6th) 272 (B.C. S.C.) — referred to

Nortel Networks Corp., Re (2010), 2010 ONSC 1304, 2010 CarswellOnt 1597, 65 C.B.R. (5th) 231 (Ont. S.C.J. [Commercial List]) — referred to

North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — considered

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Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

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Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — followed

4519922 Canada Inc., Re (2015), 2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 15 — referred to

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

Generally — referred to

s. 2 "insolvent person" — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 192 — referred to

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

Generally — considered

s. 2(1) "debtor company" (a) — referred to

s. 3(1) — pursuant to

s. 11 — pursuant to

s. 11.1(1) "regulatory body" [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — referred to

s. 11.1(3) [en. 1997, c. 12, s. 124] — pursuant to

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — referred to

s. 11.2(5) [en. 2005, c. 47, s. 128] — considered

s. 21 — considered

s. 34(1) — referred to

two days. In certain cases, Just Energy uses and ISO Service Provider to act as the front facing entity to the regulator. In those cases, ERCOT sends its invoice to the ISO Service Provider who is obliged to pay within two days. The ISO Service Provider then looks to Just Energy for payment but gives Just Energy extended time to pay, say for example 30 days. In effect, the ISO Service Provider is providing Just Energy with working capital and liquidity.

93 Just Energy has received advice to the effect that these arrangements amount to Eligible Financial Contracts under the *CCAA*. This poses a challenge because Eligible Financial Contracts are not subject to the prohibition on the exercise of termination rights under the *CCAA*. [17] Since the parties to Eligible Financial Contracts cannot be prevented from terminating, Just Energy is of the view that counterparties to those contracts must be given incentives to continue to provide power supply and financial services. The proposed incentive takes the form of a charge in favour of those counterparties that continue to provide commodities or services to Just Energy.

94 Shell and BP, the two largest commodity and ISO Service Providers, have already entered into such arrangements. The proposed order would allow any other commodity provider or ISO Service Provider to enter into a similar arrangement with Just Energy and benefit from a similar charge.

95 No one has challenged that analysis for today's purposes and no one opposes the proposed charges. Given the possibility of mischief in the absence of such charges and given that the relief today is sought for only 10 days, in my view it would be preferable to offer the protection of the charges as requested.

96 I note that in certain circumstances, the court can compel commodity and service providers to continue supplying a *CCAA* debtor. I am, however, somewhat reluctant to use those provisions given that the suppliers and service providers in question are part of a highly regulated, interwoven industry. Compelling a supplier in such an industry to continue to provide supply or services may well infringe on the regulators' objective of maintaining a financially sound electrical market. Given the urgency with which the application arose, it is preferable to provide financial incentives to such parties and not risk imperiling the financial stability of other regulated actors by forcing them to supply.

97 This court has already observed in the past that the availability of critical supplier provisions under the *CCAA* does not oust the court's jurisdiction under section 11 to make any other order it considers appropriate. [18]

98 The proposed charges would rank either *pari passu* with the DIP or immediately below it, depending on the nature of the transaction. Although Just Energy's secured creditors were present at today's hearing, they did not object to the proposed charges.

99 Certain prefiling obligations such as tax arrears could result in directors of Just Energy being held personally liable. The company seeks authorization to make prefiling payments with that sort of critical character that are integral to its ability to operate. In the absence of any objection, that relief is granted.

F. Should Set off Rights to Be Stayed?

100 As part of the stay, Just Energy seeks an order precluding financial institutions from exercising any "sweep" remedies under their arrangements with Just Energy.

101 The concern is that the financial institutions would empty Just Energy's accounts by reason of a claim to a right of set off. Exercise of such rights would effectively undermine any reorganization by depriving Just Energy of working capital and thereby impairing its business.

102 Although s. 21 of the CCAA preserves rights of set-off, the Court may defer the exercise of those rights. Section 21 does not exempt set-off rights from the stay. This differs from other provisions of the *CCAA*, which provide that certain rights are immune from the stay. [19] As Savage J.A. of the British Columbia Court of Appeal observed, the broad discretion accorded to the *CCAA* Court to make orders in furtherance of the objectives of the statute must, as a matter of logic, extend to set-off. [20]

Tab

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2022 ONSC 4617
Ontario Superior Court of Justice

Carillion Canada Inc.

2022 CarswellOnt 12891, 2022 ONSC 4617, 2022 A.C.W.S. 3680, 2 C.B.R. (7th) 68

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 CARILLION CANADA HOLDINGS INC., CARILLION CANADA INC., CARILLION CANADA FINANCE CORP., CARILLION CONSTRUCTION INC., CARILLION PACIFIC CONSTRUCTION INC., CARILLION SERVICES INC., CARILLION SERVICES (FSCC) INC., BEARHILLS FIRE INC., OUTLAND CAMPS INC., OUTLAND RESOURCES INC., ROKSTAD POWER GP INC., 0891115 B.C. LTD., GOLDEN EARS PAINTING & SANDBLASTING LTD., PLOWE POWER SYSTEMS LTD., AND CARILLION GENERAL PARTNER (B.C.) LIMITED (Applicants)

G.B. Morawetz C.J. Ont. S.C.J.

Heard: May 12, 2022
Judgment: September 2, 2022
Docket: CV-18-590812-00CL

Counsel: Monique Jilesen, Madison Robins, Laura Cobb, for Carillion Canada Inc.
Mark A. Freake, John J. Salmas, for HSBC Canada
Carlo Di Carlo, for Monitor, Ernst & Young Inc.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Proceedings subject to stay
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Set-off
Debtor commenced liquidation proceedings and applied for protection under Companies' Creditors Arrangement Act ("CCAA") — Debtor continued to use operating account with bank for day-to-day business expenses overseen by monitor — Prior to initial order, bank had contractual set-off rights and initial order temporally stayed bank from exercising its rights of contractual set-off — After initial order, bank paid out $6.8 million for letters of credit without seeking leave from court to debit funds — Bank was aware of CCAA proceeding and stay provisions in initial order when it exercised set-off — Debtor brought motion for order directing bank to return funds and declaration that bank be prohibited from exercising set-off rights — Motion dismissed — Bank was entitled to retain $6.8 million as valid set-off as against debtor — Bank's exercise of set-off breached initial order and required leave to exercise its right of set-off, but bank's set-off rights were pre-pre-set-off rights that were preserved pursuant to s. 21 of CCAA — There was no prohibition to restrict the funds in operating account from being available for set-off purposes — Although bank knowingly breached initial order by unilaterally exercising set-off rights, it did not result in prejudice to other unsecured creditors — Recovery of unsecured creditors was dependent upon whether bank's set-off rights were preserved pursuant to s. 21 of CCAA.
Table of Authorities
Cases considered by *G.B. Morawetz C.J. Ont. S.C.J.*:

Montréal (Ville) c. Restructuration Deloitte Inc. (2021), 2021 SCC 53, 2021 CSC 53, 2021 CarswellQue 18528, 2021 CarswellQue 18529, 94 C.B.R. (6th) 1, 463 D.L.R. (4th) 657 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

s. 19 — referred to

s. 19(1) — referred to

s. 21 — referred to

MOTION by debtor for order directing bank to return funds and declaration that bank be prohibited from exercising set-off rights.

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 This motion was first argued before Hainey J. on July 15, 2020. His decision remained under reserve at the time of his passing and was re-argued before me.

2 Carillion Canada Inc. ("CCI") brings this motion for an order directing HSBC Bank Canada ("HSBC") to return or make payment of $6,823,000 to CCI or the Monitor, and a declaration that HSBC is prohibited from exercising any rights against CCI to set-off, indemnification, damages, reimbursement or otherwise sweep or debit CCI's bank accounts during the CCAA Stay Period.

FACTS

3 On January 15, 2018, Carillion plc commenced liquidation proceedings in the United Kingdom. As a result of cash flow issues associated with the liquidation of its UK parent, CCI and its related companies (the "Applicants" or "Carillion Canada Group"), applied on January 25, 2018 for protection under the Companies' CreditorsArrangement Act (“CCAA”) (the "CCAA Proceeding").

4 Prior to the commencement of the liquidation proceedings of Carillion plc, the Carillion Canada Group and other global Carillion entities were part of a Global Cash Concentration Arrangement with HSBC UK, whereby all cash was swept on a daily basis to a CCI bank account with HSBC UK, resulting in a zero dollar balance at the start of every day in the Canadian bank accounts of the Carillion Canada Group.

5 The Carillion Canada Group terminated its participation in the Global Cash Concentration Arrangements immediately upon Carillion plc's liquidation. In conjunction, HSBC cancelled the overdraft facility on which CCI relied for liquidity.

6 The initial order (the "InitialOrder”) in the CCAA Proceeding appointed Ernst & Young Inc. ("EY") as the Monitor. The Initial Order contained a number of provisions which affected the Carillion Canada Group's operations during the period of CCAA protection (the "Stay Period"), including:

(a) a defined Stay prohibiting any person or entity from "exercising any option, right or remedy or taking any enforcement steps under or in respect of any agreement or agreements with respect to which any of the Applicants are party, borrower, principal obligor or guarantor";

(b) a Non-Derogation of Rights provision which required persons who "provided any kind of letter of credit" for the benefit of the Carillion Canada Group before the date of the Initial Order to "continue honouring" these assurances "in accordance with their terms";

> "Pre-filing Claim" means any Claim of any Person in whole or in part against the Applicants that (A) is based in whole or in part on facts existing prior to the Filing Date, (B) relates to a time period prior to the Filing Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA had the Applicants become bankrupt on the Filing Date and includes an Equity Claim and a Secured Claim.

62 HSBC submits that the rights and claims of HSBC and CCI connection with the letters of credit and indemnity agreements satisfy each of (A), (B) and (C).

63 The legal argument of HSBC is further developed commencing at paragraph 10 of the supplementary factum.

> 10. HSBC issued the Letters of Credit between 2002 and 2009 and CCI executed the Indemnity Agreements, . . . during the same time period. As such, the rights, obligations and liabilities of each of HSBC Canada and CCI arose between nine and 16 years before the Filing Date and relate to facts existing prior to the Filing Date, even if such rights, obligations and liabilities were contingent in nature. . . .
>
> 11. The fact that the HSBC Canada's claims and CCI's liabilities under the Indemnity Agreements were not quantified until after the Filing Date does not transform the claims into post-filing claims, rather it simply renders the claims contingent prefiling claims. In *AbitibiBowater Inc. Re*, [2012 SCC 67 ("*AbitibiBowater*")] the SCC held that "[u]nlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred . . . [and] . . . thus, the broad definition of 'claim' in the BIA includes contingent and future claims that would be unenforceable at common law or in civil law."
>
> 12. Regarding the test for determining a contingent claim, the SCC in *AbitibiBowater* held that the "criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative". As discussed below, far from being remote or speculative, the events leading to HSBC exercising its set-off rights were triggered by CCI's own decision to cease funding its SPA premiums after the Filing Date.
>
> 13. Additionally, in this case, the definition of "Claims" in the Claims Procedure Order expressly captures "contingent" claims.

64 HSBC also references s. 19(1) of theCCAA which sets out which claims may be dealt with by compromise or arrangement.

> 19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are
>
> (a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of
>
> (i) the day on which proceedings commenced under this Act, and
>
> (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and;
>
> (b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

65 HSBC goes on to submit that s. 19 does not only capture debts that crystallized prior to the Filing Date, as CCI asserts, but also any "liabilities" in relation to "any obligation incurred by the company" before the date on which the CCAA Proceedings commenced. Here, HSBC set-off was in relation to contractual indemnity obligations incurred by CCI and set-off rights granted by CCI to HSBC on consent, prior to the filing date.

66 In *AbitibiBowater*, the Supreme Court determined that in order to qualify as claims subject to the CCAA process —

(1) there must be a debt;

(2) the debt, liability or obligation must be incurred before commencement of the CCAA proceedings; and

(3) it must be possible to attain a monetary value to the debt, liability or obligation.

67 In my view, the *AbitibiBowater* analysis supports the position that HSBC's claim for set-off may be asserted in these proceedings on the basis that they arose out of pre-pre-obligations. In addition, a plain reading of s. 19 supports the position put forth by HSBC, as does a plain reading of the definition of "Pre-filing Claim" in the Claims Procedure Order.

68 In addition, the Non-Derogation of Rights provision at paragraph 23 of the Initial Order required HSBC to honour the Letters of Credit in accordance with their terms. As such, it is clear to me that CCI considered HSBC's obligation under the Letters of Credit to have existed prior to the commencement of the CCAA Proceeding.

69 I find that the contractual set-off claim of HSBC is a pre-pre set-off which, as the Supreme Court of Canada acknowledged in *Montréal* at paragraphs 63 — 64 is preserved pursuant to section 21 of the CCAA.

SUMMARY

70 The foregoing results in the following conclusions:

1. Prior to the Initial Order, HSBC had contractual set-off rights.

2. The InitialOrder temporally stayed HSBC from exercising its rights of contractual set-off.

3. The set-off rights of HSBC are pre-pre-set-off rights which are preserved pursuant to s. 21 of the CCAA.

4. The was no prohibition that would restrict the funds in CCI's Operating Account from being available for set-off purposes.

5. Although HSBC knowingly breached the Initial Order by unilaterally exercising set-off rights, this activity did not result in prejudice to other unsecured creditors of Carillion Canada Group. The recovery of unsecured creditors is dependent upon whether HSBC's set-off rights are preserved pursuant to s. 21 of the CCAA.

71 I have no doubt that, prior to exercising its set-off rights, HSBC was well aware that there was a significant likelihood that a court would find that it was stayed from exercising its set-off rights unilaterally. However, the actions that HSBC took are not such that should alter the legal conclusion that HSBC is entitled to a set-off claim. There is no evidence that the exercise of the set-off had the effect of undermining CCI's restructuring efforts. Simply put, I am not prepared, nor do I think it appropriate, to override HSBC's set-off claim and reduce HSBC's claim to the same priority as any other general unsecured claim in the CCAA Proceeding. Section 21 of the CCAA recognizes and preserves the pre-pre set-off claim of HSBC. HSBC set-off rights have been found to be valid and consequently are to be enforced separate and apart from any distribution to general unsecured creditors.

DISPOSITION

72 In the result, the motion of CCI for an order directing HSBC to return or make payment in the amount of $6,820,000 CCI is dismissed. The request for a declaration that HSBC be prohibited from exercising any rights against CCI to set-off is dismissed.

73 With respect to costs, the parties had reached an agreement that the successful party would be entitled to its costs in the amount of $50,000. Notwithstanding this agreement, the conduct of HSBC in unilaterally exercising set-off rights in the face of the stay provisions in the Initial Order, is such that, in my view, the appropriate disposition is for HSBC to pay costs in the amount of $50,000 to CCI.

Motion dismissed.

2022 ONSC 4617, 2022 CarswellOnt 12891, 2022 A.C.W.S. 3680, 2 C.B.R. (7th) 68

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Tab

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KeyCite treatment
Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Long Run Exploration Ltd (Re) | 2024 ABKB 710, 2024 CarswellAlta 3148 | (Alta. K.B., Nov 29, 2024)

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

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Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
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Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.c Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been

rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan.

Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en

gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple, un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour

absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

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

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

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

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

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

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

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation .... If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

Tab

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Arrangement de MPECO Construction inc. | 2019 QCCS 297, 2019 CarswellQue 730, EYB 2019-306949, 67 C.B.R. (6th) 87 | (Que. Bktcy., Feb 4, 2019)

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 CSC 60, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

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

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency
Related Abridgment Classifications
Tax
I General principles
I.7 Tax claims in bankruptcy proceedings
Tax
III Goods and Services Tax [GST] and Harmonized Sales Tax [HST]
III.12 Collection and remittance
III.12.b GST/HST held in trust
Headnote
Tax --- Goods and Services Tax — Collection and remittance — GST held in trust
Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute

provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount

collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer

sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Table of Authorities

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), *(*sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny)* 2009 G.T.C. 2036 (Eng.), *(*sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny)* [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, *(*sub nom. *9083-4185 Québec Inc. (Bankrupt), Re)* 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

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

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a

limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

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

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

Tab

8

2016 ABQB 215
Alberta Court of Queen's Bench

F.A.S.T. Industries Ltd. v. Sparta Engineering Inc.

2016 CarswellAlta 681, 2016 ABQB 215, [2016] A.W.L.D. 1919,
265 A.C.W.S. (3d) 300, 35 C.B.R. (6th) 293, 55 C.L.R. (4th) 31

F.A.S.T. Industries Ltd., Plaintiff and Sparta Engineering Inc. and CWC Energy Services Corp., Defendants

Master R.P. Wacowich, In Chambers

Heard: April 4, 2016
Judgment: April 14, 2016
Docket: Edmonton 1503-08800

Counsel: Dean Hitesman, for Plaintiff
Tyler Derksen, for Defendants

Subject: Contracts; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.6 Effect of proposal
VI.6.a General principles

Headnote

Bankruptcy and insolvency --- Proposal — Effect of proposal — General principles

Defendant was hired by third party to carry out maintenance and repairs on oil services rig — Defendant hired plaintiff to conduct repairs on rig — Agreement between parties was verbal — Plaintiff had received invoice from defendant for parts and services provided by defendant to plaintiff on previous project in amount of $111,249.08 — Plaintiff had not paid invoice due to cash flow problems — Plaintiff invoiced defendant for $348,586.68 for its work on rig — Defendant set off earlier debt by plaintiff — Plaintiff claimed defendant could not use set-off because plaintiff had filed Notice of Intention to make Proposal ("NOI") before its invoice was rendered — Plaintiff brought application for summary judgment on its invoice and determination that defendant was caught by stay of proceedings in s. 69 of Bankruptcy and Insolvency Act so as to preclude set-off against plaintiff's invoice for work on rig — Application granted — Work on rig was not completed by plaintiff and invoice had not been issued, before NOI issued — Debt by plaintiff to defendant existed at time of NOI, but debt of defendant to plaintiff did not exist until work was completed — Debt came into existence when plaintiff invoiced defendant — Defendant was caught by s. 69 of Act and precluded from setting off pre-NOI indebtedness of plaintiff against post-NOI indebtedness of defendant — Plaintiff was granted summary judgment for amount of $111,249.08, which was amount of indebtedness unjustifiable set off by defendant and outstanding balance of defendant's indebtedness.

Table of Authorities

Cases considered by *Master R.P. Wacowich, In Chambers*:

Aero Trades (Western) Ltd. (Receiver of) v. Canada (1988), 71 C.B.R. (N.S.) 97, [1989] 1 W.W.R. 723, (sub nom. *Clarkson Co. v. R.)* 89 D.T.C. 5050, (sub nom. *Clarkson Co. v. R.)* Can. S.T.R. 80-041, (sub nom. *Clarkson Co. v. R.)* 18 C.E.R. 139, (sub nom. *Clarkson Co. v. R.)* 2 T.C.T. 4042, (sub nom. *Clarkson Co. v. Canada)* [1989] 1 C.T.C. 142, (sub nom. *Aero Trades (Western) Ltd. (Receivership) v. Canada)* 91 N.R. 380, 1988 CarswellNat 487, 24 F.T.R. 321 (note) (Fed. C.A.) — considered

Cobourg Felt Hat Co., Re (1925), 5 C.B.R. 622, 28 O.W.N. 131, [1925] 2 D.L.R. 997, 1925 CarswellOnt 22 (Ont. S.C.) — considered

Jones, Re (2003), 2003 CarswellOnt 3184, (sub nom. *Jones v. R.)* 2003 D.T.C. 5663, 175 O.A.C. 263, [2004] 1 C.T.C. 65, 66 O.R. (3d) 674 (Eng.), 66 O.R. (3d) 683 (Fr.), 45 C.B.R. (4th) 263, 66 O.R. (3d) 674, 66 O.R. (3d) 683 (Ont. C.A.) — referred to

Sabey, Re (1996), 1996 CarswellBC 2816, 46 C.B.R. (3d) 77 (B.C. S.C.) — referred to

Vachon v. Canada (Employment & Immigration Commission) (1985), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 1985 CarswellNat 12, 1985 CarswellNat 668 (S.C.C.) — distinguished

728835 Ontario Ltd., Re (1998), 1998 CarswellOnt 2025, 3 C.B.R. (4th) 211 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

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

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(1)(a) — considered

s. 66(1) — considered

s. 69 — considered

s. 69(1)(a) — considered

s. 97(3) — considered

APPLICATION for summary judgment on plaintiff's invoice and determination that defendant was caught by stay of proceedings in s. 69 of *Bankruptcy and Insolvency Act* so as to preclude set-off against plaintiff's invoice.

***Master R.P. Wacowich, In Chambers*:**

Introduction:

1 The plaintiff F.A.S.T. Industries Ltd. (FAST) is a corporation which has worked in the oilfield services industry since 2010. The defendant Sparta Engineering Inc. (Sparta) is a corporation which since 2009 has been in the business of design project management and design of mechanical systems including equipment used for oil and gas well maintenance. Sparta was hired by a third party, CWC Energy Services Corp. to carry out maintenance and repair work on a CWC oil services rig (rig). CWC is no longer a party to this action.

2 Sparta and FAST had worked on similar projects in the past and in November 2014 Sparta hired FAST to conduct repairs on the rig in question. FAST was to do the hands on work and Sparta was to oversee the project and provide mechanical advice and other expertise as required.

3 The agreement between Sparta and FAST to do the work was verbal. They had previous similar agreements between them, all verbal. FAST was to provide labour and parts to bring the rig into good working condition and subsequently bill Sparta for the parts and labour provided.

4 Previous to this agreement FAST received an invoice from Sparta dated April 11, 2014 for parts and services provided by Sparta to FAST on a previous project. As was their practice, this was pursuant to a verbal agreement. It was in the amount of $111,249.08 which debt is not in dispute.

5 FAST was one of a number of corporations involved in the oil services who were having cash flow difficulties in 2014. This caused financial difficulties for FAST which resulted in the bill from Sparta not being paid.

6 Fast invoiced Sparta on April 6, 2015 for $348,586.68 for its work on this rig. Sparta set off the 2014 debt by FAST to it after April 6, 2015. FAST claims Sparta cannot use set off because FAST had filed a Notice of Intention to make a Proposal (NOI) on March 5, 2015.

7 FAST filed the NOI under section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the BIA). This combined with section 69 of the BIA resulted in a stay of proceedings against FAST by all its creditors which was imposed immediately on the issuance of the NOI.

8 Section 50.4(1) of the BIA states:

> Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating:
>
> (a) the insolvent person's intention to make a proposal ....

9 Section 69(1) of the BIA states:

> ... on a filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy ...

Issue

10 Was the April 2014 debt of FAST to Sparta caught by the stay of proceedings set out in section 69 so as to preclude set-off against FAST's invoice of April 6, 2015 for work on this rig?

Analysis

11 Sparta's position is that the majority of the FAST work was completed previous to the date of the NOI and is a debt owing. The evidence indicates that approximately 75% of the work on the rig had been completed by FAST on March 5, 2015.

12 The uncontroverted evidence of Bret Wetthuhn a director of FAST is set out in his Affidavit as follows:

> 21. On March 5, 2015, being the date that FAST filed a Notice of Intention to Make a Proposal, the Fast services had only been partially completed. On that date the rig was disassembled and was in many different pieces on the floor at the Sedgewick Shop.
>
> 22. On March 5, 2015, in order for FAST to complete the FAST services, FAST still had to assemble all of the parts for the rig and paint the rig. While by March 5, 2015, the majority of the labour required to complete the FAST services had been completed, a significant amount of labour was still required by FAST employees to complete the FAST services which labour was performed after March 5, 2015 as evidenced by the Records attached as Exhibits "C", "D", "E", "F" and "G" to my Affidavit. In addition, on March 5, 2015, FAST was continuing to wait for a number of parts that had not yet arrived which were required to complete the FAST services.
>
> 23. On March 5, 2015, FAST was not in a position to invoice Sparta for the partially completed FAST services. The agreement between FAST and Sparta pursuant to the Contract was that FAST would invoice Sparta for the FAST services only once the FAST services were complete. There would be no prepaid deposits or progress payments made by Sparta to FAST until the FAST services were completed. Not only was this the agreement for the Contract, this had been the agreement and understanding between FAST and Sparta on previous occasions where FAST had performed services for Sparta.

13 I accept this evidence of Mr. Wetthuhn. Mr. Wetthuhn was onsite and clearly stated the facts which were not altered on his Questioning on Affidavit. So the work was not complete before the NOI was issued.

14 Additionally, as indicated, the invoice by FAST to Sparta for this work for $348,586.68 plus GST was issued on April 6, 2015 after the March 5, 2015 filing of the NOI. It was the practice of the parties to expect payment after invoices were sent. Also, Sparta did not take possession of the rig until April 1, 2015.

15 So the work was not completed, an invoice had not been issued, and the rig was not moved off the FAST lot before the NOI issued. Accordingly, the Applicant submits, the Sparta April 2014 invoice cannot be set off against the FAST April 2015 invoice. Simply put, it is the Applicant's position that a creditor may only exercise right of setoff in a proposal if both of the debts concerning the set off existed as of the date of the filing of the NOI.

16 In support of that position the Applicant refers to *Vachon v. Canada (Employment & Immigration Commission)*, 1985 CarswellNat 12, 1985 CarswellNat 668, [1985] 2 S.C.R. 417, [1985] S.C.J. No. 68, 23 D.L.R. (4th) 641, 34 A.C.W.S. (2d) 379, 57 C.B.R. (N.S.) 113, 63 N.R. 81, J.E. 85-1089 (S.C.C.). In that case the Supreme Court of Canada interpreted the equivalent stay of proceedings provision to include a stay of recovery through set-off of a pre-existing debt against the subsequent benefit accruing to the debtor. It held that the stay of proceedings effectively precludes a creditor's right to set off debts owing to the creditor by the debtor in the pre-bankruptcy period against the debt owed to the debtor by the creditor that arose in the bankruptcy. Although the facts in the *Vachon* decision are fundamentally different from those in the case at bar, the principle set out in *Vachon* is sound and applicable to this action.

17 The Applicant submits:

> Subsequent case law has indicated that the reasoning and decision in *Vachon* is equally applicable to a creditor's right to set-off in respect of debt owing to the creditor by the debtor in the pre-Notice of Intention to Make a Proposal period against debt owing to the debtor by the creditor that came into existence in the post-Notice of Intention to Make a Proposal period.
>
> *Sabey, Re*, 1996 CarswellBC 2816 (B.C. S.C.) at para 16, [1996] B.C.J. No. 2820 (B.C. S.C.) [Sabey]
>
> *Jones, Re*, 2003 CarswellOnt 3184 (Ont. C.A.) at para 14, (2003), 66 O.R. (3d) 674 (Ont. C.A.) [Jones]
>
> Consequently, in order to preserve both the fair and equal treatment of creditors under the proposal and the debtor's ability to meet its obligations under the proposal, it is a general principle that a creditor is prohibited from setting off a debt owed to it by the debtor that existed before the filing of the Notice of Intention to Make a Proposal against a debt owed by it to the debtor that came into existence after the filing a Notice of Intention to Make a Proposal.
>
> *Cobourg Felt Hat Co., Re*, 1925 CarswellOnt 22, [1925] 2 D.L.R. 997 (Ont. S.C.) (In Bankruptcy)

18 In *Cobourg*, Fisher, J. stated:

> [9] It is a duty of the Court to guard against any invasion of the equitable rights of creditors under a composition and to refuse to sanction or permit any transaction which has the effect of giving to any one particular creditor any benefit or advantage over and above that which he is entitled to in common with the other creditors.

19 There is no evidence of any arrangement to give Sparta an undue advantage over other unsecured creditors but there does not need to be. It is enough that the result of the position taken would be an undue advantage of one creditor against others.

20 The Applicant cites *Aero Trades (Western) Ltd. (Receiver of) v. Canada*, 1988 CarswellNat 487 (Fed. C.A.) at paras 18, 22, 26, (1988), [1989] 1 C.T.C. 142 (Fed. C.A.). This case indicates that a determination of the time at which a debt comes into existence depends primarily upon the intention of the parties, as disclosed by the words of the contract, in particular the language regarding the performance of services and the provisions regarding the rendering of invoices, and by the conduct of

the parties with respect to the invoicing procedures followed. As indicated, it was the custom of the parties for the debt to be payable on an invoice being issued.

21 The Respondent submits it is only logical that an invoice would be rendered once the work was complete but that does not mean that the debt did not exist before hand.

22 Houlden and Morawetz Bankruptcy and Insolvency Analysis states:

> A right of set-off has the effect of securing the claim of the party entitled to it. Instead of having to prove with other creditors for the whole of his or her debt, the creditor can set off dollar for dollar what he or she owes the bankrupt and prove only for or pay only the balance...
>
> A bankrupt's estate includes only the net amount of a debt owing to the bankrupt after proper allowance for the recognized common-law right of set off ...
>
> The object of set-off is to avoid the perceived injustice to a person who has had mutual dealings with a bankrupt of having to pay in full what he or she owes to the bankrupt while having to rest content with a dividend on what the bankrupt owes him or her [citations omitted, emphasis added]
>
> L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, WestlawNext Canada (Consulted on March 21, 2016) [Houlden] F§237 — Set-Off (1) — Generally.

23 In order for legal set-off to apply, the debts must exist between the same parties and be capable of being ascertained with certainty at the relevant date:

> Mutual debts are debts due from either party to the other for liquidated sums or money demands that can be ascertained with certainty at the date of bankruptcy. Each party must have the right to enforce its claim at the date of bankruptcy, and if one party cannot do so, there is no right of legal set off ...
>
> Houlden, supra at F§237 — Set-Off (2) — Legal Set-Off

24 The Respondent cites in its favour *728835 Ontario Ltd., Re* (1998), 3 C.B.R. (4th) 211, 79 A.C.W.S. (3d) 673, 1998 CarswellOnt 2025 (Ont. Gen. Div. [Commercial List]). It confirms the right to set-off in insolvency proceedings as codified by section 97(3) of the *Bankruptcy and Insolvency Act* and further confirms that, pursuant to section 66(1) of that legislation, such right of set-off applies to Proposals. It states:

> Section 97(3) of the *Bankruptcy and Insolvency Act* specifically preserves the right of setoff in respect of all claims made against the estate of the bankrupt and section 66(1) makes this provision applicable to Proposals under the BIA. There is no question that as of May 1, 1998 (the date Cellular World filed its Notice of Intention to make a Proposal) there were mutual debts in existence. It is immaterial that one of the debts may not actually have been payable until after the date of the Notice of Intention to file a proposal since both debts were in existence as of that date. (***728835 Ontario Ltd, Re)***
>
> [emphasis added]

25 There did not exist here and there does not have to be something akin to a fraudulent preference — an attempt by a creditor to use an artificial mechanism to gain preference over other creditors. The debt by FAST to Sparta existed at the time of the NOI. But the debt of Sparta to FAST did not exist at least until the work was completed on April 1, 2015. More likely, the debt existed when FAST issued their invoice on April 6, 2015.

26 As indicated by *Houlden and Morawetz* and *728835 Ontario Ltd., Re*, both debts have to be in existence when the NOI is filed. When the NOI was filed, FAST had at best a potential claim for quantum merit for the work completed. If Sparta refused to pay it would have been in breach of contract. It could not set-off FAST's April 2014 debt against this potential liability by FAST.

27 Sparta received what it bargained for. It received a repaired rig after the NOI was filed. It must now stand in line with other unsecured creditors for FAST's 2014 debt to it.

28 Accordingly, Sparta is caught by s. 69 and precluded from setting off the pre-NOI FAST indebtedness against the post NOI Sparta indebtedness. FAST is awarded Summary Judgment for the sum of $111,249.08 being the amount of the FAST indebtedness that Sparta unjustifiably set-off and the outstanding balance of the Sparta indebtedness.

29 If the parties cannot agree on costs, they can speak to me within 30 days of the Order prepared reflecting this decision.

Application granted.

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Tab

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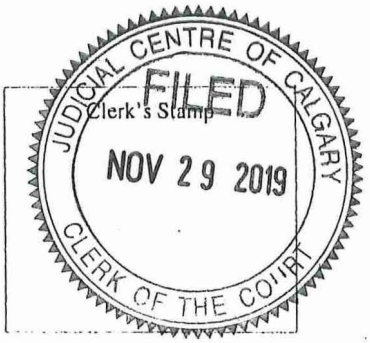

COURT FILE NUMBER	1901-16581
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ACCEL CANADA HOLDINGS LIMITED and ACCEL ENERGY CANADA LIMITED
APPLICANTS	ACCEL ENERGY CANADA LIMITED and ACCEL CANADA HOLDINGS LIMITED
RESPONDENT	VODA INC.
DOCUMENT	**ORDER**

I hereby certify this to be a true copy of the original ORDER.
dated this 29 day of Nov 2019
for Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

LAWSON LUNDELL LLP
Barristers and Solicitors
Suite 1100, 225 – 6th Avenue SW
Brookfield Place
Calgary AB T2P 1N2
Tel: (403) 269-6900
Fax: (403) 269-9494
File No. 33414-145446

Attention: William L. Roberts / Jonathan H. Selnes

DATE ON WHICH ORDER WAS PRONOUNCED: November 28, 2019

LOCATION OF HEARING OR TRIAL: Calgary, AB

NAME OF JUSTICE WHO MADE THE ORDER: Justice K. M. Horner

UPON THE APPLICATION OF THE APPLICANTS, ACCEL Energy Canada Limited and ACCEL Canada Holdings Limited (**together, ACCEL**), heard on November 28, 2019 for an Order directing VODA INC. (**VODA**) to release $7,000,000 CAD to ACCEL, **AND UPON REVIEWING** the Second Report of the Monitor, PricewaterhouseCoopers Inc. (the **Monitor**); **AND UPON HEARING SUBMISSIONS** from counsel for the Applicants, ACCEL; counsel for the Monitor, and counsel for VODA; and such other counsel that have appeared;

IT IS HEREBY ORDERED AND DECLARED THAT:

1. On or before 12:00 p.m. MST on Friday, November 29, 2019, VODA shall pay $5 million to ACCEL, representing a portion of revenue from ACCEL's October production, failing which VODA shall be in contempt of Court;

2. The remainder of ACCEL's application dated November 28, 2019, is adjourned to 1:00 p.m. MST on Monday, December 2, 2019, before the Honourable Madam Justice Horner; and

3. Costs may be spoken to by the parties.

J.C.Q.B.A. L.Ho for K.M. Horner

APPROVED AS TO FORM OF ORDER GRANTED:

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Jeff Lee, Q.C.
Counsel for the Respondent
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