COURT FILE NUMBER	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.

JUDICIAL CENTRE OF CALGARY
FILED
Jan 06, 2025
NB
by Email
CLERK OF THE COURT

C10246
COM
Jan 6, 2025

BOOK OF AUTHORITIES OF THE RESPONDENT,
TRAFIGURA CANADA LIMITED

FOR THE HEARING SCHEDULED IN JUDGE'S CHAMBERS
ON January 6, 2025, AT 2:00 PM

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TABLE OF AUTHORITIES

Tab No.	Description
1)	*Re North American Tungsten Corp*, 2015 BCSC 1382 at paras 10-11, aff'd 2015 BCCA 390
2)	*Re 728835 Ontario Ltd.* (1998), 111 OAC 155 (Gen Div)
3)	*Husky Oil Operations Ltd v Minister of National Revenue* (1993), 22 CBR (3d) 153, [1994] 1 WWR 629; affirmed [1995] 10 WWR 161, 128 DLR (4th) 1 (SCC)
4)	*Montreal (Ville) c Restructuration Deloitte Inc*, 2021 SCC 53
5)	*Iberdrola Energy Projects Canada Corporation v Factory Sales & Engineering inc. dba FSE Energy,* 2018 BCCA 272
6)	*SemCanada Crude Co.,* 2009 ABQB 397
7)	*Trevali Mining Corporation* (Re), 2024 BCSC 2252
8)	*Yukon Zinc Corp.* (Re), 2015 BCSC 836

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	*North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1382

Date: 20150730
Docket: S154746
Registry: Vancouver

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

And

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

And

In the Matter of North American Tungsten Corporation Ltd.

Petitioner

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

Counsel for the Petitioner:	John R. Sandrelli Jordan D. Schultz
Counsel for the Monitor, Alvarex & Marsal Canada Inc.:	Kibben M. Jackson Vicki L. Tickle
Counsel for Callidus Capital Corporation:	William E.J. Skelly
Counsel for Government of Northwest Territories:	H. Lance Williams
Counsel for Wolfram Bergbau and Hütten AG:	Angela L. Crimeni David Brown
Counsel for Global Tungsten and Powders Corp.:	Kieran E. Siddall Scott Boucher
Place and Date of Hearing:	Vancouver, B.C. July 27 and 30, 2015
Place and Date of Judgment:	Vancouver, B.C. July 30, 2015

[1] **THE COURT:** 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

[7] GTP has delivered a detailed written argument today, and I will follow the issues raised in that argument as it provides a convenient way to consider the issues that are before the Court.

Issue 1: Is there a debt due and owing by NATC to GTP?

[8] NATC contends that there is nothing due and owing under the loan agreement because, at the time of filing, it was up to date on its payments and so GTP has nothing to set off against. That submission ignores the fact that NATC is in default under the loan agreement.

[9] Section 2.2(c) of the loan agreement provides that the entire unpaid amount of the loan, together with interest and costs, shall be repayable forthwith upon the occurrence of an event of default. An event of default under the loan agreement includes a default in payment when due of any amount owing under the agreement. NATC failed to pay the June 30, 2015 loan payment. As a result it is in default.

Issue 2: In any event, is it immaterial that the debt has not yet fallen due for payment?

[10] I also agree with the submissions of GTP on this issue. Even if it could be said that the time for payment of the NATC debt had not arrived, that would not defeat GTP's right of set-off.

[11] As noted in Palmer, *The Law of Set-off in Canada*, (Aurora, Ontario, Canada Law Book Inc., 1993) p. 34, a debt, for the purpose of set-off, "is a sum of money which is certainly, and at all events, payable without regard to the fact whether it be payable now or at a future time." The monies owing by NATC under the loan agreement are "certainly, and at all events", payable to GTP.

Issue 3: Is legal set-off available for pre-filing and post-filing obligations?

[12] GTP relies on the provisions of s. 21 of the *CCAA* and on the decision in *Air Canada (Re)*, [2003] O.J. No. 6058 (S.C.J.).

[13] Section 21 reads as follows:

> 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.

[14] The circumstances in *Air Canada* were different from those before this Court. The issue raised was whether the second sentence in a term in the initial order should be struck out. The term in that order read as follows:

> THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the *CCAA* as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date.

[15] Air Canada took the position that there is no right to a legal set-off as between pre-filing and post-filing obligations, and that the term of the order should not be varied. Farley J. disagreed and struck the second sentence from the term of the order. Academics have accepted that the ruling stands for the proposition that

mutuality is not severed by the granting of an initial order on a *CCAA* proceeding, such that set-off is available between pre-filing and post-filing obligations.

[16] For example, in his article "Air Canada and Stelco*:* Legal Developments and Practical Lessons" in *the Annual Review of Insolvency Law* (Toronto: Carswell, 2006), Robert Thornton summarized the decision as follows at page 14:

> … Farley, J. held that there was no loss of mutuality upon the commencement of a *CCAA* proceeding. Accordingly, legal set-off is available both in respect of debts existing as of the date of an initial order, and in respect of debts that arose after the date of the initial order.

[17] NATC says that *Air Canada* is wrongly decided and points to decisions dealing with proposals under the *Bankruptcy and Insolvency Act*. There is some merit to the policy arguments that are advanced by NATC. It says that it would make sense, from a policy perspective, to arrive at such a conclusion because: a stay of proceedings assists in preserving the status quo as of the filing date; after a filing, a company ceases to act solely in its own corporate interests and begins to operate under the mandatory scrutiny of a monitor; and, the debtor's objective ceases to be focused solely on maximizing profits.

[18] While I find there are some merits to the policy arguments, in order to arrive at the decision sought by NATC, I would have to find that *Air Canada* was wrongly decided. I am simply not prepared to do so on the basis of the material and the argument before me.

[19] In addition, given the decision I have arrived at with regard to the grant of a temporal stay, I need not wrestle with this issue, as my conclusion does not rest on this finding.

Issue 4: Does the Court have jurisdiction to stay set-off rights once those have been determined?

[20] I am using that terminology for the issue because that is how it is phrased by Mr. Siddall in his submissions today. GTP gives three reasons for its position that the Court does not have the right to stay set-off rights. It says, first of all, that the

case law does not support or anticipate such a stay once the creditor's set-off rights have been determined; secondly, it says that a temporal stay in the case at bar would effectively extinguish GTP's set-off rights under s. 21 causing significant prejudice to GTP; and, third, that the scope of the Court's discretion under the *CCAA* does not extend to extinguishing rights which have been specifically conferred by that statute.

[21] Starting with the first of these submissions, NATC relies on *Air Canada* and on *Tucker v. Aero Inventory (UK) Limited*, 2009 CanLII 63138 (Ont. S.C.), for the argument that the court does have the power to grant a temporal stay of set-off rights. GTP says both are distinguishable. It notes that *Air Canada* was by consent and in *Tucker* and in *Air Canada*, the stay was only being put in place until a determination of the set-off rights.

[22] Here GTP says it is asking the Court to determine its set-off rights today such that any extension of the stay cannot be granted beyond an order determining that right. GTP says this would be contrary to s. 21.

[23] I disagree. This is a very narrow reading of *Tucker* and *Air Canada*. This argument places far too much emphasis on the term "determination". In fact, those cases refer to "determination and enforcement' of set-off rights.

[24] For example, at para. 25 of *Air Canada*, Farley J. said:

> With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise.

[25] It is significant that the reference in *Air Canada* was to determination <u>and enforcement</u> so that set-off rights would be considered when the company has stabilized or cratered. In other words, it is the enforcement that is key, not determination, and that should await the outcome of the restructuring process. In

other words, a temporal stay of rights can be granted to further the purpose of the initial order and the purposes of the *Act*. Such a stay can apply to enforcement of set-off rights even where it is acknowledged those rights exist.

[26] I turn to GTP's argument that it would suffer significant prejudice. It says it will suffer prejudice because a temporal stay in this case would effectively extinguish its set-off rights. In other words, it may never be able to set off its debts for new tungsten purchases against NATC's pre-filing debt to GTP.

[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.

[33] When I consider all of those factors, as well as my view that there is no prejudice to GTP, it is appropriate to continue the temporal stay of GTP's set-off rights for so long as the stay granted by the amended initial order continues, which is to October 31, 2015.

[34] That is the conclusion of my ruling.

[35] Is there any clarification needed?

[36] MR. SCHULTZ: A few points, My Lord. First off, in the petitioner's notice of application we had sought special costs against GTP given the conduct that gave rise to these applications and we continue to seek that. I do not have much to add to the submissions of Mr. Sandrelli in terms of GTP's conduct and the background, but I would remind the court that we are seeking that.

[37] THE COURT: I do not need to hear from you on that, Mr. Siddall. In my view, GTP has raised significant legal arguments. While I have not accepted them, the actions of GTP are not such as to attract special costs.

[38] MR. SCHULTZ: Thank you, My Lord.

[39] MR. SKELLY: Just before we move off of that, if Your Lordship is not prepared to order special costs, are you prepared to order costs to the parties who had to appear?

[40] THE COURT: Yes, I am prepared to order costs. And I so order.

[41] MR. SIDDALL: Sorry, we're going a little bit quickly, My Lord. I just wanted to slow down a bit. I was not given an opportunity to make submissions on costs. I am not going to add a lot to what you have ruled, but I would seek that you limit it to the costs as between NATC and GTP where the issues raised [indiscernible] stay or not, the other parties in the courtroom who said little, and although obviously I am not criticizing them for attending, but again, the notice of application, it raised issues between NATC and GTP, so I ask Your Lordship to limit your cost order to the costs of NATC.

[42] THE COURT: It will not be so limited. The issue raised was a significant issue that affected other parties, and I certainly do not fault them for attending and making submissions, however brief.

[DISCUSSION]

[43] MR. SIDDALL: The terms of the order that my friend and I will obviously work on -- do I have it that you are prepared to declare that we have set-off rights -- that GTP has set-off rights? So one of the orders will be that we have set-off rights and then the next order will be that those rights are still stayed.

[44] THE COURT: Those rights are stayed.

[45] THE COURT: I will make the order that the signatures of the parties, other than GTP and NATC who are in attendance, are dispensed with.

"Butler J."

Date: 1998064
Docket:**C29704**

COURT OF APPEAL FOR ONTARIO

1998 CanLII 2019 (ON CA)

RE: **IN THE MATTER OF THE PROPOSAL OF 728835 ONTARIO LIMITED O/A CELLULAR WORLD OF THE FORMER CITY OF NORTH YORK NOW THE AMALGAMATGED CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

BEFORE: **LABROSSE, WEILER AND LASKIN JJ.A.**

COUNSEL: **Howard F. Manis for the appellant**

Kent E. Thompson and Wendy Del Mul for the respondent

HEARD: **May 28, 1998**

E N D O R S E M E N T

[1] The appellant Cellular World moved for an order for interim relief pending the filing of its proposal under the *Bankruptcy and Insolvency Act* (the "*BIA*"). Lederman J. dismissed the motion.

[2] Cellular World's appeal raises two issues:

(i) whether Lederman J. was correct in deciding that the respondent Cantel was entitled to exercise its contractual right of set-off for debts owing to it by Cellular World before the filing of the Notice of Intention under the *BIA;*

(ii) whether Lederman J. was correct in deciding that the court could not require Cantel to supply goods to Cellular World on credit.

<u>The First Issue: Set-Off</u>

[3] Where mutual debts exist at the date of bankruptcy, s.97.(3) of the *BIA* preserves a creditor's right of set-off unless the set-off is a fraudulent preference. Section 66(1) of the *BIA* makes s.97(3) applicable to proposals.

[4] Each of the three agreements between Cellular World and Cantel contain a right of set-off. On the date the Notice of Intention was filed, mutual debts existed. Cellular World owed Cantel over $800,000; Cantel owed Cellular World approximately

1998 CanLII 2019 (ON CA)

$183,000. Cellular World does not suggest that a set-off would amount to a fraudulent preference. Accordingly, in our view, Lederman J. correctly concluded that Cantel could exercise its right of set-off. The appellant cannot point to any case where a creditor in the position of Cantel was prohibited from exercising a right of set-off that it had contracted for with the debtor. The cases relied on by the appellant concerned debts arising after bankruptcy.

[5] In seeking a stay of Cantel's right of set-off, Cellular World relied on s.69(1) of the *BIA* and on policy considerations. Giving effect to the appellant's interpretation of s.69(1) would defeat the purpose of ss.97(3) and 66(1). All of these sections must be read together. Section 69(1) cannot oust the operation of s.97(3) and its application to proposals.

[6] The policy considerations advanced by Cellular World in support of its position are answered by Justice Gonthier's judgment in *Husky Oil Operations Ltd. v. Minister of National Revenue* (1996), 35 C.B.R. (3d) 1 (S.C.C.).

[7] The appellant's first ground of appeal therefore fails.

<u>Second Issue: Selling on Credit</u>

[8] Section 65.1(4)(a) and (b) of the *BIA* answers Cellular World's contention that the court should require Cantel to supply goods on credit. Cantel cannot be restrained from requiring immediate payment for any goods delivered to Cellular World after the filing of the Notice of Intention. Therefore, we agree with Lederman J.'s conclusion on this issue.

[9] For these reasons, the appeal is dismissed with costs.

93 327 013

THE COURT OF APPEAL FOR SASKATCHEWAN

THE WORKERS' COMPENSATION BOARD,

(Respondent) APPELLANT,

- and -

HUSKY OIL OPERATION LTD.,

(Applicant) RESPONDENT

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of National Revenue,
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF SASKATCHEWAN,
as represented by the Minister of Human Resources,
Labour and Employment,
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF SASKATCHEWAN,
as represented by the Minister of Finance,
Bank of Montreal, Eric Zimmerman,
Garth Price, Trevor Brown, Arthur Gingras,
Kelly Houston, Darcy Kuzio, SBW-Wright Construction Inc.,
Campbell West (1991) Ltd., Fuller Austin Insulation Inc.,
United Industrial Equipment Rentals Ltd.,
Atco Enterprises Ltd., Hans Bohle and
Deloitte & Touche Inc.
as Trustee in Bankruptcy of the Estate of
Metal Fabricating and Construction Ltd.,

Respondents

CORAM:

The Honourable Mr. Justice Wakeling
The Honourable Mr. Justice Lane
The Honourable Madam Justice Jackson

COUNSEL:

R.G. Richards and E.L. Bennett for the appellant, Workers' Compensation,
G. Berscheid for Federal Justice,
J.T. Irvine for Saskatchewan Justice,
J.S. Ehmann and J. Estabrooks, student at law, for Husky Oil,
K. M. Bolstad for the Respondent, Bank of Montreal,
G. T. Meschishnick for Trustee (not appearing - written material)

DISPOSITION:

Appeal Heard:	June 1, 1993
Appeal Dismissed:	November 8, 1993
On Appeal From:	Q.B. 333/92 J.C. Battleford
Appeal File:	1337
Reasons by:	The Honourable Mr. Justice Wakeling
In concurrence:	The Honourable Mr. Justice Lane and The Honourable Madam Justice Jackson

WAKELING J.A.

This appeal probes the extent to which provincial legislation may affect federal legislation relating to bankruptcy.

The issue arises as a result of legislation in this province which provides that if money is not available to pay The Workers' Compensation Board (W.C.B.) its full assessment, as a consequence of the bankruptcy of the primary obligant, it will be paid by another. The provision in question is s. 133 of *The Workers' Compensation Act*, S.S. 1979, c. W-17.1, the relevant part of which reads as follows:

> 133.--(1) Where a person, whether carrying on an industry included under this Act or not, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, for the execution by or under the contractor of the whole or any part of any work for the principal, it is the duty of the principal to ensure that any sum that the contractor or any subcontractor is liable to contribute to the fund is paid and, where the principal fails to do so and the sum is not paid, he is personally liable to pay that sum to the board.
>
> . . .
>
> (3) Where the principal is liable to make payment to the board under subsection (1), he is entitled to be indemnified by any person who should have made the payment and is entitled to withhold, out of any indebtedness due to that person, a sufficient amount in respect of that indemnity.

The chamber judge concluded that the above section was unconstitutional as "it would have the effect of altering the scheme of distribution in the *Bankruptcy Act*." It is from this decision that the W.C.B. brings this appeal.

There is no dispute about the fact that under the following section of the *Bankruptcy and Insolvency Act* (the *Act*), R.S.C. 1985, c. B-3, such a claim by the W.C.B. would rank eighth in priority and in many cases the claim would go unpaid:

> **136.**(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . .
>
> (h) all indebtedness of the bankrupt under any Workmen's Compensation Act, under any Unemployment Insurance Act, under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;
>
> . . .

However, if the legislation is valid, the claim of the W.C.B. would be paid by the owner who would then have a claim against the bankruptcy estate. The net result is a clear advantage to the W.C.B. as it has managed to assure payment of its claim and leave it to the owner to struggle for repayment under the *Act* either claiming the right of set-off or ranking at the bottom of the list of priorities as an unsecured creditor.

The provinces have obviously been dissatisfied with the degree of priority s. 136 of the *Act* provides with regard to claims of this nature. This dissatisfaction has led them on other occasions to attempt to gain a greater advantage than was provided by the *Act* only to have the judgments of the Supreme Court of Canada thwart their plans. This case represents one more attempt by a province to circumvent the restriction which s. 136 of the *Act* has imposed on the ability of the W.C.B. to collect its claim.

The four cases of a somewhat similar nature which have been decided by the Supreme Court are central to the determination of this appeal. The first is *Bourgault v. Quebec Deputy Minister of Revenue*, [1980] 1 S.C.R. 35 in which the province sought to protect its interest in the sales tax collected by a merchant by legislating that it was a preferred creditor to the extent of the tax collected but not paid to the government at the time of the bankruptcy. In this fashion Quebec attempted to advance its position, not by an effort to change the *Act*, but by improving its position within the structure of that *Act* so as to rank as a preferred creditor. The position of the Supreme Court is made evident in the following comment of Pigeon J., at 44:

> It is abundantly clear that this was intended to put on an equal footing all claims by Her Majesty in Right of Canada or of a Province except in cases where it was provided otherwise, namely, para. (c), the levy, and para. (h), workman's compensation or unemployment insurance assessments and withholdings for income tax. Paragraph (j) ends with the following words: 'notwithstanding any statutory preference to the contrary'. The purpose of this part of the provision is obvious. Parliament intended to put all debts to a government on an equal footing; it therefore cannot have intended to allow provincial statutes to confer any higher priority.

This decision was followed by *Deloitte, Haskins & Sells Limited and The Workers' Compensation Board and A.G. of Canada et al*, [1985] 1 S.C.R. 785 which dealt with a similar attempt by the province of Alberta to advance the unpaid claim of that province's W.C.B. against a bankrupt. It did this by indicating that the amount due W.C.B. constituted a charge on the assets of the employer and as such made the W.C.B. a secured creditor under the *Act*.

This legislation was also found to be an attempt by the province to change the priority which had been given the W.C.B. by the *Act*. To the extent it only affected property and civil rights within the province, it was valid legislation but where it conflicted with the priorities set out by the *Act* it was invalid as a consequence of the paramountcy of federal legislation in the area of bankruptcy.

Writing for the majority, Wilson J. had this to say about the legislation (at 806):

> With respect, the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act* [now s. 136(1)]. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: by virtue of the applicable provincial legislation I am a secured creditor within the meanings of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me.

The third case is *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, which involved an attempt by the province of British Columbia to obtain a more secure position in respect of its claim to unpaid sales tax which had been collected by a merchant. Since efforts to increase the status of such a claim had failed in the past, this strategy involved an attempt to avoid the application of the *Act* by declaring that money held by a merchant for the Crown constituted a trust fund. It was then contended that the following section of the *Act* applied so that the money would not become an asset held by the trustee:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person;
>
> . . .

The Supreme Court took the position that the province could not declare money held by another to be a trust which would not otherwise constitute a trust in order to gain an advantage in bankruptcy. McLachlin J., on behalf of the Court, had this to say at p. 33:

> To interpret s. 47(a) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

The final case in this series is *F.B.D.B v. Quebec.*, [1988] 1 S.C.R. 1061 which involved a somewhat different but related problem which is why it is dealt with last although it was decided before *Belair.* This case involved a claim of the W.C.B. of Quebec against the Federal Business Development Bank (F.B.D.B.) which had enforced its security, as it was entitled to do, against a bankrupt debtor without regard for the restrictions imposed on other creditors by the *Act*. Since the action of the F.B.D.B. did not involve the trustee or the administration of the bankruptcy estate, the W.C.B. felt it could claim its right to priority over the security held by the F.B.D.B. The W.C.B. alleged that its claim was in a different category to those previously considered by the Supreme Court since it did not interfere directly with any proceedings involving priorities established by s. 136 of the *Act*. This position was also rejected and the judgment of Lamer J. at p. 1071 makes the reason clear:

> In any event, I feel that the decisions in *Re Bourgault* and *Deloitte* are conclusive as to the fate of the appeal. These cases stand for the following proposition: in a bankruptcy matter, it is the *Bankruptcy Act* which must be applied. If a bankruptcy occurs, the order of priority is determined by the ranking of s. 107 of the *Bankruptcy Act* [now s. 136], and any debt mentioned in that provision must therefore be given the specified priority.

It is apparent from these cases that the Supreme Court has determined that where the federal powers over bankruptcy have been exercised in the *Act*, it is not possible for provincial legislation to change the scheme of distribution which the *Act* has established. The provincial legislation will have valid application as legislation dealing with property and civil rights within the province in respect of all areas of the law except those which involve conflict with federal legislation. The establishment of priorities, including those of provincial agencies such as the W.C.B., has been established by s. 136 of the *Act* and that priority cannot be altered by provincial legislation.

These cases deal with situations where the provinces first tried unsuccessfully to elevate their claims within the ranking established by the *Act* and when that was not successful they then tried to isolate their claim from the *Act* with an equal lack of success. The consistent theme which runs through these four cases is that where federal legislation has established the priority that shall be accorded various kinds or classes of claims, that is the priority which should consistently be applied by each of the provinces. It follows that provincial legislation which purports to change these priorities fails as being in conflict with valid federal legislation which has fully occupied the field under the authority of s. 92 of the *Constitution Act, 1867.*

This case represents yet another effort to avoid conflict with the bankruptcy process by avoiding the trustee in bankruptcy and directing the claim at a third party. It is alleged that the theme identified in the above cases does not have application to the issue presented by this appeal because the W.C.B. does not seek to change its ranking under the *Act* but instead leaves that field entirely and turns to direct its claim against another party. The W.C.B. argues that the priorities under the *Act* are in no way threatened in this instance by a claim against a third party.

Before the position of the W.C.B. can be usefully analyzed, we must consider what occurs when the third party is required to make payment. A third party will want to seek repayment of what it has had to pay the W.C.B. and to do this it will first seek to set-off what it has paid against what is due the bankrupt and will then claim as an unsecured creditor for any balance that may remain. The issue that must therefore be considered is whether this result involves a sufficient variation of the priorities established by the *Act* to constitute a conflict.

This specific issue has been considered recently by the Ontario Court of Appeal in *Re Evelyn Stevens Interiors* (1990), 72 D.L.R. (4th) 712 in which the Court decided that similar legislation which had been contained in the Ontario Workers' Compensation Board Act for many years was not in conflict with the *Act*. It concluded that the provincial legislation worked to require the principal to make payment to the Board so that the Board having received payment had no claim under the *Act* against the bankrupt so it did not need to rely on s. 136. The principal then had a right to set-off what it had paid the W.C.B. against what it would otherwise pay the trustee in bankruptcy but that the right of set-off did not constitute a conflict with the *Act* as it was specifically provided for under the following section:

> 97. (3) The law of set-off 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 is affected by the provisions of this Act respecting frauds or fraudulent preferences.

This judgment is obviously entitled to the greatest deference but it must be questioned for at least two reasons. First, it is not clear that s. 97(3) can properly be said to justify provincial legislation which has the effect of changing priorities otherwise established by the *Act*. Second, the judgment refers to the trilogy of cases from the Supreme Court without reference to the F.B.D.B. case which has considerable relevance to this case. Both of these concerns are of sufficient substance to warrant further examination.

The provision in the *Act* dealing with the right of set-off is meant to acknowledge and accept the application of the common law right of set-off as it has been developed over the years. The reference to this section in Houlden and Marawetz: *Bankruptcy and Insolvency Law of Canada,* at p. 490 and 491, makes it clear that the right of set-off has been recognized for some time going back to the English Bankruptcy Act of 1875. It covers both legal and equitable set-off and was meant to indicate that a bankrupt's estate includes only the net amount after proper allowance for the recognized common law right of set-off. To read more than a common law right of set-off into s. 97(3) seems to conflict with the decision in *Belair*. In that case, the province argued that it was not in conflict with the *Act* as its legislation applied only to what constituted a trust and trusts were not included as a bankruptcy asset. The Supreme Court refused to accept that argument because a province could not create a trust by giving another form of asset that name and in that fashion escape the application of s. 136. It is hard to see how the approach the Supreme Court applied in *Belair* does not have equal application here. The province has created a claim that would not exist in the common law and then applied s. 97(3) to indicate such a claim is contemplated within the framework of the *Act*. The effect of such legislation is to avoid the application of s. 136 which the Supreme Court has consistently said cannot be accomplished by provincial legislation.

This concern over the application of the *Belair* judgment may be put in yet another way. If the position of the W.C.B. in *Evelyn Stevens* is supported by the reference to set-off in the *Act*, one would expect that the creation of a trust would have enjoyed the same support by virtue of the reference to trusts in the *Act*. The fact that a trust was referred to in the *Act* was not seen as support for the province's position in *Belair* and the distinction that must be made if *Belair* does not have application in this case is not dealt with in *Evelyn Stevens*.

The judgment in *Evelyn Stevens* contains the statement that "this is not a device of the province to defeat the *Bankruptcy Act* scheme of distribution". That statement is not easily understood as it can hardly be disputed that without the legislation the distribution would be different. It would seem to be no less a redistribution scheme than was put forward by the provinces in each of the trilogy of cases referred to in that judgment. But in any event, the motive of the legislature is not as important as the effect of the legislation.

The validity of a law must be judged having regard to its effects. In *Continuing Canadian Constitutional Dilemmas*, Professor Lederman states (at p. 239):

> A rule of law expresses what should be human action or conduct in a given factual situation. We assume enforcement and observance of the rule and hence judge its meaning in terms of the consequences of the action called for.

The second concern raised by *Evelyn Stevens* is its failure to consider the *F.B.D.B.* case. If that judgment did no more than affirm the trilogy of cases the failure to refer to it would be of no consequence, but that is not the case. The *F.B.D.B.* judgment not only affirmed the trilogy of cases but also went one step further to apply it to parties not directly involved in a bankruptcy. As has been indicated, the W.C.B. in that case argued that provincial legislation gave it priority over a secured creditor of the bankrupt and as its action was outside the bankruptcy realm such legislation was valid as relating to property and civil rights powers within the province. Nevertheless, the Supreme Court rejected this argument because the claim of the W.C.B. was of a type specifically dealt with in the ranking established under the *Act* and that ranking could not be altered by the application of provincial legislation. That principle does not appear to have been considered in the *Evelyn Stevens* judgment.

The bankruptcy process has to be disturbed in one way or another by this legislation. If the claim of the W.C.B. is paid by a third party it has advanced its position rather dramatically. If the principal who pays it to the W.C.B. applies the right of set-off, the bankruptcy estate has been reduced and thereby altered to the detriment of those on the list of priorities. Even if the right of set-off is not applied, then the claim of the principal as an unsecured creditor has changed the result by increasing the total amount of the claims being made by this class of creditor. There is no way that the bankruptcy pie can be cut as a consequence of this legislation without disturbing the scheme of distribution established under s. 136 of the *Act*.

As a final comment, it is necessary to indicate that the appellants sought to sever s. 133(3) of *The Workers' Compensation Act* from the balance of s. 133 if the right of set-off was determined to be the obstacle standing in the way of a conclusion that the legislation was valid. Because it has been found that the legislation is invalid whether or not set-off is applied, this issue of severance has not been addressed. I am however of the view, without ruling on the matter, that there is no apparent justification for a conclusion that the legislators would have intended the principal to pay in full whether or not a right of set-off was available.

For the above reasons, I am unable to follow the judgment in the *Evelyn Stevens* case as I find it impossible to conclude that s. 133 of *The Workers' Compensation Act* does not alter the scheme of distribution established by s. 136 of the *Bankruptcy and Insolvency Act*. That being so, on the basis of the trilogy of cases and the further *F.B.D.B.* case, I find s. 133(1) and s. 133(3) of *The Workers' Compensation Act* to be *ultra vires* the province in so far as they purport to apply to a situation such as exists in this case.

In the result, the appeal is dismissed with costs on the usual scale of double Column 5 if requested.

DATED at the City of Regina, in the Province of Saskatchewan, this 8th day of November A.D. 1993.

WAKELING J.A.

I concur

LANE J.A

I concur

JACKSON J.A.

14 P

Montréal (City) v. Deloitte Restructuring Inc.

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe and S.L. Martin JJ.

Heard: May 20, 2021;

Judgment: December 10, 2021.

File No.: 39186

[2021] S.C.J. No. 53 | [2021] A.C.S. no 53 | 2021 SCC 53 | 2021EXP-3009 | 2021 CarswellQue 18528 | 340 A.C.W.S. (3d) 7 | 463 D.L.R. (4th) 657 | 94 C.B.R. (6th) 1

Ville de Montréal, Appellant; v. Deloitte Restructuring Inc., Respondent, and Alaris Royalty Corp., Integrated Private Debt Fund V LP, Thornhill Investments Inc., Ville de Laval and Union des municipalités du Québec, Interveners

(143 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Application of Act — Compromises and arrangements --Directions — Claims — Appeal by City of Montreal from Quebec Court of Appeal judgment affirming judgment of supervising judge that compensation could not be effected in favour of City dismissed — After SM Group became subject to proceedings under CCAA, it continued to perform work for City — City refused to pay and invoked its right to effect compensation between what it owed SM Group and two alleged claims against SM Group resulting from fraud that pre-dated initial order — City had not shown claim arising under Voluntary Reimbursement Program fell within s. 19(2)(d) of CCAA — Initial order stayed City's right to pre-post compensation — It was not appropriate to lift stay in relation to City's claims — Companies' Creditors Arrangement Act, ss. 11, 11.02, 19(2)(d).

Bankruptcy and insolvency law — Proceedings — Practice and procedure — General principles — Legislation — Interpretation — Statutes — Regulations — Stays — Appeal by City of Montreal from Quebec Court of Appeal judgment affirming judgment of supervising judge that compensation could not be effected in favour of City dismissed — After SM Group became subject to proceedings under CCAA, it continued to perform work for City — City refused to pay and invoked its right to effect compensation between what it owed SM Group and two alleged claims against SM Group resulting from fraud that pre-dated initial order — City had not shown claim arising under Voluntary Reimbursement Program fell within s. 19(2)(d) of CCAA — Initial order stayed City's right to pre-post compensation — It was not appropriate to lift stay in relation to City's claims — Companies' Creditors Arrangement Act, ss. 11, 11.02, 19(2)(d).

Statutory interpretation — Statutes — Construction — Liberal — By context — Legislative intent — Real or apparent purpose — Appeal by City of Montreal from Quebec Court of Appeal judgment affirming judgment of supervising judge that compensation could not be effected in favour of City dismissed — After SM Group became subject to proceedings under CCAA, it continued to perform work for City — City refused to pay and invoked its right to effect compensation between what it owed SM Group and two alleged claims against SM Group resulting from fraud that pre-dated initial order — City had not shown claim arising

under Voluntary Reimbursement Program fell within s. 19(2)(d) of CCAA — Initial order stayed City's right to pre-post compensation — It was not appropriate to lift stay in relation to City's claims — Companies' Creditors Arrangement Act, ss. 11, 11.02, 19(2)(d).

Construction law — Payment — Owner's right to set-off against — Appeal by City of Montreal from Quebec Court of Appeal judgment affirming judgment of supervising judge that compensation could not be effected in favour of City dismissed — After SM Group became subject to proceedings under CCAA, it continued to perform work for City — City refused to pay and invoked its right to effect compensation between what it owed SM Group and two alleged claims against SM Group resulting from fraud that pre-dated initial order — City had not shown claim arising under Voluntary Reimbursement Program fell within s. 19(2)(d) of CCAA — Initial order stayed City's right to pre-post compensation — It was not appropriate to lift stay in relation to City's claims — Companies' Creditors Arrangement Act, ss. 11, 11.02, 19(2)(d).

Appeal by the City of Montreal from a judgment of the Quebec Court of Appeal that affirmed a declaratory judgment of the supervising judge. In 2018, SM Group, a consulting engineering firm, became subject to proceedings under the Companies' Creditors Arrangement Act ("CCAA"). It continued to perform work for the City. The City refused to pay for the work and invoked its right to effect compensation between what it owed SM Group and two claims it allegedly had against SM Group resulting from fraud that arose before the initial order. The first claim arose from a settlement agreement entered into under the Voluntary Reimbursement Program ("VRP") established by Bill 26. The second claim was based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract. The monitor of SM Group applied for a declaratory judgment that compensation could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. She held that pre-post compensation was not possible with respect to the VRP claim, and that the water meter contract claim was neither liquid nor exigible, which precluded compensation. The Court of Appeal agreed that the compensation invoked by the City could not be effected.
HELD: Appeal dismissed.

The City had not shown the VRP claim related to a debt resulting from fraud within the meaning of s. 19(2)(d) of the CCAA. The City had not proven the alleged fraud. The substantive provisions of Bill 26 and the VRP Regulation contemplated fraud only hypothetically. Neither the content of the VRP agreement nor its legal framework supported a presumption that SM Group admitted to having committed a fraudulent act. The court had the authority under sections 11 and 11.02 of the CCAA to stay rights held by creditors, including a creditor's right to effect pre-post compensation, if the exercise of those rights could jeopardize the restructuring process. Section 21 of the CCAA was limited to authorizing compensation between debts that arose before an initial order was made ("pre-pre compensation") for the purpose of quantifying creditors' claims on the date of commencement of proceedings. The provision did not authorize pre-post compensation. The initial order stayed the City's right to pre-post compensation. Allowing the City to withhold amounts owed to SM Group pending the outcome of the case relating to the water meter contract was not appropriate. The City had not acted in accordance with the standard of diligence expected in CCAA proceedings. The City was conflating the public interest with its own interest as a public body. It would not be appropriate to lift the stay in relation to the claims in issue. Dissenting reasons were provided.

Statutes, Regulations and Rules Cited:

Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, S.C. 1997, c. 12

Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR, c. R 2.2.0.0.3 ("Bill 26"), s. 1, s. 3, s. 7, s. 9, s. 10, s. 11, s. 14, s. 17

Act to give effect to the Charbonneau Commission recommendations on political financing, S.Q. 2016, c. 18

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 71, s. 97(3), s. 121(1), s. 178(1)(e)

Civil Code of Quebec, Art. 2849

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6(1), s. 11, s. 11.01, s. 11.02, s. 11.02(1), s. 11.02(2), s. 11.08, s. 11.1, s. 19, s. 19(1), s. 19(2), s. 19(2)(d), s. 20, s. 21, s. 32

Integrity in Public Contracts Act, S.Q. 2012, c. 25

Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1, s. 1, s. 4, s. 7, s. 8

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 73(1)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and insolvency -- Stay of creditors' rights and remedies -- Claims that may be dealt with by compromise or arrangement -- Compensation between debt arising before and debt arising after initial order -- Quebec Voluntary Reimbursement Program -- Whether claim arising from agreement entered into under Quebec Voluntary Reimbursement Program is necessarily claim that relates to debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d) of Companies' Creditors Arrangement Act -- Whether supervising judge's discretion in restructuring context allows judge to stay right invoked by creditor to effect compensation between debt arising before and debt arising after initial order -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02, 19(2)(d), 21 -- Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts, CQLR, c. R-2.2.0.0.3 -- Voluntary Reimbursement Program, CQLR, c. R-2.2.0.0.3, r. 1.

Court Summary:

In August 2018, the Superior Court made an initial order by which SM Group, a consulting engineering firm, became subject to proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The order stayed the rights and remedies of creditors, among other things, and appointed a monitor. Following that order, SM Group continued to perform work for Ville de Montréal ("City"). However, the City refused to pay for that work and invoked its right to effect compensation between what it owed SM Group and two claims it allegedly had against SM Group that arose before the initial order. Those claims are related to the application of the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts* ("Bill 26") and, according to the City, result from fraud on SM Group's part. The first claim arises from a settlement agreement entered into under the Voluntary Reimbursement Program ("VRP") that resulted from Bill 26 ("VRP claim"). The second claim is based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract.

In response to the City's refusal to pay for the work done by SM Group after the initial order, the monitor applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. The Court of Appeal reached the same conclusion as the supervising judge: that the compensation invoked by the City could not be effected. It found that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is not an exception to the rule stated in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, whereby compensation between debts arising before and after an initial order ("pre-post compensation") is prohibited. It was also of the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, the Court of Appeal agreed with the supervising judge that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

Held (Brown J. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and Moldaver, Karakatsanis, **Côté**, Rowe and Martin JJ.: First, a claim arising from an agreement entered into under the VRP is not necessarily a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. In this case, the City has not shown that the VRP claim relates to a debt resulting from fraud within the meaning of that provision. Second, with regard to pre-post compensation, a supervising judge has the discretion to stay the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law. However, the supervising judge may refuse to stay this right, or may lift such a stay, only in exceptional circumstances, given the high disruptive potential of this form of compensation. In the case at bar, the initial order stayed the City's right to pre-post compensation, and it would not be appropriate to lift the stay in relation to the claims in issue.

To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*.

The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(2) provides, by way of exception, that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud. To prove that its claim relates to a debt resulting from obtaining property or services by false pretences or fraudulent misrepresentation pursuant to s. 19(2)(d), a creditor has the burden of establishing, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service.

In this case, the City did not try to prove or even allege any of these elements. The content of the VRP agreement, Bill 26 and the regulation made under it ("VRP Regulation") must therefore be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. This interpretation exercise confirms that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

First, it is clearly stipulated in the VRP agreement entered into by the parties that the amount fixed in the agreement can in no way be considered to constitute an admission of liability. As a result, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*.

Second, Bill 26 and the VRP Regulation do not create a statutory presumption or a presumption of fact that a debtor made fraudulent representations to a public body. The use of the words "may have been" in s. 3 of Bill 26 and in s. 1 of the VRP Regulation to describe the purpose of the VRP indicates that fraud is a possibility rather than a certainty. Section 7 of the VRP Regulation supports this point, since it states that the fact that a natural person or an enterprise participates in the VRP does not constitute an admission of liability or of a fault committed by the natural person or enterprise. The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8.

The City is wrong to say that reading ss. 1, 3 and 10 of Bill 26 together leads to the conclusion that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. Although s. 1 of Bill 26 does not refer to fraud as being hypothetical, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. Finally, the two schemes created by Bill 26 must not be confused. Section 10 states that fraud was committed, but this section is part of the scheme introduced by Chapter III (ss. 10 to 17), which applies to judicial proceedings brought against a natural person or enterprise that allegedly participated in fraud in relation to a public contract, and not part of the VRP scheme introduced by Chapter II (ss. 3 to 9). It is up to the courts to conclude that fraud has been committed, and the existence of fraud will be recognized by a court only under the Chapter III scheme, which did not take effect until the VRP scheme introduced by Chapter II ended. The reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies. Accordingly, the City has not shown that the VRP claim falls within s. 19(2)(d) of the *CCAA*. Neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act.

Furthermore, a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law can be stayed by a court under ss. 11 and 11.02 of the *CCAA*. Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. While at first glance the language of this provision limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order. A court has the power to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation. Such an interpretation advances the *CCAA*'s remedial objectives and is consistent with its scheme.

In the vast majority of cases, an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. However, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. The absolute prohibition against pre-post compensation imposed by the Quebec Court of Appeal in *Kitco* must therefore be tempered. However, a court must be cautious before allowing such a form of compensation, given its high disruptive potential.

Moreover, s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is limited to authorizing compensation between debts that arise before an initial order is made ("pre-pre compensation") for the purpose of quantifying creditors' claims on the date of commencement of proceedings. This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. It follows that a supervising judge retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part. The first consideration relates both to the order itself and to the means that are employed. It is assessed in light of the *CCAA*'s remedial objectives, which include protecting the public interest. In very specific circumstances, a court could conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*. However, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors. The second consideration is also important because it discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage.

In the case at bar, the words of the stay order made by the Superior Court are broad enough to stay pre-post compensation, and it would not be appropriate to lift the stay in relation to the VRP claim. Because the City has not proved the alleged fraud and has not relied, in support of its position, on any of the *CCAA*'s remedial objectives other than protecting the public interest, it has not discharged its burden of proving that the order being sought is appropriate. In addition, the City did not act with the diligence expected in *CCAA* proceedings.

With regard to the water meter contract claim, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in that case. That order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of that case would not be appropriate for the same reasons as those relating to the VRP claim.

Per **Brown** J. (dissenting): The appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect pre-post compensation for the VRP claim and whether compensation is available in respect of the water meter claim. There is agreement with the majority that a supervising judge has a discretion under s. 11 of the *CCAA* as to whether to allow a creditor to effect pre-post compensation, or set-off. However, this discretion is not limited solely to the exceptional circumstances the majority describes. The scope of s. 21 of the *CCAA* is not limited to pre-pre compensation; pre-post compensation is permitted, but must be subject to the exercise of a supervising judge's discretion. Moreover, nothing in s. 21 of the *CCAA* prohibits judicial compensation.

The approach taken by the Quebec Court of Appeal in *Kitco*, according to which pre-post compensation will never be authorized under the *CCAA*, involves several errors and must be rejected. To begin with, the Court of Appeal erred in relying on a judgment rendered by the Court in the context of a bankruptcy under the *Bankruptcy and Insolvency Act* ("*BIA*"). Although the scheme established by the *CCAA* and the one established by the *BIA* must be viewed as an integrated body of insolvency law, there remain many differences between them, including two that are fundamental. First, when an insolvent company has recourse to the *CCAA*, it continues its business activities and is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee. There is thus no loss of mutuality under the *CCAA*. This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. Secondly, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective of restructuring a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules. The *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved. Because of these objectives, a broad discretion is also conferred on supervising judges by s. 11 of the *CCAA*. This discretion has no equivalent in the *BIA*.

Next, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*. The approach proposed in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces, which is contrary to the principle of homogenous interpretation of federal statutes.

Lastly, staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance. However, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process in this situation.

In the instant case, there is no need to decide whether the VRP claim must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. Section 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). It is true that proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit pre-post compensation; however, whether the City's VRP claim results from fraud is a question to be decided by the supervising judge, not by the Court.

Given that the supervising judge did not exercise her discretion under s. 11 of the *CCAA*, believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, it is not for the Court to exercise that discretion in order to determine whether to permit pre-post compensation. Supervising judges are in the best position to decide whether to exercise their discretion in a particular case. In cases involving an exercise of discretion by a court of first instance, it is not in the interests of justice for the Court to step into that court's shoes and decide these matters.

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History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Healy and Ruel JJ.A.), 2020 QCCA 438, [2020] J.Q. nº 1852 (QL), 2020 CarswellQue 1987 (WL Can.), affirming a decision of Corriveau J., 2019 QCCS 2316, [2019] J.Q. nº 4840 (QL), 2019 CarswellQue 5032 (WL Can.). Appeal dismissed, Brown J. dissenting.

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Raphaël Lescop and *Eleni Yiannakis*, for the appellant.

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Elizabeth Ferland, for the intervener Ville de Laval.

Marc Duchesne, for the intervener Union des municipalités du Québec.

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English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE R. WAGNER AND S. CÔTÉ J.

I. Introduction

1 This appeal raises an issue relating to compensation, or set-off in a common law setting, between two debts in the context of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The question is whether compensation is permitted for debts between the same parties: on the one hand, a debt resulting from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3 ("Bill 26"), that predates an initial order made under the *CCAA* and, on the other hand, a debt between the same parties that postdates that order. In these reasons, we will use the expression "pre-post compensation" to refer generally to compensation between debts arising before and after an initial order.

2 This question thus affords the Court an occasion to interpret, for the first time, certain provisions of Bill 26 as well as the regulation made under it, the *Voluntary Reimbursement Program*, CQLR, c. R-2.2.0.0.3, r. 1 ("VRP Regulation"). In doing so, we will clarify for public bodies the burden of proof that rests on them in seeking to establish that a claim arising from an agreement entered into under the Voluntary Reimbursement Program ("VRP") is fraudulent.

3 Bill 26 was passed by the Quebec National Assembly in March 2015 in response to a commission of inquiry that had brought to light the existence of schemes involving collusion and corruption in the awarding and management of public contracts in the construction industry ("Charbonneau Commission"), and the VRP Regulation was made a few months later. The program resulting from this legislation, which was in effect for two years, allowed enterprises to "reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which there may have been fraud or fraudulent tactics" (s. 3 of Bill 26).

4 To answer the question with respect to compensation in the context of this appeal, the Court must first determine whether a claim arising from an agreement entered into under the VRP is necessarily a "claim that relates to" a "debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" pursuant to s. 19(2)(d) of the *CCAA*. We would answer this question in the negative. It cannot be presumed that a claim arising from the VRP falls within that provision where no evidence to this effect has been tendered. We also conclude that a court should generally exercise its discretion to stay pre-post compensation, although it may, in rare cases, refuse such a stay. As well, the court may later lift the stay of the right to pre-post compensation in appropriate cases. In the case at bar, however, we conclude that the initial order stayed the right of the appellant, Ville de Montréal ("City"), to pre-post compensation and that it would not be appropriate to lift the stay in relation to the claims in issue.

5 The appeal should therefore be dismissed.

II. Facts

6 SM Group, which at the relevant time was a consulting engineering firm, performed a variety of contracts for the City over a period of several years. The Charbonneau Commission's work uncovered a link between SM Group and certain central players in the collusion schemes. Two of its former officers were in fact charged with criminal offences. SM Group subsequently became insolvent.

7 On August 24, 2018, the Quebec Superior Court made an initial order by which SM Group became subject to proceedings under the *CCAA* and the rights and remedies of creditors were stayed. The respondent, Deloitte Restructuring Inc. ("Deloitte"), was appointed as monitor. Following that order, SM Group continued to perform work for the City, including the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

8 The City refused to pay for that work. On November 7, 2018, it invoked its right to effect compensation between its debt to SM Group for the work done after the initial order and two claims against SM Group that, according to the City, arose before the order and resulted from fraud on SM Group's part.

9 On November 12, 2018, the Superior Court approved the sale of some of SM Group's assets to Thornhill Investments Inc. ("Thornhill"). One week later, SM Group's contracts were assigned to Thornhill.

10 The two claims raised by the City are related to the application of Bill 26. The purpose of that statute, read in conjunction with the *Integrity in Public Contracts Act*, S.Q. 2012, c. 25, enacted in 2012, and the *Act to give effect to the Charbonneau Commission recommendations on political financing*, S.Q. 2016, c. 18, enacted in 2016, is to strengthen public confidence in government institutions by addressing the revelations made by the Charbonneau Commission. Bill 26 has been described as [TRANSLATION] "a statutory benchmark for establishing a lack of ethics and lax (if not criminal) morals in a number of enterprises in relation to the awarding of public contracts in Quebec" (*R. v. Fedele*, 2018 QCCA 1901, at para. 44 (CanLII)).

11 The first claim the City alleges it has against SM Group arises from a settlement agreement entered into in November 2017 by SM Group and the Minister of Justice, acting on the City's behalf, under the VRP ("VRP claim"). The second is based on a proceeding brought by the City against SM Group in September 2018, in which it claimed more than $14 million from SM Group for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim").

12 Because SM Group had failed to repay the VRP claim and because the sale of certain assets to Thornhill was imminent, the City advised SM Group that it intended to effect compensation between what it owed SM Group and the above-mentioned claims, noting that those claims could not be discharged or dealt with by a compromise or arrangement in the planned restructuring process given that they resulted from fraud and from a misappropriation of public funds.

13 In response, Deloitte applied for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the City to SM Group for work performed for the City.

III. Judicial History

A. *Quebec Superior Court, 2019 QCCS 2316 (Corriveau J.)*

14 The supervising judge granted Deloitte's application for a declaratory judgment and held that pre-post compensation could not be effected in favour of the City. Even though, in her view, the VRP claim was linked to an allegation of fraud that had not been refuted by SM Group, she concluded that, according to the principles laid down in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation.

B. *Quebec Court of Appeal, 2020 QCCA 438 (Rochette and Healy JJ.A., Ruel J.A. Dissenting in Part)*

15 Rochette J.A., writing for the majority, rejected the City's argument regarding the VRP claim. Relying on *Kitco*, he reached the same conclusion as the supervising judge: that pre-post compensation could not be effected in this case. He also rejected the City's argument that a claim relating to fraud falling within s. 19(2)(d) of the *CCAA* is an exception to the rule stated in that case. In any event, he expressed the view that the City had not proved that s. 19(2)(d) applied to its claims. Finally, with regard to the water meter contract claim, Rochette J.A. added that the conditions for judicial compensation were not met, since the certainty, liquidity and exigibility of that claim had to be determined later in a proceeding other than that of the restructuring case.

16 Ruel J.A., dissenting in part, agreed with his colleagues on the nature of the water meter contract claim. However, he was of the view that the VRP claim had to be presumed to fall within s. 19(2)(d) of the *CCAA* and that *Kitco* had to be distinguished on the basis that it had been rendered in a different context. In the final analysis, Ruel J.A. found that s. 19(2)(d) of the *CCAA* represents an exception to the principle established in that case and that it therefore allowed pre-post compensation between the two parties' respective debts.

IV. Issues

17 This appeal raises the following three questions:

1. Is the VRP claim a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*?
2. Does the *CCAA* permit compensation between a debt that arises before an initial order and one that arises after that order?
3. If compensation is permitted, should the City be authorized to withhold the payments owed to SM Group until judgment is rendered in the case relating to the water meter contract?

18 We will deal with these questions by considering each of the City's claims separately.

V. Analysis

19 In essence, the City argues that the VRP claim cannot be dealt with by a compromise or arrangement because it relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. According to the City, such a claim falls outside the absolute prohibition against pre-post compensation imposed by *Kitco*. The City also argues that the absolute nature of the *Kitco* rule is inconsistent with the broad discretion conferred on supervising judges by the *CCAA*. It submits that supervising judges can, in exercising their discretion, authorize pre-post compensation in appropriate circumstances. The exercise of this discretion is particularly appropriate where fraud is involved.

20 For the reasons that follow, we are of the view that the VRP claim in this case is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. We also conclude that a right to pre-post compensation, or set-off, invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the *CCAA*. In our opinion, however, a supervising judge has the discretion to authorize pre-post compensation only in exceptional circumstances, given the high disruptive potential of this form of compensation. In this regard, the fact that the debt underlying a VRP claim is fraudulent, where this is shown, is a relevant factor in the exercise of the supervising judge's discretion. In this case, we find that it would not be appropriate to allow the City to effect compensation with respect to the VRP claim. Nor would it be appropriate to authorize the City to withhold the payments owed to SM Group pending the outcome of the case relating to the water meter contract.

A. *Voluntary Reimbursement Program Claim*

(1) <u>Characterization of the Voluntary Reimbursement Program Claim</u>

21 We must begin by determining whether the VRP claim is a claim that relates to a fraudulent debt, because this is the premise behind the City's reasoning. For the reasons that follow, we conclude that this basic premise is not correct: the VRP claim is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*. The mere fact that a debtor company participated in the VRP is not sufficient to infer that the company defrauded a public body. In light of this conclusion, it is not necessary for us to deal with Deloitte's alternative argument that s. 19 of the *CCAA* is inapplicable in this case because there is no plan providing for a compromise or arrangement.

22 The first step in characterizing the VRP claim is to distinguish, for the purposes of the *CCAA*, claims that are subject to a compromise or arrangement from those that are not. Section 19(1) of the *CCAA* sets out the general scheme governing claims that may be dealt with by a 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).

23 As an exception to this scheme, s. 19(2) of the *CCAA* provides that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud:

> **(2)** A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:
>
> ...

> **(d)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; ...

24 The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which is analogous in every respect to s. 19(2)(d) of the *CCAA*. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes "for[m] part of an integrated body of insolvency law" (para. 78; see also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 74).

25 To discharge its burden of proving that its claim relates to a debt "resulting from obtaining property or services by false pretences or fraudulent misrepresentation", a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at Hs.63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006; D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the *CCAA* applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at Hs.63). This exception to the general scheme established by s. 19(1) of the *CCAA* must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

26 The City's burden was certainly not negligible: it had to prove that SM Group had knowingly made a false representation that led to the VRP claim. However, the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations.

27 As a result, the content of the VRP agreement, Bill 26 and the VRP Regulation must be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. In this regard, and for the reasons that follow, we agree with the majority of the Court of Appeal that s. 19(2)(d) of the *CCAA* does not apply to the VRP claim.

28 First, the content of the VRP agreement itself is a complete bar to the City's argument that participation in the program in itself justifies a finding that the City's claim results from SM Group's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulates that the amount fixed in the agreement can in no way be considered to constitute an admission of liability, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the *CCAA*. The onus was therefore on the City to prove, in accordance with the provisions of that statute, that SM Group had knowingly made a false representation to it in order to obtain property or a service.

29 In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at Hs.63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the *BIA* that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard (see, e.g., *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417, at para. 2 (CanLII); *Dupuis*, at paras. 36-40; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII); *Tavan v. Rostami*, 2014 QCCA 304, at paras. 3-6 (CanLII); *Léger*, at paras. 30-40; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. para I-6280, at paras. 20-25; *Sharma v. Sandhu*, 2019 MBQB 160, at paras. 38-45 (CanLII); *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719, at paras. 90-92 (CanLII); *Berger*, at paras. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.J.), at pp. 106-7, aff'd (1985), 53 C.B.R. (N.S.) 275 (C.A.); *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301, at paras. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, at paras. 37-63; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at paras. 30-48 (CanLII); *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, at paras. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, at paras. 53-58).

30 Second, Bill 26 and the VRP Regulation published in the *Gazette officielle du Québec* pursuant to ss. 3 and 4 of that statute do not provide any greater support for the City's position. We agree with the majority of the Court of Appeal, who rejected the idea of a statutory presumption or a presumption of fact that a debtor made fraudulent representations based solely on the fact that it participated in the VRP. That scheme, which was in effect from November 2015 to December 2017, created no such presumption.

31 The purpose of the VRP as defined in s. 3 of Bill 26 -- in Chapter II, entitled "Reimbursement Program" -- supports this conclusion:

> **3.** The Minister publishes in the *Gazette officielle du Québec* a voluntary, fixed-term reimbursement program to make it possible for an enterprise or a natural person mentioned in section 10 to reimburse certain amounts improperly paid in the course of the tendering, awarding or management of a public contract in relation to which <u>there may have been fraud or fraudulent tactics</u>.

32 The use of the words "may have been" in the phrase "there may have been fraud or fraudulent tactics" clearly contradicts the City's argument. Moreover, the same words are also used in s. 1 of the VRP Regulation in describing the purpose of that program:

> **1.** The Voluntary Reimbursement Program makes it possible for every natural person and every enterprise to reimburse certain amounts improperly paid by a public body in the course of the tendering, awarding or management of a public contract entered into after 1 October 1996 in relation to which <u>there may have been fraud or fraudulent tactics</u>.

33 The fact that fraud is characterized as a possibility rather than a certainty is by no means surprising. Given the VRP's purpose of recovering amounts paid improperly by public bodies, it stands to reason that Bill 26 does not provide for any mechanism to determine whether amounts agreed to under the VRP are in fact related, in whole or in part, to fraud. Section 7 of the VRP Regulation supports this point, since it states the following:

> **7.** The fact that a natural person or an enterprise participates in the Program does not constitute an admission of liability or of a fault committed by the natural person or enterprise.

34 The fault in question in s. 7 is a matter of civil liability and is limited to the public contract to which a VRP agreement pertains. Where the legislature intends to refer to penal or criminal proceedings, or to civil proceedings outside the scope of a VRP agreement, it does so expressly. This interpretation is confirmed when s. 7 of the VRP Regulation is read in conjunction with s. 8:

> **8.** Every natural person or enterprise participating in the Program acknowledges that revealing information or sending documents within the Program framework does not restrict in any manner whatever a public body's capacity to bring civil proceedings against the natural person or enterprise in relation to public contracts for which a settlement has not been reached under the Program or to which the Act does not apply.
>
> Every natural person or enterprise acknowledges that participation in the Program and the conclusion of an agreement under it in no manner protects the natural person or enterprise, or its officers, against any penal or criminal proceedings that have been or may be brought in connection with public contracts entered into by the natural person or enterprise.

35 Evidence that a natural person or enterprise participated in the VRP therefore cannot on its own justify characterizing a claim as being related to a debt resulting from fraud pursuant to s. 19(2)(d) of the *CCAA*.

36 However, the City submits that reading ss. 1, 3 and 10 of Bill 26 together leads to an entirely different conclusion, namely that a natural person or enterprise that participated in the VRP necessarily defrauded a public body. In our view, the City is wrong.

37 It is true that s. 1 of Bill 26 does not refer to fraud as being hypothetical:

> **1.** This Act provides for exceptional measures for the reimbursement and recovery of amounts improperly paid as a result of fraud or fraudulent tactics in the course of the tendering, awarding or management of public contracts.

As we saw above, however, s. 3 of Bill 26 and s. 1 of the VRP Regulation are clear: there is no question that, unlike s. 1 of Bill 26, which sets out the purpose of that statute generally, the substantive provisions of Bill 26 and the VRP Regulation contemplate fraud only hypothetically. In addition, the City's interpretation cannot be reconciled with ss. 7 and 8 of the VRP Regulation, which are reproduced above.

38 That being said, the City points out that s. 3 of Bill 26 refers to s. 10, which specifically states that fraud was committed:

> **10.** Any enterprise or natural person who has, in any capacity, participated in fraud or fraudulent tactics in the course of the tendering, awarding or management of a public contract is presumed to have caused injury to the public body concerned.
>
> In such a case, the officers of the enterprise in office at the time the fraud or fraudulent tactics occurred are held liable unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.
>
> The directors of the enterprise in office at the time the fraud or fraudulent tactics occurred are also held liable if it is established that they knew or ought to have known that fraud or fraudulent tactics were committed in relation to the contract concerned, unless they prove that they acted with the care, diligence and skill that a prudent person would have exercised in similar circumstances.
>
> The enterprises and natural persons referred to in this section are solidarily liable for the injury caused, unless such liability is waived by the public body.

39 We do not agree with the City's interpretation on this point. It is up to the courts to conclude that fraud of this kind has been committed. More precisely, we are of the view that the City is confusing two schemes created by Bill 26: one - - the VRP (ss. 3 to 9) -- introduced by Chapter II and the other by Chapter III, which is entitled "Special Rules Applicable to Judicial Proceedings" (ss. 10 to 17). The first scheme was designed to encourage -- for a two-year period -- natural persons or enterprises fearing that a public body would bring civil proceedings against them to participate in the VRP with a view to entering into an agreement through a completely confidential process (s. 7 of Bill 26; s. 4 of the VRP Regulation). It was only once the first scheme ended that the second, one of an entirely different nature, took effect.

40 The scheme provided for in ss. 10 to 17 of Bill 26 is one that deviates from the general law. It applies to judicial proceedings brought by a public body, or by the Minister of Justice on behalf of a public body, against a natural person or enterprise that allegedly participated in fraud in relation to a public contract. When a court allows such an action, not only can it assume that the defendant caused injury to the public body through its fraudulent act (s. 10 para. 1), but in addition, "[t]he injury is presumed to correspond to the amount claimed by the public body concerned for the contract concerned if the amount does not exceed 20% of the total amount paid for that contract" (s. 11 para. 1). The enterprises and natural persons contemplated by the statute are solidarily liable for such injury (s. 10 para. 4). An amount granted "bears interest from the date the work is accepted by the public body concerned for the contract concerned" (s. 11 para. 3). As well, the court "must add a lump sum equal to 20% of any amount granted for injury, to cover expenses incurred for the purposes of th[e] Act" (s. 14).

41 In other words, these provisions are designed to make it easier to prove causation and injury when such a proceeding is brought, but it should be noted that they are of no effect if a court finds that the evidence of fraud is insufficient; as well, and most importantly, they in no way make it easier to prove such a fault. Section 10 of Bill 26 is therefore of no assistance to the City, which in any event has not sought to show, on any basis other than the mere existence of the VRP agreement, that SM Group took part in fraud in connection with a contract the City awarded to it. The schemes created by Bill 26 suggest that a court will recognize the existence of fraud only under the Chapter III scheme. Moreover, it appears that the reference to s. 10 in s. 3 merely serves to specify the natural persons to whom the VRP applies, namely directors and officers of enterprises.

42 Lastly, it should be mentioned that it can easily be imagined that an enterprise that entered into a potentially contentious public contract with a public body would make the strategic choice to participate in the VRP out of fear of bad publicity or to avoid exposing itself to the exceptional scheme of Chapter III of Bill 26, the result of which, if the proceeding were decided in the public body's favour, would likely be significant additional financial liability for the enterprise on top of the legal fees it would have to pay.

43 In sum, neither the content of the VRP agreement nor its legal framework supports a presumption that SM Group admitted to having committed a fraudulent act; nor does the VRP agreement constitute a serious, precise and concordant presumption of fact (art. 2849 of the *Civil Code of Québec*). It follows that the City has not shown that the VRP claim falls within s. 19(2)(d) of the *CCAA*.

(2) Compensation Between Debts Arising Before and After an Initial Order (Pre-post Compensation)

44 The bankruptcy of large companies often resulted in "the entire disruption of the corporation, loss of goodwill, and sale of assets on a discounted basis" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 22-23; see also *Century Services*, at para. 16). Parliament, wishing to protect the survivability of such companies, which are essential to economic prosperity and to a high rate of employment, therefore set up a restructuring process in the *CCAA* that was designed to prevent them from being dismantled and having their assets liquidated at a discount (*Century Services*, at paras. 17-18 and 70; *Callidus*, at paras. 41-42).

45 Initially, restructuring under the *CCAA* was done through a plan of arrangement or compromise negotiated between the debtor company and its creditors that averted the company's bankruptcy by allowing it to adjust its debts and reorganize its business (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at pp. 588-90 and 592). Later, liquidation under the *CCAA* emerged as a practice. Liquidation can also serve as a tool for restructuring a struggling business "by allowing the business to survive, albeit under a different corporate form or ownership" (*Callidus*, at para. 45; see also Sarra, at p. 169; K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311).

46 The primary tool that allows the *CCAA* to achieve its restructuring objective is a stay of proceedings and of creditors' rights (Sarra, at pp. 17 and 52; McElcheran, at p. 5). The direct effect of a stay is that it creates a status quo period that stabilizes the debtor company's situation by shielding it from its creditors while the restructuring process is under way (*Century Services*, at para. 60; see also *Kitco*, at para. 43 (CanLII)). Without such a period, there would be a free-for-all in which individual creditors would fight it out to enforce their rights without regard for the company's survival or the maximization of its liquidation value (*Century Services*, at para. 22).

47 During the status quo period, the debtor company can therefore continue operating without fear of being driven into bankruptcy by its creditors. This temporary respite creates an environment conducive to fair negotiations between the various stakeholders and gives the debtor the necessary time to prepare a plan of compromise or arrangement ensuring its survival, or to take steps to maximize the value of the business it operates with a view to its liquidation under the *CCAA* (*Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 32 Alta. L.R. (2d) 150 (Q.B.), at para. 15; *Kitco*, at para. 43; *Callidus*, at paras. 40 and 46).

48 The fundamental feature of the *CCAA* is a grant to the courts that apply it of a broad discretion to make any orders needed to ensure that restructuring is successful and that the *CCAA*'s objectives are achieved (*Century Services*, at para. 19). The true "engine" driving the statutory scheme (*Callidus*, at para. 48, citing *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36), this judicial discretion also plays a prominent part in stays of proceedings.

49 In principle, a court may deny a stay application. Such applications are rarely denied, however, to the point where the terms "initial order" and "stay order" have, in practice, become interchangeable (Sarra, at p. 51). Stays are in fact requested and granted systematically, other than in certain exceptional cases (p. 51).

50 A stay is a temporary measure, however; once it has been lifted, creditors regain their ability to fully exercise their rights and remedies (*Quinsam Coal Corp., Re*, 2000 BCCA 386, 20 C.B.R. (4th) 145, at paras. 9 and 14). On an initial application in respect of a debtor company, a court may include in its initial order a first stay period of no more than 10 days (s. 11.02(1) of the *CCAA*). After that, the court may renew the stay for any period it considers necessary (s. 11.02(2) of the *CCAA*). When a stay is renewed, or at any other time in the course of the proceedings, an interested creditor may, in accordance with the procedure set out in the initial order, apply to the court to lift a stay affecting any of its rights or remedies (Sarra, at pp. 58-60 and 88; see also *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J.), at para. 5; *Parc industriel Laprade inc. v. Conporec inc.*, 2008 QCCA 2222, [2008] R.J.Q. 2590, at paras. 7-8 and 14-15).

51 While it is true that the *BIA* and the *CCAA* form part of an integrated body of insolvency law, there are nonetheless some fundamental differences between the two schemes (*Century Services*, at para. 78). Unlike the *BIA*, the *CCAA* gives courts a broad discretion to decide whether a stay is appropriate, to determine how long it should last and to adjust its scope depending on what is needed to restructure the debtor company and to achieve the objectives of the *CCAA*. In this regard, the *CCAA* has been described as a "skeletal" statute that does not contain "a comprehensive code that lays out all that is permitted or barred" (*Century Services*, at para. 57, quoting *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44).

52 To fully understand the rights and restrictions applicable in a given case, it is therefore not enough to read the legislation; it is also important to consider the court's exercise of its discretion, which is reflected in all of the many orders made throughout the proceedings.

53 The question raised by this appeal is therefore whether a court's discretion allows it to stay a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law and, by extension, to authorize pre-post compensation in appropriate cases.

(a) *Power to Grant and Lift a Stay of the Right to Pre-post Compensation*

54 In our view, the broad discretion conferred on a court by ss. 11 and 11.02 of the *CCAA* allows it to stay rights held by creditors if the exercise of those rights could jeopardize the restructuring process. This includes a creditor's right to effect pre-post compensation.

55 Under s. 11.02 of the *CCAA*, a court may stay any action, suit or other proceeding that might be brought against the debtor company. Despite the language of s. 11.02, which at first glance limits the power to order a stay to judicial proceedings, the courts have taken a large and liberal approach in interpreting the scope of the rights and remedies that can be included in a stay order (see *Meridian*, at para. 26; *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.), at pp. 113-14; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, at paras. 31-33; McElcheran, at pp. 135 and 245-46; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 363). For example, in *Quintette Coal*, the British Columbia Court of Appeal concluded that a creditor's right to pre-post set-off can be stayed just like any other enforcement measure with a high disruptive potential (see also *Associated Investors of Canada Ltd. (Manager of) v. Principal Savings & Trust Co. (Liquidator of)* (1993), 13 Alta. L.R. (3d) 115 (C.A.), at paras. 23-24; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 13-16, aff'd 2015 BCCA 426, 378 B.C.A.C. 116, at paras. 28-30). In our view, this interpretation is the correct one, as it advances the *CCAA*'s remedial objectives and is consistent with its scheme.

56 It can also be seen from the various model initial orders adopted by the country's superior courts that prohibitions against setting off debts are standard practice, and in the vast majority of cases take effect as soon as an initial order is made (see Court of Queen's Bench of Alberta, *Alberta Template CCAA Initial Order*, January 2019 (online), at paras. 14 and 16; Supreme Court of British Columbia, *Model CCAA Initial Order*, August 1, 2015 (online), at paras. 16 and 18; Ontario Superior Court of Justice, Commercial List, *Initial Order*, January 21, 2014 (online), at paras. 15-16; Superior Court of Quebec, Commercial Division, *Initial Order*, May 2014 (online), at paras. 10 and 12; Court of Queen's Bench for Saskatchewan, *Saskatchewan Template CCAA Initial Order*, December 6, 2017 (online), at paras. 15-16).

57 A court's discretion is therefore broad enough to allow it to stay the right of creditors to effect pre-post compensation. In such a case, the prohibition against pre-post compensation flows directly from the stay order. Conversely, a court may in its discretion refuse to impose such a prohibition or, if pre-post compensation was stayed by the order, lift the stay at a later date to allow an interested creditor to assert its rights. On this point, we reject the absolute prohibition proposed by the Quebec Court of Appeal in *Kitco*, because we conclude that a court has the discretion to allow pre-post compensation in appropriate cases.

58 The instances in which a court should not stay the right to effect pre-post compensation in an initial order will be rare, however. It must be borne in mind that a supervising judge's discretion, although broad, is not boundless. It must be exercised in furtherance of the *CCAA*'s remedial objectives (*Callidus*, at para. 49).

59 The status quo period could be rendered pointless if creditors were allowed to effect pre-post compensation without restraint (see *Kitco*, at paras. 20 and 43). *Tungsten*, in which the court stayed pre-post set-off, provides a good example of the disruptive potential of this form of set-off (*North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 ("*Tungsten* (S.C.)"), at para. 32, aff'd 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 16, 20 and 25, and 2015 BCCA 426, 378 B.C.A.C. 116, at para. 29). If a creditor could rely on compensation to refuse to pay for goods or services supplied by the debtor during the status quo period, the restructuring could be torpedoed. The debtor would have a disincentive to provide its creditors with goods and services because it would fear not being paid for them; it would then be deprived of the funds needed to continue operating (see *Kitco*, at paras. 46-48). Section 32 of the *CCAA* in fact gives the debtor a right -- subject to the limits and formal requirements provided for in that provision -- to disclaim or resiliate any agreement to which it is a party on the day on which the restructuring proceedings commence. In addition, an interim lender would most likely refuse to continue to finance the debtor's operations during this period if the loaned funds were destined to enrich another creditor at its expense. Lastly, the rampart set up by a stay to protect against attacks from all sides by creditors would also crumble, thereby increasing the risk of the debtor's collapse and bankruptcy (see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 22 and 29).

60 The inevitable interruption of the business relationship between the debtor and those who are at once creditors and customers could not come at a worse time. Without these contracts and without the payment of accounts receivable and interim financing to replenish the debtor's working capital, the resale value of its business would melt away, thus setting up roadblocks for restructuring it by way of liquidation. And such a situation could also be unfavourable to creditors that wish to effect compensation. If the debtor terminates a contract and refuses to perform it, the creditor concerned will be deprived of the benefit of the contract and will have to find a new contracting party in place of the debtor, with no guarantee that the price will remain the same.

61 Furthermore, where pre-post compensation has been stayed, the court retains the discretion to lift the stay based on the specific facts of each case. However, it must be cautious in doing so, given the high disruptive potential of such compensation.

62 In conclusion, we are of the view that ss. 11 and 11.02 of the *CCAA* authorize a court to stay pre-post compensation. Although we would temper the rule from *Kitco*, which involves an absolute prohibition against pre-post compensation, it is our view that in the vast majority of cases an initial order will, and should, stay a creditor's right to set up pre-post compensation against the debtor. Finally, where an initial order has stayed the right of creditors to pre-post compensation, the court retains the discretion to lift the stay having regard to the circumstances.

(b) *Scope of Section 21 of the CCAA*

63 In addition, we note that s. 21 of the *CCAA* does not grant creditors a right to pre-post compensation that would be shielded from a supervising judge's power to order a stay under ss. 11 and 11.02 of the *CCAA*. Although s. 21 of the *CCAA* indicates that there is a right to effect compensation in proceedings under that statute, we are of the opinion that it applies only to compensation between debts that arise *before an initial order is made* (in other words, "pre-pre compensation"). The modern approach to statutory interpretation dictates this conclusion (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87). Our interpretation of s. 21 of the *CCAA* is not based on an inappropriate analogy with the provisions of the *BIA*.

64 Section 21 does state that it is possible to effect compensation in insolvency proceedings under the *CCAA*, but it does not specifically deal with pre-post compensation. It reads as follows:

> **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.

Read in light of its context, its purpose and the scheme of the *CCAA*, s. 21 is, in our view, limited to authorizing pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings.

65 With regard to the context, s. 21 is in a different part of the statute than the one that provides for a court's discretion to order a stay. The power to order a stay (ss. 11 and 11.02) and most of the exceptions to it (see, e.g., ss. 11.01, 11.08 and 11.1) appear in Part II, which is entitled "Jurisdiction of Courts". Section 21, meanwhile, is in the division of Part III entitled "Claims", which also includes ss. 19 and 20. This indicates that Parliament probably did not consider s. 21 to be an exception to the stay period. If Parliament had in fact intended s. 21 to be an exception, it would have included it in Part II or expressly stated that it was an exception.

66 What is more, when s. 21 is considered in the broader context of the "Claims" division, it becomes clear that this provision is part of a set of rules governing the claims that may be dealt with by a compromise or arrangement and the quantification of the resulting amounts.

67 Section 19 specifies which claims may be dealt with by a compromise or arrangement (s. 19(1)) and those which will remain intact despite the creditors' agreement to a compromise or arrangement and its sanction by a court (s. 19(2)). Only claims arising before the date of commencement of bankruptcy or insolvency proceedings are "claims" that fall under s. 19 and therefore give creditors a right to vote on a compromise or arrangement. As for s. 20, it contains rules for determining the amount of claims. Once that amount has been determined, it can then be used to define the relative weight of the voting rights of each creditor with a claim.[1]

68 Section 21 complements ss. 19 and 20; the compensation authorized by s. 21 is intended, among other things, to determine the value of the claim that a creditor may have against the debtor on the *date of commencement of proceedings*. In other words, the purpose of s. 21 is to provide an accurate picture of the pecuniary interest each creditor has in the restructuring on the date of commencement of proceedings, and of the number of votes each creditor should have (see *Kitco*, at para. 83). This provision is not concerned with what might happen to the debtor's business after that date, because the date of commencement of proceedings is when [TRANSLATION] "the claims must be established" and therefore when the mutuality of debts must be assessed (B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec -- Collection Droit des affaires -- Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at No. 70; see also *Kitco*, at para. 34).

69 With all due respect for our colleague, in light of the context of s. 21, it is evident that this provision is not meant to legitimize pre-post compensation.

70 This contextual interpretation of s. 21, which limits its scope to pre-pre compensation, is also confirmed by the section's purpose. It was added to the *CCAA* to prevent the unfair situation that would result from a creditor being required to pay its debt to the debtor company in full but receiving almost nothing from the debtor in payment of its claim under an arrangement or compromise. The effect of s. 21 is that the creditor receives payment of its claim up to the value of the debt it owes to the debtor (Anderson, Gelbman and Pullen, at p. 27; Boucher, at No. 70; McElcheran, at p. 116).

71 It is true that compensation "creat[es] a type of security interest in the [insolvent company's] estate" because it "[authorizes] the party claiming set-off [to] 'reorde[r]' ... his priority" by reducing the value of that party's claim (*Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 59-60; see *Kitco*, at paras. 63-68). The creditor uses its indebtedness to the debtor as a form of security for its claim, security that is equal in value to its debt to the insolvent company (*Stein v. Blake*, [1996] 1 A.C. 243 (H.L.), at p. 251). This portion of its claim is therefore sure to be paid in full (*Husky Oil*, at para. 58). The effect of compensation is thus to deviate from the principle of equality among ordinary creditors, a fundamental principle of insolvency law that applies with equal force in proceedings under the *CCAA*, one of the remedial objectives of which is to ensure the fair and equitable treatment of the claims made against a debtor (*Callidus*, at para. 40). The exception created by compensation must therefore be interpreted narrowly. As a general rule, "[o]nce a formal insolvency process commences, all unsecured creditor remedies are stayed and the creditor must stand in line behind secured and preferred creditors and share any remaining recoveries in the estate *pro rata* with all other unsecured creditors" (McElcheran, at p. 78).

72 The prejudice suffered by a creditor wishing to effect pre-post compensation does not justify expanding the scope of s. 21. When the debt owed by the creditor arises after a stay order has been made, prejudice is merely illusory. The fact that the creditor contracted obligations toward the debtor company during the stay period does not place it in a worse situation than it would have been in had it contracted with a third party instead. If it had contracted with a third party, it would likewise have had to pay the full price of the goods or services it obtained (*Tungsten* (S.C.), at para. 27). A creditor that contracts with the debtor company during the status quo period knows or ought to know that it will probably receive only pennies on the dollar in payment of its pre-order claim and that payment of its post-order debt will benefit it and the other creditors.

73 Because there is really prejudice only in the case of pre-pre compensation, this exception to the principle of equality should apply to only one of the debtor's assets on the date of commencement of insolvency proceedings, that is, the debt owed to it by the creditor (*Kitco*, at para. 68; *Husky Oil*, at para. 59). Otherwise, giving the green light to pre-post compensation would amount to granting certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings (for example, amounts received as interim financing). Professor Wood aptly describes the injustice that would thus befall the other ordinary creditors whose rights and remedies have been stayed:

> The ability to exercise a right of set-off in restructuring proceedings can operate to improve greatly the position of one creditor at the expense of the other creditors. This is illustrated in the following example. Suppose that the debtor company owes $1,000 to a creditor. The debtor company then initiates restructuring proceedings. While the proceedings are under way, the debtor company sells and delivers goods to the creditor for $1,000. By exercising its right of set-off, the creditor obtains full recovery of its claim at the expense of the other unsecured creditors whose claims will be compromised or otherwise affected by the plan. [p. 400]

74 Yet the very purpose of the stay period is to ensure that no creditor gains an advantage over the others while the restructuring of the debtor company is under way (*Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (S.C.), at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at para. 6); *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11, at para. 17). Pre-post compensation should not allow a creditor to do indirectly what it cannot do directly. Parliament could not have intended to create such an additional security interest that can be realized during the stay period simply because the creditor and the debtor company have a continuing business relationship.

75 To repeat, viewing s. 21 as allowing pre-post compensation would undermine the effectiveness of the status quo period, would jeopardize the survival of the debtor company or the business it operates and could derail the restructuring process. It is clear that Parliament could not have intended that a struggling company, deprived of its only lifeline, be condemned to drown in its debts solely because a single creditor wanted to gain an advantage over the others. Such an outcome is contrary to the fundamental objectives of the *CCAA*.

76 Before concluding, we will pause to briefly discuss *Kitco*. In that case, the Court of Appeal rejected a literal interpretation of s. 21 as allowing all forms of compensation, including pre-post compensation, without any restrictions. Our colleague is of the view that *Kitco*, which was applied by the majority of the Court of Appeal and by the supervising judge in the instant case, has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. He cites *Air Canada, Re* (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.), and *Tungsten* in this regard.

77 In our view, *Kitco* is not at odds with the jurisprudence of the rest of the country on the interpretation of s. 21. *Air Canada* and *Tungsten* did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors.

78 First of all, in *Air Canada*, the issues did not relate to the impact of pre-post compensation on the achievement of the *CCAA*'s objectives. Rather, the case concerned the requirements for legal set-off at common law and the interpretation of a provision of the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, that was worded differently from s. 18.1 (now s. 21) of the *CCAA*. On the subject of legal set-off, Air Canada argued that the making of an initial order under the *CCAA* results in a loss of mutuality between debts, by analogy with the vesting of a bankrupt's property in a trustee under the *BIA*. This was the context in which the court found that an initial order under the *CCAA* does not alter the status of creditor and debtor of the insolvent company, unlike what happens in a bankruptcy proceeding.

79 Moreover, in *Tungsten*, the dispute related primarily to the possibility of staying the right to pre-post set-off. The judge who ruled on the applications did not analyze the arguments concerning the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, finding that it was not necessary to do so in the circumstances. Our colleague maintains that the question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted by s. 21 of the *CCAA*. In our view, the fact that the possibility of effecting pre-post set-off was not argued tends more to weaken the authority of that decision than to strengthen it.

80 Therefore, and with due respect for the contrary view, the state of the law on the interpretation of s. 21 had not been settled elsewhere in Canada. When ruling in *Kitco*, the Court of Appeal was not bound by *Air Canada* and *Tungsten*.

81 In summary, we conclude, as the Court of Appeal did in *Kitco*, that s. 21 of the *CCAA* allows pre-pre compensation for the purpose of quantifying creditors' claims on the date of commencement of proceedings (*Kitco*, at para. 82). This provision does not have the effect of authorizing pre-post compensation. That being said, s. 21 of the *CCAA* does not prohibit this form of compensation either. A supervising judge therefore retains the discretion to stay or to authorize the exercise of a right to pre-post compensation, or set-off, invoked by a creditor under the civil law or the common law.

82 We turn now to the situation in this case.

(c) *Application*

83 In the case at bar, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation:

No Exercise of Rights or Remedies

> <u>ORDERS that during the Stay Period</u>, and subject to, *inter alia*, subsection 11.1 CCAA, <u>all rights and remedies</u>, including, but not limited to modifications of existing rights and events deemed to occur pursuant to any agreement to which any of the Debtors is a party as a result of the insolvency of the foreign Debtors and/or these CCAA proceedings, any events of default or non-performance by the Debtors or any admissions or evidence in these CCAA proceedings, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") <u>against or in respect of the Debtors, or affecting the Business, the Property or any part thereof, are hereby stayed and suspended except with leave of this Court</u>.
>
> ...
>
> **No Interference with Rights**
>
> <u>ORDERS that during the Stay Period, no Person shall</u> discontinue, fail to honour, <u>alter, interfere with</u>, repudiate, resiliate, terminate or cease to perform <u>any right</u>, renewal right, contract, agreement, licence or permit <u>in favour of or held by the Debtors</u>, except with the written consent of the Debtors, as applicable, and the Monitor, or with leave of this Court. [Emphasis added.]
>
> (A.R., vol. I, at p. 75)

84 Given that the order stayed compensation in respect of pre-post claims, what remains to be determined is whether the Superior Court should have exercised its discretion under s. 11 of the *CCAA* and allowed such compensation in respect of the VRP claim. Although we are of the view that the supervising judge erred in finding, in reliance on *Kitco*, that she had no discretion to authorize pre-post compensation, we feel that remanding the case to the court of original jurisdiction would be unhelpful and would not be in the interests of justice. What is more, the delays resulting from this case have prejudiced the rights of third persons in good faith involved in the restructuring of SM Group. In this regard, Thornhill was unable to reimburse, as stipulated, the transition financing granted by the interveners Alaris Royalty Corp. and Integrated Private Debt Fund V LP, which are also creditors of SM Group, largely because of the City's refusal to pay the cost of the work done by SM Group.

85 In exercising its discretion under the *CCAA*, a court must keep three baseline considerations in mind: (1) the appropriateness of the order being sought, (2) due diligence and (3) good faith on the applicant's part (*Callidus*, at para. 49; *Century Services*, at para. 70).

86 The first consideration, the appropriateness of the order being sought, relates both to the order itself and to the means that are employed (*Century Services*, at para. 70). It is assessed in light of the remedial objectives of the *CCAA* (*Callidus*, at para. 49; *Century Services*, at para. 70). These remedial objectives include the following: avoiding the social and economic losses resulting from the liquidation of an insolvent company; maximizing creditor recovery; ensuring fair and equitable treatment of the claims against the debtor company; preserving going-concern value where possible; protecting jobs and communities affected by the company's financial distress; and enhancing the credit system generally (*Callidus*, at paras. 40-42). In this regard, the context of restructuring by way of liquidation, and the impact of pre-post compensation on its progress, can be weighed by a court in exercising its discretion. In addition, protecting the public interest, although it overlaps a number of the remedial objectives to be considered by the courts, must also be included in this list (*Callidus*, at para. 40; *Century Services*, at para. 60).

87 Here, the City argues that protecting the public interest is a consideration that favours pre-post compensation. It submits that the majority of the Court of Appeal erred in not considering [TRANSLATION] "the public interest in ensuring the recovery of fraudulently misappropriated public funds" (A.F., at para. 2; see also para. 80). We cannot accept this argument, for the following reasons.

88 In our view, the City is wrongly conflating the public interest with its own interest as a public body with a claim. The objective of protecting the public interest does not mean that public bodies should be placed in a better position than other creditors because their claims relate to public funds. That would be contrary to the principle of equality among creditors. In the context of the *CCAA*, protecting the public interest therefore cannot be reduced to protecting the interests of a particular creditor. It involves taking account of interests beyond those of the debtor company and its creditors, such as the interests of employees whose jobs are threatened or of the community in which the debtor company operates (*Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 102; *Metcalfe*, at paras. 50-52; Sarra, at pp. 162 and 501; Wood, at p. 341; see also, for a clear illustration, *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), at para. 50).

89 Protecting the public interest can also encompass considerations of commercial morality that reflect societal norms, such as considerations related to the fact that no one should profit from fraudulent activities in which they have taken part (A. Keay, "Insolvency Law: A Matter of Public Interest?" (2000), 51 *N. Ir. Legal Q.* 509, at pp. 513 and 525). In very specific circumstances, a court could therefore conclude that protection of the public interest and the *CCAA*'s other remedial objectives justify authorizing pre-post compensation in favour of a creditor that has proved that it was a victim of fraud within the meaning of s. 19(2)(d) of the *CCAA*, which explains the relevance of determining whether the VRP claim is a claim resulting from fraud in this case. But while such a conclusion is possible in law, it should not be drawn automatically. In every case, a court should exercise its discretion as indicated in *Callidus* and *Century Services*, and if it so happens that predominant weight must be given to the objective of protecting the public interest, the court should take care not to reduce the public interest to the interests of a particular creditor or group of creditors.

90 In the instant case, the City's VRP claim is an ordinary claim because, as we have indicated, the City has not proved the alleged fraud and such proof cannot be inferred solely from the fact that its claim is related to an agreement entered into under the VRP. Its argument that the objective of protecting the public interest favours pre-post compensation must therefore be rejected. The City has not relied on any of the *CCAA*'s other remedial objectives in support of its position. It follows that it has not discharged its burden of proving that the order being sought is appropriate. Moreover, the work performed for the City by SM Group was in the public interest, as it involved continuing to carry out major projects, such as the construction of the Samuel De Champlain Bridge and the rebuilding of the Turcot Interchange.

91 The second consideration, due diligence, clearly weighs against pre-post compensation by the City. Under the *CCAA*, this consideration is important because it "discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage" (*Callidus*, at para. 51). The procedure set out in the *CCAA* involves negotiations as well as compromises between the debtor and stakeholders and is overseen by a court and a monitor; it follows that all those who participate must be on an equal footing and must have a clear understanding of their respective obligations and rights (para. 51). This Court accordingly reached the following conclusion in *Callidus*:

> A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently). [para. 51]

92 In this case, it is clear that the City did not act in accordance with the standard of diligence expected in *CCAA* proceedings. On this point, Deloitte submits that the City should have given notice of its intention to effect compensation in the days after the initial order was made on August 24, 2018. The record does not show that the City learned of the initial order on August 24, 2018, but, as indicated in an email to counsel for Deloitte, the City was aware of the existence of that order by at least September 10, 2018. Whatever the case may be, we are of the view that a diligent creditor, after learning of the debtor's insolvency when it is subject to proceedings under the *CCAA*, cannot wait 47 to 58 days to notify the debtor of its intention to effect compensation.

93 The City justifies the lateness of its application by stating that it was waiting for one of the payments on the VRP claim, which was due on October 31, 2018, before taking any action. Yet the VRP agreement indicates that the payment in question was actually due on October 1, 2018. Furthermore, the City knew or ought to have known that the term had already expired several weeks earlier, as SM Group's insolvency had resulted in the loss of the benefit of the term of the VRP claim.

94 Whether intentional or not, this inaction on the City's part tended to place it in a better position than other ordinary creditors at what, we should point out, was a critical time in the restructuring process. By invoking compensation, the City could obtain services without paying for them. The City had to suspect that if it had indicated its intention to proceed in this manner right from the start, as due diligence requires, SM Group would likely have refused to undertake the work provided for in the contract, knowing that it would not be paid and that this would be a major stumbling block in the interim financing process. What is more, under s. 32 of the *CCAA*, SM Group could even have asked that the contract be resiliated.

95 In summary, the considerations that guide the exercise of a court's discretion do not justify lifting the stay of the City's right to pre-post compensation. Given our conclusions on the first two considerations, it is not necessary for us to discuss the City's good faith. In our view, remanding the case to the court of original jurisdiction would lead inevitably to the same outcome.

B. *Water Meter Contract Claim*

96 Here again, the words of the stay order made by the Superior Court are broad enough to prohibit pre-post compensation. However, the Superior Court agreed to lift the stay of proceedings to allow the City to establish the existence and amount of its claim in the case relating to the water meter contract. The relevant excerpts from its judgment are as follows:

> [TRANSLATION]
>
> **THE COURT**, seized of the Application of Ville de Montréal dated September 27, 2018 for authorization to lift the stay of proceedings <u>in order to deal with and liquidate a claim in the Civil Division</u> ("**Application**");
>
> ...
>
> **LIFTS**, in favour of the Applicant, Ville de Montréal, the stay of proceedings ordered in this case with regard to S.M. Consultants Inc., The S.M. Group Inc., The SMI Group Inc. and The S.M. Group International L.P. ("**Debtors Concerned**") ... <u>for the sole purpose of allowing the Applicant, Ville de Montréal, to establish its claim against the Debtors Concerned</u> ... in the proceedings instituted in the Superior Court of Quebec bearing number 500-17-104932-184; [Emphasis added.]
>
> (A.R., vol. IV, at p. 129)

97 This order did not authorize the City to withhold the amounts owed to SM Group for the work subsequent to the initial order with a view to effecting compensation if the City was successful in the case relating to the water meter contract. The City submits that it is entitled to withhold the payments owed to SM Group until judgment is rendered in that case.

98 In the circumstances, an order allowing the City to withhold the amounts owed to SM Group pending the outcome of the case relating to the water meter contract would not be appropriate. Remanding the case to the court of original jurisdiction for a decision on this question would, once again, be unhelpful and contrary to the interests of justice.

99 Not only would the order being sought by the City place Thornhill at the mercy of the outcome of lengthy and complex judicial proceedings -- which, it must not be forgotten, concern a claim for several million dollars -- but it would not be appropriate for the same reasons as those relating to the VRP claim. The City is conflating the public interest with its own interest as a public body with a claim that was never established. In addition, the City did not act diligently. Although its originating application in the case relating to the water meter contract was filed on September 26, 2018, it breached its obligation of diligence by waiting until November 7, 2018 before indicating its intention to effect compensation, even though it had been aware of the initial order since at least September 10, 2018.

VI. Conclusion

100 For these reasons, we would dismiss this appeal with costs.

English version of the reasons delivered by

R. BROWN J. (dissenting)

101 I agree with the majority that a supervising judge has a discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), as to whether to allow a creditor to effect compensation, or set-off, between pre-initial order and post-initial order debts ("pre-post compensation"). I find, however, that this discretion is not limited solely to the exceptional circumstances the majority describes. While my colleagues in the majority recognize the broad discretion conferred on a supervising judge by the *CCAA*, in my view they fail to give full effect to it by concluding that pre-post compensation will never be authorized unless there are exceptional circumstances.

102 Moreover, unlike my colleagues who limit the scope of s. 21 of the *CCAA* to compensation between debts arising before an initial order is made, I conclude that pre-post compensation is permitted under s. 21 of the *CCAA* but that it must be subject to the exercise of a supervising judge's discretion. The majority at the Quebec Court of Appeal (2020 QCCA 438), like the supervising judge (2019 QCCS 2316), erred in relying on the Quebec Court of Appeal's decision in *Quebec (Agence du revenu) v. Kitco Metals Inc.*, 2017 QCCA 268, to conclude that pre-post compensation will never be authorized. But, for the reasons set out below, this Court must in my view reject the approach taken in *Kitco*.

103 Given that the supervising judge in this case did not exercise her discretion, believing herself to be bound by *Kitco*, it would be unwise for this Court to exercise that discretion for the first time in order to determine whether Ville de Montréal (the "City") may effect compensation here. I would therefore allow the appeal solely for the purpose of remanding the case to the Superior Court so it can decide whether the City may effect compensation between the debts incurred by SM Group before the initial order and the amounts owed by the City to SM Group for work performed by the latter after the initial order. I would also allow the appeal so that it can be determined whether compensation is available in respect of the City's water meter claim against SM Group, as nothing in s. 21 of the *CCAA* prohibits judicial compensation.

104 Furthermore, and again unlike my colleagues, I find that there is no need in this appeal to decide whether the City's claim against SM Group, which derives from the *Act to ensure mainly the recovery of amounts improperly paid as a result of fraud or fraudulent tactics in connection with public contracts*, CQLR, c. R-2.2.0.0.3, must be characterized as a claim based on "false pretences or fraudulent misrepresentation" within the meaning of s. 19(2)(d) of the *CCAA*. In my view, s. 21 of the *CCAA* must be interpreted as allowing pre-post compensation regardless of whether a claim results from fraud for the purposes of s. 19(2)(d). I nonetheless agree with my colleagues that proof by a creditor that it was a victim of fraud within the meaning of s. 19(2)(d) is a factor favouring pre-post compensation that must be weighed by a supervising judge along with the other relevant considerations.

105 My colleagues consider it necessary to characterize the City's claim arising from the Voluntary Reimbursement Program ("VRP") because proof that the debt underlying a claim is fraudulent is a relevant factor in the exercise of a supervising judge's discretion to permit or to deny pre-post compensation (para. 20). As they acknowledge, this is a relevant factor in the exercise of *a supervising judge's* discretion. As I will explain in greater detail below, whether the City's VRP claim results from fraud is a question to be decided *by the supervising judge* in the exercise of her discretion, not by *my colleagues* or this Court.

I. Decision of the Quebec Court of Appeal in *Kitco*

106 Kitco Metals Inc. specialized in buying scrap gold and extracting fine gold from it for resale. It was subject to special tax rules: it paid the goods and services tax ("GST") and the Quebec sales tax ("QST") on the purchase of scrap gold ("inputs"), but the sale of fine gold was not subject to these taxes. Under these special rules, Kitco paid the taxes to its gold suppliers, which were required to remit them to the Agence du revenu du Québec ("Agency"). When the fine gold was sold, Kitco was then entitled to a refund of the taxes paid. The Agency, however, became aware of a fraudulent scheme by which the gold suppliers were not remitting to it the taxes they collected, even though it was refunding Kitco for them.

107 The Agency, suspecting that Kitco was involved in this fraudulent scheme, sent it a notice of assessment for more than $300 million (the pre-order debt). On June 7, 2011, the Agency proceeded with compulsory execution on that notice to recover the amounts it considered it was owed. The next day, Kitco filed a notice of intention to make a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), thereby staying its creditors' remedies (s. 69). One month later, it instead obtained an initial order under the *CCAA* that continued the stay of remedies (stay still in effect at the time of judgment). Meanwhile, Kitco had been continuing its business activities since June 8, 2011: it was paying taxes on inputs and claiming tax refunds from the Agency in accordance with the applicable tax rules. The Agency owed it more than $1.7 million in refunds (the post-order debt) but applied this amount as compensation against the tax assessments it was claiming from Kitco. Kitco successfully brought a motion in the Superior Court to force the Agency to refund it $1.7 million on the basis that this compensation was unlawful.

108 Vézina J.A., writing for the Court of Appeal in *Kitco*, began by explaining that June 8, 2011 was the date of commencement of insolvency proceedings and therefore the date on which the creditors' remedies were stayed and their claims had to be established (para. 34 (CanLII)). He also took the view that the compensation effected by the Agency was unlawful. In his opinion, although s. 21 of the *CCAA* does not expressly state that compensation can be effected only in respect of debts that arose prior to insolvency proceedings, a literal interpretation of the section must be rejected because it would be incompatible with, among other things, the principle that ordinary creditors must be treated equally (para. 20). Such an interpretation would also undermine the status quo period that companies in financial difficulty need in order to develop a plan of arrangement (para. 43). Vézina J.A. therefore concluded that a literal interpretation would ultimately be contrary to the *CCAA*'s restructuring objective (para. 45).

109 This conclusion was based in large part on Vézina J.A.'s observation that the schemes of the *BIA* and the *CCAA* have [TRANSLATION] "close links" and are two "integrated" schemes, which means that "case law and scholarly opinion can be applied to both equally" (paras. 51-52). Relying on para. 56 of *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, 2005 SCC 52, [2005] 2 S.C.R. 564, he considered that "[t]he general principles of the *BIA* preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy" (*Kitco*, at para. 61). On this point, he found that the principles laid down in *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, in which the Court stated that set-off is like a form of security, cannot readily be transposed into the civil law, in which compensation is automatic and is effected by operation of law once two debts coexist and are certain, liquid and exigible (para. 65). Lastly, he was of the view that s. 21 of the *CCAA* and s. 97(3) of the *BIA* identify the point in time when compensation may be effected, that is, on the date on which the creditors' "provable claims" must be established, which is the date of commencement of insolvency proceedings:

> [TRANSLATION] In my opinion, sections 21 *CCAA* and 97(3) *BIA*, which provide that the "law of set-off or compensation applies to all claims...", thereby identify the point in time when compensation is effected, or in other words, the moment at which the claims must be established: it is on the date of [commencement of proceedings] that temporal reciprocity is established. [para. 82]

110 Vézina J.A. found, at para. 78, that the question of what constitutes a "provable claim" is answered by s. 121(1) of the *BIA*, which refers to "[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt".

111 With respect, I am of the view that several errors were made in *Kitco*. First, Vézina J.A. erred in relying on this Court's judgment in *D.I.M.S. Construction* to reach the conclusion that pre-post compensation can never be allowed under the *CCAA*, even though that judgment was rendered in the context of a bankruptcy under the *BIA*. Despite the similarities between the insolvency schemes established by the *CCAA* and the *BIA*, these are two different statutes, and their differences are significant in the case at bar. Secondly, *Kitco* was based on an inappropriate narrow interpretation of s. 21 of the *CCAA* that disregarded the "flexible" nature the *CCAA* is recognized as having (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at p. 337) as well as the broad discretion conferred on supervising judges, whereas courts of other Canadian provinces have held that pre-post set-off can be permitted. Thirdly, *Kitco* was decided in a context where a company in financial difficulty was actually restructured, and it cannot readily be transposed into a context such as the one in the instant case, which instead involves the liquidation of a company's assets and contracts.

A. *Fundamental Differences Between the Two Insolvency Schemes*

112 It is important to underscore the fundamental differences between the scheme established by the *CCAA* and the one established by the *BIA*, differences that highlight that, under the *CCAA* scheme, the mutuality of debts is maintained and supervising judges have a broad discretion that allows them to authorize pre-post compensation. I do not question the notion that these two schemes must be viewed as "an integrated body of insolvency law" and that legislative efforts to harmonize them have been going on for several decades (*Century Services*, at paras. 19-24 and 78). As I recount below, however, there remain many differences between the two schemes (Wood, at p. 337).

113 The three principal Canadian statutes dealing with insolvency, the *CCAA*, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), have the following main objectives: "... to treat the claims of creditors fairly and equitably, to protect the public interest, to create a fair, timely and cost-effective process, and to achieve a balance of benefit and cost in deciding whether to restructure or liquidate a business, maximizing enterprise value" (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10, objectives referred to with approval by the Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 40). More specifically, the *CCAA*'s main objective is the financial and commercial rehabilitation of an insolvent company through the filing of a plan of arrangement with its creditors (Wood, at p. 338; B. Boucher, "Procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*", in *JurisClasseur Québec -- Collection Droit des affaires -- Faillite, insolvabilité et restructuration* (loose-leaf), by S. Rousseau, ed., fasc. 14, at Nos. 2 and 8). In seeking an initial order, an insolvent company shields itself from its creditors, staying their remedies for a certain period so that all its energy can be channeled into preparing a plan of arrangement for a viable recovery (Boucher, at No. 2).

114 For these reasons, the scheme established by the *CCAA* is flexible and allows creative solutions to be put forward to achieve the objective mentioned above, the restructuring of a financially distressed company, in contrast to the *BIA*, which provides a set of pre-established rules (Boucher, at No. 8; Wood, at p. 337). The *CCAA* is therefore characterized as "remedial" legislation (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 500; Boucher, at No. 3).

115 The Court has found that the *CCAA*'s provisions must be interpreted expansively to enable its remedial objectives to be achieved, and in particular to allow a company to continue its activities and to avoid the social and economic losses that can result from its liquidation (*Century Services*, at para. 70). Because of the remedial scope of the *CCAA*, a "broad" discretion is also conferred on supervising judges by s. 11 of the *CCAA* (*Callidus*, at para. 48; *Century Services*, at para. 14). This section provides that a supervising judge may make "any order that [the judge] considers appropriate", although it specifies that such an order must be consistent with the restrictions set out in the *CCAA* and must be "appropriate" in light of the circumstances of each case. As this Court noted in *Callidus*, s. 11 is in a sense the "engine" of the *CCAA* (para. 48, quoting *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36). This discretion granted to supervising judges under the *CCAA* allows for the implementation of "creative and effective" solutions (*Century Services*, at para. 21, quoting 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), in recognition of the "positional advantage" gained by supervising judges, who "acquir[e] extensive knowledge and insight into the stakeholder dynamics and the business realities of [*CCAA*] proceedings" (*Callidus*, at paras. 47-48). Examples of "creative" solutions adopted by courts under the *CCAA* include "security for debtor in possession financing or super-priority charges on the debtor's assets" and the release of "claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors" (*Century Services*, at para. 62).

116 As the Court again recently recognized, the broad discretion conferred on supervising judges by s. 11 of the *CCAA* enables them to propose solutions "that respond to the circumstances of each case and 'meet contemporary business and social needs'" (*Callidus*, at para. 48, quoting *Century Services*, at para. 58). This broad discretion is unique to the *CCAA* and has no equivalent in the *BIA*, which is based instead on pre-established rules designed to apply to a range of situations. This is, therefore, one major difference between the two insolvency schemes.

117 Another major difference between these two schemes is that the *CCAA* allows a company that has obtained an initial order to continue its business activities during the restructuring or reorganization period (*Callidus*, at para. 41). The continuation of a struggling company's business activities averts "the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70) and "preserves going-concern value" (*Callidus*, at para. 46). Accordingly, when an insolvent company has recourse to the *CCAA*, it is not divested of its property in favour of a third party, unlike with the measures put in place under the *BIA* that vest the bankrupt's property in a trustee (s. 71 of the *BIA*). There is thus no loss of mutuality under the *CCAA*. The status of debtor or creditor of the insolvent company remains unchanged and is not bestowed on a third party.

118 This mutuality, which survives the initial order, is what makes compensation possible under the *CCAA*, unlike under the *BIA*. This same fundamental difference between the *CCAA* scheme and the *BIA* scheme also played a crucial role in *D.I.M.S. Construction*, on which Vézina J.A. largely relied in *Kitco*. In *D.I.M.S. Construction*, this Court had to determine whether the schemes established in two Quebec labour law statutes subverted the scheme of distribution provided for by the *BIA*. Those two statutes created a similar mechanism that required an employer subject to one of them to pay an assessment due from a contractor whose services it had retained. Once the employer had paid the assessment, it was entitled to retain the amount it had paid out of any sums it owed to the contractor, thereby effecting compensation (para. 2). In that case, three employers had been directed to pay the assessments of a contractor, D.I.M.S. Construction inc., *before* it went bankrupt on April 1, 1999, but only one of them had done so before that date (paras. 3-4). D.I.M.S. Construction's trustee in bankruptcy, relying on the Court's judgment in *Husky Oil*, asked the Court to declare that two sections of the statutes in question were inoperable in the context of a bankruptcy under the *BIA* (para. 5).

119 In her analysis, Deschamps J. began by discussing s. 97(3) of the *BIA*, which concerns compensation, and made two relevant observations. First, because s. 97(3) applies to claims against a bankrupt's estate, a creditor must meet the conditions set out in s. 121(1) of the *BIA*, which means that, in order to effect compensation, the creditor must "prove the bankrupt was subject to a debt by reason of an obligation incurred before the bankruptcy" (para. 40 (emphasis added)). Second, s. 97(3) states that compensation is effected in the same manner as if the bankrupt were a plaintiff or a defendant in a lawsuit and, exceptionally, makes it possible to proceed "as if the bankrupt's patrimony had not vested in the trustee as a result of the bankruptcy" (para. 41).

120 Deschamps J. concluded that there are three possible scenarios in Quebec civil law, depending on when an employer pays an assessment due from a contractor: (1) the payment is made by the employer *before* the bankruptcy, and the debts become certain, liquid and exigible *before* the bankruptcy; (2) the payment is made *before* the bankruptcy and the employer is in debt to the bankrupt contractor, but one of the conditions for legal compensation is not met; and (3) the payment is made *after* the bankruptcy (para. 42). Regarding the third scenario -- one that also brings into play art. 1651 of the *Civil Code of Québec*, which provides that a person subrogated to the rights of another (the employer in that case) does not have more rights than the subrogating creditor -- Deschamps J. concluded that when the employer pays after the contractor's bankruptcy, "[t]he dual status of creditor and debtor", and therefore the mutuality of the debts, does not arise until *after* the bankruptcy (para. 51). It must therefore be inferred that s. 97(3) of the *BIA*, read in conjunction with ss. 121, 136(3) and 141 of the *BIA*, requires that "the mutual debts come into existence before the bankruptcy" in order for compensation to be effected (para. 55 (emphasis added)). Deschamps J. added at para. 56 that, according to the rules specific to the bankruptcy scheme under the *BIA*, the trustee may object to the substitution of a creditor (the employer in that case) if this has the effect of giving the creditor a security that did not exist at the time of the bankruptcy:

> What distinguishes a pre-bankruptcy payment from a post-bankruptcy payment is that, in the former case, the substitution of creditors takes place before the moment when the trustee acquires the bankrupt's property. In the case of a post-bankruptcy payment, the substitution occurs after the bankruptcy, and the trustee can object to it. The general principles of the BIA preclude any transaction that would have the effect of granting a security that did not exist before the bankruptcy. [Emphasis added.]

121 The argument is a simple one. For legal compensation to be effected, in addition to the fact that a claim must be shown to be certain, liquid and exigible, [TRANSLATION] "two persons must be reciprocally debtor and creditor of each other" (*Code civil du Québec: Annotations -- Commentaires 2020-2021* (5th ed. 2020), by B. Moore, ed., et al., at p. 1558). This is one of the four essential conditions for compensation to be possible. This mutuality of claims is severed when an insolvent company becomes bankrupt, because a trustee in bankruptcy is appointed and the company's property is vested in the trustee (s. 71 of the *BIA*). On the date of the initial bankruptcy event, the bankrupt company loses its status as creditor or debtor in favour of the trustee. As well, the bankrupt company ceases its business activities and normally does not incur any obligations after the bankruptcy. This is why claims provable under the *BIA* must be established on the date of the initial bankruptcy event and why, logically, compensation cannot be effected between pre- and post-bankruptcy debts (ss. 97(3) and 121(1)). However, as the intervener Union des municipalités du Québec rightly noted at the hearing, the situation is very different when an insolvent company applies for an initial order under the *CCAA*, since the company continues its business activities while at the same time seeking a stay of its creditors' remedies (transcript, at pp. 48-49). Under the *CCAA*, the property of the company applying for an initial order is not vested in a monitor. The mutuality of debts remains intact, as the company continues to be the debtor or creditor of a claim (see, on this point, L. Morin and G.-P. Michaud, "Set-Off and Compensation in Insolvency Restructuring under the *BIA*/*CCAA*: After the *Kitco* and *Beyond the Rack* Decisions", in Sarra and Romaine, *Annual Review of Insolvency Law 2016*, 311, at pp. 343-44; see also A. R. Anderson, T. Gelbman and B. Pullen, "Recent Developments in the Law of Set-off", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2009* (2010), 1, at pp. 23-25 (these authors acknowledge that an insolvent company's property is not vested in a monitor under the *CCAA* and that the mutuality of debts is not severed, but they advocate having the courts interpret the *CCAA* in such a way as to put an end to this mutuality)).

122 These two fundamental differences between the *CCAA* scheme and the *BIA* scheme suffice to explain why this Court should reject the approach proposed in *Kitco*. As we will see below, courts of other Canadian provinces have relied in part on these differences between the two schemes to find that s. 21 of the *CCAA*, unlike the equivalent provisions in the *BIA* (s. 97(3)) and the *WURA* (s. 73(1)), does not prohibit pre-post set-off.

B. *Courts of Other Canadian Provinces Have Recognized the Possibility of Effecting Pre-post Set-off*

123 For two reasons, the right to effect set-off under the *CCAA* has been a subject of debate among Canadian courts. First, before the legislative reform of 1997 (*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12) and the addition of s. 21 (formerly s. 18.1), this right was not formally recognized in the *CCAA*. Secondly, questions relating to the framework for the right to effect set-off have arisen in recent decades, particularly with regard to the possibility of staying this right temporarily after an initial order has been made (*CCAA*, s. 11.02(1); see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.); *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751, 71 B.C.L.R. (3d) 226; *North American Tungsten Corp., Re*, 2015 BCCA 390, 377 B.C.A.C. 6 ("*Tungsten No. 1*") (decision on application for leave to appeal), aff'd 2015 BCCA 426, 378 B.C.A.C. 116 ("*Tungsten No. 2*"); *Re Just Energy Corp.*, 2021 ONSC 1793); or of directly restricting the right in the language of an initial order under the *CCAA* (*Crystallex International Corp., Re*, 2012 ONSC 6812, 100 C.B.R. (5th) 132).

124 More specifically, the question now before this Court is whether s. 21 of the *CCAA* allows pre-post compensation. This question is all the more relevant in the context of a restructuring process under the *CCAA* because the insolvent company continues its business activities.

125 One of the first cases in which this question was considered after the 1997 legislative reform was *Air Canada, Re* (2003), 45 C.B.R. (4th) 13, a judgment of Farley J. of the Ontario Superior Court of Justice. There, Farley J. had to decide whether a paragraph included in an initial order whose purpose was to limit the right of Air Canada's creditors to effect set-off should be varied.[2] Air Canada essentially argued that under the *CCAA*, as under the *BIA*, legal set-off cannot be permitted between pre- and post-order debts (paras. 10-11). Because the *BIA* provides, in s. 71 (formerly s. 71(2)), that the bankrupt's property vests in the trustee on the date of the initial bankruptcy event, Farley J. concluded that there is no longer any mutuality between a creditor and a bankrupt debtor following a bankruptcy, despite such mutuality being a necessary condition for set-off:

> *In a bankruptcy*, the trustee is inserted into the proceedings. Post-bankruptcy dealings of a creditor with the trustee in bankruptcy do not involve the same party, namely the debtor before the condition of bankruptcy... . Thus, creditors who incur post-bankruptcy obligations to trustees in bankruptcy cannot claim legal set-off to avoid paying such obligations by setting-off such obligations against their proven (pre-bankruptcy) claims against the bankrupt. The same parties are not involved so there cannot be mutual cross-obligations. [Emphasis in original; para. 14.]

126 Farley J. next considered Air Canada's second argument, that s. 21 (then s. 18.1) of the *CCAA* must be interpreted similarly to s. 73(1) of the *WURA* (at paras. 16-17), which provides that the law of set-off applies to "all claims on the estate of a company, and to all proceedings for the recovery of debts due or accruing due to a company <u>at the commencement of the winding-up of the company</u>". He rejected this argument for several reasons, emphasizing in particular the differences between the words of s. 73(1) of the *WURA* and those of s. 21 of the *CCAA*. For example, s. 21 does not provide that set-off must be between claims accruing due as of the date an initial order is made. Farley J. noted that these differences in wording reflect a choice made by Parliament, which did not intend to enact identical set-off provisions in Canada's three insolvency statutes (para. 23). For these reasons, he ordered that the paragraph of the order restricting the right to effect set-off be varied (para. 24).

127 Although he struck out the part of the initial order that precluded pre-post set-off, Farley J. nonetheless stayed set-off until Air Canada's situation was more stable in order to avoid the disruptive consequences that would result from allowing set-off during the status quo period. He suggested that the best time to effect set-off would be in conjunction with the formation of a plan of arrangement (para. 25).

128 My colleagues argue (at para. 77) that "*Air Canada* and *Tungsten* [which I will discuss below] did not determine whether pre-post compensation is consistent with the interpretation and objectives of the *CCAA*, let alone establish a framework for the exercise of this right by creditors." This, however, ignores that *Air Canada* is widely recognized as being authoritative and as standing for the proposition that mutuality is not severed by an initial order made under the *CCAA*, which means that pre-post set-off or compensation is possible but is subject to a supervising judge's power to stay it (see R. Thornton, "Air Canada and Stelco: Legal Developments and Practical Lessons", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2006* (2007), 73; *North American Tungsten Corp., Re*, 2015 BCSC 1382, 28 C.B.R. (6th) 147 ("*Tungsten No. 3*"), at para. 15). For example, Robert Thornton writes:

> Air Canada was indebted to certain parties as at the date of the Initial Order. Subsequent to the date of the Initial Order, those parties became indebted to Air Canada. They wished to set-off their post-CCAA debts against Air Canada's pre-CCAA debts owing to them... .
>
> ...
>
> ... Farley J. held that there was no loss of mutuality upon the commencement of a CCAA proceeding. <u>Accordingly, legal set-off is available both in respect of debts existing as at the date of an initial order and in respect of debts that arose after the date of an initial order. Farley J. was correct in so doing.</u>
>
> ...
>
> <u>It now appears to be clear in Canada that legal and equitable set-off are unaffected by proceedings commenced under the CCAA</u> other than (i) the right to exercise them may be "temporally" stayed and (ii) if

> the CCAA applicant refuses to acknowledge the set-off, it would be necessary for the creditor to seek judicial intervention.
>
> It is the authors' view that it is appropriate for set-off rights to continue after the commencement of a CCAA proceeding. The CCAA applicant continues to carry on business in the ordinary course. [Emphasis added; pp. 94-96.]

129 In *Tungsten*, the British Columbia Court of Appeal also considered set-off under s. 21 of the *CCAA* -- first in an application for leave to appeal two orders of the British Columbia Supreme Court (*Tungsten No. 1*, per Savage J.A.) and then in an appeal from that decision denying leave to appeal (*Tungsten No. 2*). The insolvent company had obtained an initial order under the *CCAA* effective June 9, 2015, at which time it owed approximately $4.4 million to Global Tungsten and Powders Corp. ("GTP") under a loan agreement. It subsequently continued selling tungsten to GTP, which gave notice that it wished to set off its claim (the pre-order debt) against the amounts due or accruing due for the tungsten sold to it (the post-order debt) (*Tungsten No. 1*, at paras. 2 and 6). The chambers judge had held that GTP had a valid right of set-off (*Tungsten No. 2*, at para. 7).

130 In these two decisions, the main question before the Court of Appeal was whether the chambers judge had erred in concluding that the right to effect set-off could be stayed, like the other creditors' remedies, once the initial order had been made. The question of whether pre-post set-off could be effected was never raised by the parties, which by implication showed that it was permitted under the *CCAA*. Relying on s. 21 of the *CCAA* as well as on s. 11 of that statute, which confers a broad discretion on a supervising judge, the Court of Appeal explained that nothing in the words of s. 21 prohibits a supervising judge from making the right of set-off subject to a stay of remedies (*Tungsten No. 1*, at paras. 12-13 and 16; *Tungsten No. 2*, at paras. 31 and 34-35).

131 Contrary to what my colleagues say at para. 79, in that case both the chambers judge and the Court of Appeal considered the arguments relating to the effects of pre-post set-off on the status quo period and on the underlying objectives of this period, but they did so from the perspective of a stay of the right to effect set-off rather than by questioning the very possibility of pre-post set-off. This shows that my colleagues' concerns about the disruptive potential of pre-post set-off were given adequate consideration by the supervising judge in exercising his discretion to permit or to stay set-off.

132 In particular, the chambers judge wrote the following: "... a temporal stay of rights can be granted to further the purpose of the initial order and the purposes of the *Act*" (*Tungsten No. 3*, at para. 25). While conceding that there was some merit to the arguments on the effects of pre-post set-off, he was not prepared to reverse the decision in *Air Canada* (paras. 17-18). Moreover, he stayed the right to effect set-off on the basis that, "[i]n order to preserve the status quo to effect a restructuring, a stay of the set-off is, and was, absolutely essential", and he added, among other things, that if the stay of set-off were not continued, the restructuring efforts "would be thrown into disarray" and "[t]he status quo would be significantly altered and the restructuring would effectively be at an end" (para. 32). The judge who considered the application for leave to appeal noted in turn that, "[c]learly, if an attempt at compromise or arrangement is to have any prospect of success there must be a means of holding creditors at bay" (*Tungsten No. 1*, at para. 16). He added that not staying the right to effect set-off would favour GTP to the detriment of the other creditors (paras. 18 and 25). Groberman J.A., who wrote the judgment of the Court of Appeal, stressed the principle that a creditor should not be able to exercise a right of set-off to circumvent a compromise or arrangement under the *CCAA* (*Tungsten No. 2*, at paras. 37-39).

133 Despite my colleagues' protestations to the contrary, the state of the law elsewhere in Canada is clear: pre-post set-off is possible under the *CCAA*, subject to a supervising judge's discretion to stay such set-off having regard to its effects on the status quo period, the underlying objectives of this period, the advancement of efforts to reach an arrangement, and the remedial objectives of the *CCAA*.

134 It must be concluded that the approach proposed by the Quebec Court of Appeal in *Kitco* has created an asymmetry between the interpretation given to s. 21 of the *CCAA* by the Quebec courts and the interpretation given to it by the courts of other Canadian provinces. This asymmetry is contrary to the principle of homogenous interpretation of federal statutes (Morin and Michaud, at p. 344).

C. *Restructuring an Insolvent Company Versus Liquidating Its Assets*

135 Finally, in *Kitco*, Vézina J.A. noted that his conclusions were based on the fact that the insolvent company was engaged in a genuine restructuring process and that staying its creditors' remedies was crucial to bringing this process to a successful conclusion. He stressed that Kitco's restructuring plan was in jeopardy because the Agency was effecting compensation with the amounts it was supposed to pay Kitco. Kitco was required to carry on its activities while paying 15 percent in taxes on its gold inputs without receiving the refund to which it was entitled in this regard. It was thus in an [TRANSLATION] "untenable" position relative to competitors in its field (paras. 47-48).

136 Staying the remedies of an insolvent company's creditors under the *CCAA* to allow the company to develop a plan of arrangement is of critical importance, particularly where the exercise of a creditor's right to effect pre-post compensation might sabotage the company's efforts to regain financial health.

137 In this case, however, and in the opinion of the monitor and the interveners themselves, there has never been any question of SM Group proposing a plan of arrangement. Once SM Group's principal creditors filed an application for an initial order under the *CCAA*, it was clear that they wished to opt for a liquidation process -- that is, the sale of the insolvent company to a new buyer. In this particular situation, where a plan of arrangement cannot be contemplated and the insolvent company will be liquidated or sold in any event, to conclude that pre-post compensation is never allowed could be unfair to the company's creditors with claims that are certain, liquid and exigible. In such cases, the creditors' remedies will be stayed indefinitely and they will never be able to effect pre-post compensation, since the insolvent company will become an "empty shell" after the sale. Moreover, because a plan of arrangement cannot be contemplated, allowing pre-post compensation will not have the effect of derailing the company's restructuring process, as there is no such process.

II. <u>Discretion Not Exercised by the Supervising Judge in This Case</u>

138 In my view, pre-post compensation is permitted under s. 21 of the *CCAA*, but it must be subject to the exercise of a supervising judge's discretion. In *Callidus*, this Court clarified the framework for the exercise of this discretion under s. 11 of the *CCAA*. The first two criteria are found in s. 11, which provides that a supervising judge may make any order that is "appropriate" in the circumstances of the case and consistent with the restrictions set out in the *CCAA*. The Court added that the exercise of the discretion must also further the remedial objectives of the *CCAA* and be focused in particular on the criteria of appropriateness, good faith and due diligence (para. 70).

139 My colleagues make a series of arguments against compensation in general and pre-post compensation in particular: the high disruptive potential of compensation; respect for the status quo period; the loss of incentive for the debtor to provide goods and services during the stay period because it would fear not being paid for them, which would deprive it of the funds needed to continue operating; the fact that an interim lender would most likely refuse to continue to finance the debtor's operations if the loaned funds were destined to enrich another creditor; the fact that the rampart set up by a stay to protect against attacks by creditors would crumble; the fact that compensation deviates from the principle of equality among ordinary creditors and that pre-post compensation amounts to giving certain creditors an additional "type of security interest" in respect of new assets acquired by the debtor after the commencement of proceedings; etc. (paras. 59, 61 and 73).

140 Most of these arguments presuppose that pre-post compensation will be systematically allowed without regard for the circumstances of each case and without considering whether it is "appropriate" -- hence my colleagues' position that pre-post compensation should never be authorized unless there are exceptional circumstances. Although these arguments are legitimate, they must be left to the supervising judge, who will weigh them -- along with the other relevant considerations and circumstances -- in exercising the discretion to permit or to deny pre-post compensation in a particular case, having regard to the remedial objectives of the *CCAA*.

141 Believing herself to be bound by the conclusions of the Quebec Court of Appeal in *Kitco*, the supervising judge in this case did not exercise her discretion under s. 11 of the *CCAA*. Given that this discretion was not exercised by the supervising judge, it is not for this Court to exercise it to determine whether to permit compensation between the amounts owed by the City to SM Group and the claim held by the City against SM Group. The Court has made it clear that supervising judges are in the best position to decide whether to exercise their discretion in a particular case based on "a circumstance-specific inquiry that must balance the various objectives of the *CCAA*" (*Callidus*, at para. 76).

142 My colleagues are of the view that remanding the case to the court of original jurisdiction would be unhelpful and not in the interests of justice (paras. 84 and 98). I respectfully disagree. In fact, this Court recently noted in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, that in cases involving an exercise of discretion by a court of first instance, "it is not in the interests of justice for this Court to step into [that court's] shoes and decide these matters at first instance", and that this Court's role is limited to reviewing the exercise of the discretion "through [a] deferential lens" (para. 88).

III. Conclusion

143 For these reasons, I would allow the appeal solely for the purpose of remanding the case to the Superior Court to have it determine whether the City may effect compensation between SM Group's pre-initial order debts and the post-initial order amounts owed by the City to SM Group. I would also allow the appeal so that it can be determined whether the City may effect compensation in respect of its water meter claim.

Appeal dismissed with costs, BROWN J. *dissenting.*

Solicitors:

Solicitors for the appellant: IMK, Montréal.

Solicitors for the respondent: Stikeman Elliott, Montréal.

Solicitors for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP: McCarthy Tétrault, Montréal.

Solicitors for the intervener Thornhill Investments Inc.: Fasken Martineau DuMoulin, Montréal.

Solicitor for the intervener Ville de Laval: Service des affaires juridiques de la Ville de Laval, Laval.

Solicitors for the intervener Union des municipalités du Québec: Borden Ladner Gervais, Montréal.

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1 A plan of compromise or arrangement must be approved by a special majority representing two thirds in value of the creditors or a class of creditors (s. 6(1) of the *CCAA*).

2 The paragraph in question read as follows: "THIS COURT ORDERS that persons may exercise only such rights of set off as are permitted under Section 18.1 of the CCAA as of the date of this order. For greater certainty, no person may set off any obligations of an Applicant to such person which arose prior to such date" (para. 2). The last sentence was particularly problematic.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Iberdrola Energy Projects Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FSE Energy,* 2018 BCCA 272

Date: 20180703
Dockets: CA44822, CA44823

Docket: CA44822

Between:

Iberdrola Energy Projects Canada Corporation

Appellant
(Petitioner)

And

**Factory Sales & Engineering Inc. d.b.a. FSE Energy,
Essex Crane Rental Corp., Slavkovic Holdings Inc.,
TVE Industrial Services Ltd., Norweld Stress (1994) Ltd.,
Peter Makin, Steelgrid Construction Corp.,
Canyon Tree Farms Inc., Enviroblast and NDT Inc.,
Chinook Scaffold Systems Ltd., Fort Machine Works Ltd.,
United Rental of Canada Inc., All Therm Services Inc., Shaw Inspections Ltd.,
Price Industries Ltd., Acier Marquis Inc., Coast Crane Ltd.,
Irwin's Safety and Industrial Labour Services Ltd., Acuren Group Inc.,
Dnow Canada ULC, Fort St James Green Energy Limited Partnership
and Fort St James Green Energy General Partner Ltd.**

Respondents
(Respondents)

- and -

Docket: CA44823

Between:

Iberdrola Energy Projects Canada Corporation

Appellant
(Petitioner)

And

**Factory Sales & Engineering Inc. d.b.a. FSE Energy,
Acuren Group Inc., Norweld Stress (1994) Ltd., Peter Makin,
Canyon Tree Farms Inc., Shic Enterprises Ltd. d.b.a. Alpha Design,**

Aluma Systems Inc., Enviroblast and NDT Inc., Dnow Canada ULC, Irwin's Safety and Industrial Labour Services Ltd., United Rental of Canada Inc., Price Industries Ltd., TVE Industrial Services Ltd., Acier Marquis Inc., All Therm Services Inc., Coast Crane Ltd., Moyes & Company Building Materials Ltd., Prime Quality Construction Inc., Merritt Green Energy Limited Partnership, Merritt Green Energy General Partner Ltd. and Chubb Insurance Company of Canada

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson
The Honourable Madam Justice Dickson

On appeal from: Orders of the Supreme Court of British Columbia, dated November 10, 2017 (*Iberdrola Energy Projects Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FSE Energy*, 2017 BCSC 1776 (October 3, 2017; re-opened November 10, 2017, unpublished), Kamloops Docket No. S54218 and Prince George Docket No. S1751190).

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Counsel for Chubb Insurance Company of Canada:	M.L. Colwell S.U. Hamilton
Counsel for Slavkovic Holdings Inc., TVE Industrial Services Ltd., and Acier Marquis Inc.:	C.J. Moore
Counsel for Counsel for Enviroblast and NDT Inc.:	N. Van Kampen
Counsel for United Rental of Canada Inc.:	D.K. Georgetti N. Graham (articled student)
Counsel for All Therm Services Inc.:	D.H. Coles

Counsel for Fort St James Green Energy Limited Partnership, Fort St James Green Energy General Partner Ltd., Merritt Green Energy Limited Partnership, and Merritt Green Energy General Partner Ltd.:	K.A. Reilly J.D. Virgin
Counsel for Shic Enterprises Ltd. d.b.a. Alpha Design:	A.S. Cochrane
Counsel for Prime Quality Construction Inc.:	G.J.R. Thomson
Place and Date of Hearing:	Vancouver, British Columbia May 9, 2018
Place and Date of Judgment:	Vancouver, British Columbia July 3, 2018

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Garson
The Honourable Madam Justice Dickson

Summary:

FSE entered into fixed-price contracts with Iberdrola to install boilers on two projects. It encountered financial difficulties, and Iberdrola entered into "settlement agreements" under which it paid subcontractors directly on behalf of FSE. When this failed to resolve FSE's financial problems, Iberdrola entered into "payment agreements" under which it advanced payments to FSE into a jointly-administered bank account, with funds in that account being used exclusively to pay subcontractors. Despite these efforts, FSE defaulted on its obligations. Unpaid subcontractors made claims under s. 4 of the Builders Lien Act against Iberdrola, claiming that it ought to have held back funds under the settlement and payment agreements. Iberdrola contended those agreements were loans, and did not engage s. 4 of the Builders Lien Act. A Supreme Court judge held in favour of the subcontractors and Iberdrola appealed. Held: Appeal allowed in part. Appeal allowed in respect of the settlement agreements and dismissed in respect of the payment agreements. The judge made no error in finding that s. 4 of the Builders Lien Act applied to funds advanced under the settlement and payment agreements. They were payments on account of contracts, and that characterization was not affected by rights Iberdrola acquired against FSE. The settlement agreement payments, however, were payments under subcontracts, not under the contract between Iberdrola and FSE. As none of the subcontractors in this action claimed by or under those subcontracts, they have no claim of lien against amounts paid under the settlement agreements.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This appeal concerns the obligation of the appellant, Iberdrola Energy Projects Canada Corporation ("Iberdrola"), to maintain a holdback under s. 4 of the *Builders Lien Act*, S.B.C. 1997, c. 45, in respect of certain funds that it advanced to ensure the completion of boiler installations on two large biomass plants. Iberdrola maintains that the funds were advanced as loans to a subcontractor, Factory Sales & Engineering Inc. ("FSE"), and did not engage the holdback provisions of the *Builders Lien Act*. The respondents who have appeared on this appeal do not accept that the funds should be characterized as loans, but say that, whether or not they were loans, Iberdrola had a legal obligation to maintain a 10% holdback.

Overview

[2] Iberdrola was the general contractor on the construction of two biomass plants, one in Fort St. James and one in Merritt. The plants were constructed on

lands owned, respectively, by Fort St. James Green Energy General Partner Ltd. and Merritt Green Energy General Partner Ltd.

[3] The boiler is a central feature of a biomass plant, and its installation was a major part of each project. On November 27, 2013, Iberdrola entered into a fixed-price contract with FSE under which FSE was to supply and install the boiler and auxiliary equipment at the Fort St. James Biomass Project. On July 14, 2014, Iberdrola and FSE entered into a similar contract with respect to the Merritt Biomass Project. FSE was responsible for engaging subcontractors, as necessary, for the supply and installation of the boilers.

[4] FSE experienced financial problems, and did not keep up payments to its subcontractors. Iberdrola learned of FSE's financial problems sometime in 2015. The failure of FSE to pay its subcontractors was a major problem for Iberdrola, as it risked significant liability to the project owners for liquidated damages in the event that the projects were delayed. It could not afford to have FSE's subcontractors walk away from the job. Iberdrola embarked on various methods of injecting funds into the project in order to keep the subcontractors working.

[5] First, Iberdrola entered into a series of "Settlement Agreements" with FSE and five of its subcontractors. Under these agreements, Iberdrola paid the subcontractors directly on behalf of FSE for outstanding amounts due. In turn, it acquired a right to set off those payments against amounts that became payable to FSE under the contract.

[6] The dates and amounts advanced (in US currency) under the five Settlements Agreements were as follows:

Date	Subcontractor	Project	Advanced
Aug. 27, 2015	Tyrod Industries	Fort St. James	$554,600.96
Aug. 27, 2015	Steelgrid Construction	Fort St. James	$677,534.19
Sept. 3, 2015	Advance Ross Electronics	Fort St. James Merritt	$890,462.79 $1,307,124.99
Sept. 22, 2015	Eaton Industries (Canada)	Fort St. James Merritt	$590,108.37 $218,154.00
Oct. 29, 2015	Prime Quality Construction	Merritt	$204,138.36

[7] The payments made under the Settlement Agreements did not put an end to FSE's financial problems, and Iberdrola began to advance further funds under different arrangements called "Payment Agreements".

[8] Under the initial Payment Agreements, FSE presented Iberdrola with a list of outstanding invoices from subcontractors. Iberdrola examined and approved the invoices, and allowed FSE to invoice it for the sum of the approved contractor invoices. Iberdrola then paid that sum to FSE by depositing it into a jointly-controlled bank account, from which FSE paid the subcontractors' invoices. The initial payment agreements were structured as advances from Iberdrola to FSE on the main boiler contracts.

[9] When the maximum amounts set out under the initial Payment Agreements proved insufficient, Iberdrola and FSE entered into Second Payment Agreements on each project. In the case of the Fort St. James project, they also entered into a Third Payment Agreement.

[10] The Second and Third Payment Agreements were, in many respects, similar to the initial Payment Agreements, but there were differences:

- FSE was no longer required to prepare and submit an invoice for the advance payments after the contractor invoices were approved;

- While the agreements still included the heading “Advance Payment by Purchaser”, the payments were referred to in the body of the agreement simply as “Funds” rather than “Advance Payments”;

- As an alternative to the use of the dedicated joint bank account, Iberdrola could, by electing to do so in writing, pay the subcontractors directly, though it does not appear that such an election was ever made;

- A term was included allowing Iberdrola to give a notice requiring FSE to reimburse it within 15 days for any funds that it had paid FSE under the agreements.

[11] The dates and amounts advanced under the five Payment Agreements were as follows (all amounts advanced are expressed in US currency):

Date	**Title**	**Project**	**Advanced**
Oct. 15, 2015	Payment Agreement	Fort St. James	$1,932,895.00
Oct. 30, 2015	Payment Agreement	Merritt	$9,530,165.00
Dec. 26, 2015	Second Payment Agreement	Fort St. James	$9,418,393.00
August 12, 2016	Second Payment Agreement	Merritt	$32,610,825.00[1]
August 12, 2016	Third Payment Agreement	Fort St. James	$18,755,171.00[2]

[12] Ultimately, FSE’s financial problems proved insurmountable. In November 2016, Iberdrola exercised its right, under the Second and Third Payment Agreements, to demand reimbursement for the funds it had advanced. FSE could not fulfill the demand. It issued a stop work notice to its subcontractors and walked

[1] According to the terms of the second payment agreement for the Merritt project, the maximum amount to be advanced was US$32,610,825.00, inclusive of the amount already advanced under the initial payment agreement. The affidavit evidence and the submissions of the parties, however, indicate that the amount advanced under the second payment agreement for the Merritt project was US$32,610,825.00 *in addition to* the amount advanced under the initial payment agreement. No explanation has been provided for this apparent discrepancy. I have accepted as correct the amount set out in the affidavits and submissions, as it is that amount that was found by the chambers judge to have been advanced.

[2] According to the terms of the third payment agreement for the Fort St. John project, the maximum amount to be advanced was US$21,215,361.11, inclusive of amounts already advanced under the initial and second payment agreements. The affidavit evidence and the submissions of the parties, however, indicate that the amount advanced under the third payment agreement for the Fort St. John project was US$18,755,171.00, which, when added to the advances under the initial and second payment agreements would exceed the maximum set out in the agreement. No explanation has been provided for this apparent discrepancy. I have accepted as correct the amount set out in the affidavits and submissions, as it is that amount that was found by the chambers judge to have been advanced.

away from the projects. FSE did not repay any amount under the Payment Agreements.

[13] Bankruptcy proceedings in respect of FSE are ongoing in Louisiana. Iberdrola seeks to adduce fresh evidence before this Court, showing that FSE is not contesting Iberdrola's claims against it in bankruptcy. As the evidence is not relevant to any issue before us, I would decline to admit the evidence.

[14] The issue on this appeal is whether Iberdrola was required, under s. 4 of the *Builders Lien Act*, to maintain a holdback on funds advanced under the Settlement Agreements and the Payment Agreements. Iberdrola argues that its duties to hold back funds were limited to funds paid under the terms of the boiler contract between it and FSE. It contends that amounts advanced under the Settlement Agreements and the Payment Agreements were simply loans to FSE, and did not engage the holdback provisions of the *Builders Lien Act*. The subcontractors and the insurance company that assumed liabilities for FSE under a labour and materials payment bond, on the other hand, take the position that Iberdrola was required to maintain holdbacks in respect of funds advanced under the Settlement Agreements and the Payment Agreements. While they dispute the characterization of those agreements as "loans", they contend that holdbacks were required whether or not the agreements constituted loans.

The Builders Lien Act

[15] The following provisions of the *Builders Lien Act* are relevant to this appeal:

> **Lien for work and material**
>
> 2 (1) Subject to this Act, a … subcontractor … who, in relation to an improvement,
>
> > (a) performs or provides work,
> >
> > (b) supplies material, or
> >
> > (c) does any combination of those things referred to in paragraphs (a) and (b)
>
> has a lien for the price of the work and material, to the extent that the price remains unpaid ….

> …
>
> **Holdback**
>
> 4 (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of
>
> > (a) the value of the work or material as they are actually provided under the contract or subcontract, and
> >
> > (b) the amount of any payment made on account of the contract or subcontract price.
>
> (2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.
>
> (3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.
>
> …
>
> (9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.
>
> …
>
> **Limit of claims**
>
> 34 (1) The maximum aggregate amount that may be recovered under this Act by all lien holders who claim under the same contractor or subcontractor is equal to the greater of
>
> > (a) the amount owing to the contractor or subcontractor by the person who engaged the contractor or subcontractor, and
> >
> > (b) the amount of the required holdback in relation to the contract between the contractor or subcontractor and the person who engaged the contractor or subcontractor.
>
> (2) For the purposes of subsection (1) (a),
>
> > (a) an amount claimed by way of counterclaim against a contractor or subcontractor by the person who engaged the contractor or subcontractor does not reduce the amount owing to the contractor or subcontractor by that person ….

[16] Section 23 of the statute allows a contractor to apply to the Supreme Court to discharge a lien upon paying the amount of the lien into court.

The Judgment Appealed From

[17] In respect of each of the projects, several subcontractors filed claims of lien for unpaid work and materials under the *Builders Lien Act*. In the case of both projects, the lien claims exceeded the amount of the holdback that Iberdrola was required to maintain, even if the holdback was calculated as including amounts under the Settlement Agreements and Payment Agreements.

[18] Iberdrola applied to the Supreme Court to have the liens discharged on payment of holdback amounts into court. It contended that holdback amounts were US$3,564,232 in respect of the Fort St. James project, and US$3,888,961 in respect of the Merritt project. The calculated holdback amounts were based on amounts paid or payable to FSE under the boiler contracts, as well as payments made for change orders, transport costs, and cancellation fees. The holdback calculation presented by Iberdrola was as follows (with all amounts in US currency):

Project:	Fort St. James	Merritt
Milestone payments made to FSE	$30,663,810.00	$29,303,920.00
Milestones achieved but not invoiced	$2,929,245.00	$8,539,560.00
Change orders paid	$296,169.00	$576,133.00
Transport costs paid to FSE	$1,753,097.00	
Cancellation fee		$470,000.00
Total	$35,642,321.00	$38,889,613.00
Holdback (10%)	$3,564,232	$3,888,961

The lien claimants did not dispute the individual amounts set out in this table, but contended that rather than a holdback for “Milestones achieved but not invoiced”, Iberdrola was required to maintain a holdback in respect of all funds advanced under the Settlement Agreements and the Payment Agreements. They calculated the amount of the holdbacks as follows:

Project:	Fort St. James	Merritt
Milestone Payments made to FSE	$30,663,810.00	$29,303,920.00
Change Orders Paid	$296,169.00	$576,133.00
Transport costs paid to FSE	$1,753,097.00	
Cancellation fee		$470,000.00
Settlement Agreement Advances	$2,712,706.31	$1,729,417.35
First Payment Agreement Advances	$1,932,895.00	$9,530,165.00
Second Payment Agreement Advances	$9,418,393.00	$32,610,825.00
Third Payment Agreement Advances	$18,755,171.00	
Total	$65,532,241.31	$74,220,460.35
Holdback (10%)	$6,553,224.00	$7,422,046.00

[19] In his October 3, 2017 reasons for judgment, the chambers judge did not analyse the terms of the Settlement Agreements or the Payment Agreements in any detail. This is understandable, given that counsel did not present detailed analyses of these various agreements, or emphasize differences among them. In the result, the judge characterized them as having the same goals and materially similar terms:

> [7] While the agreements were titled differently (e.g. Settlement Agreement; Payment Agreement), they were all designed to pay the subcontractors working for FSE. The agreements stated that those monies advanced by Iberdrola were to be set off or deducted from any amount that Iberdrola owed to FSE.

[20] He characterized the Settlement Agreements and Payment Agreements as changes to the fixed price contract:

> [17] Iberdrola and FSE changed the manner in which they conducted business between themselves. The initial fixed price contract was amended or abandoned. It was apparent that the value of the projects had increased dramatically or that FSE had under-bid the contract.
>
> [18] Iberdrola took the necessary steps to complete the projects by ensuring the subcontractors were paid the increased amount. The agreements between Iberdrola and FSE did not change the scope or nature of the work. The agreements simply changed the manner in which the subcontractors were to be paid by giving Iberdrola more control over the payments. The contract remained the same; FSE was to supply and install boilers - only the cost of providing those services had increased.
>
> …

> [21] … Iberdrola agreed to pay the increased costs for the completion of the work set out in the contract.

[21] The judge did not consider the question of FSE's obligations to repay amounts to Iberdrola to be of importance in calculating the appropriate holdback:

> [19] Whether the arrangement between Iberdrola and FSE was a loan is not determinative of the issue for resolution. The question as to the amount required for a holdback can be answered by simply looking at the value of the work and the amount paid for it. That is what the clear language of s. 4 requires.

[22] He accepted that the amount paid under the contract included the amounts advanced under the Settlement Agreements and the Payment Agreements, and that the holdback under s. 4 of the *Builders Lien Act* should take those amounts into account. He therefore declared the required holdback amounts to be US$6,553,223[3] in respect of the Fort St. James project and US$7,422,046 in respect of the Merritt project. He made an order for payment into court of that amount.

[23] There was some confusion, after the initial reasons for judgment, as to whether the payment into court was to be made under s. 23 or under s. 24 of the *Builders Lien Act*. Under s. 23, a contractor is entitled to discharge liens by paying the full amount of the lien claims or the holdback (whichever is less) into court to the credit of the lien claims. Under s. 24, a contractor deposits security into court, in exchange for which the lien charged against land is cancelled. A payment under s. 23 is a final determination of the contractor's obligations, while a payment under s. 24 is an interlocutory order for security.

[24] The parties reappeared before the chambers judge, who determined that the payment was to be made under s. 23 of the *Builders Lien Act*. No issue is taken with that determination on appeal.

[3] This amount is one dollar less than the amount shown in the subcontractors' calculations. The discrepancy is unexplained, and I will treat it as inconsequential.

Issue on Appeal

[25] The sole issue on appeal is whether the judge was correct in determining that amounts advanced under the Settlement Agreements and the Payment Agreements were subject to holdbacks under s. 4 of the *Builders Lien Act*. The question resolves itself into one of whether the Settlement Agreements and Payment Agreements were (or were part of) subcontracts "under which a lien may arise" as those words are used in s. 4 of the *Builders Lien Act*. While the appellant divides this issue into numerous alleged errors by the chambers judge, its essential argument is that its holdback obligations were determined exclusively by the fixed-price contract it entered into with FSE (and any change orders that it agreed to). It contends that the judge erred in finding that the Settlement Agreements and Payment Agreements amended or replaced the fixed price contract.

Is the *Builders Lien Act* to be Strictly Construed?

[26] The appellant contends that the *Builders Lien Act*, as a statute that creates rights that derogate from freedom of contract, must be strictly construed. In support of that proposition, it cites *Clarkson Co. Ltd. v. Ace Lumber Ltd.*, [1963] S.C.R. 110 and *Nita Lake Lodge Corp. v. Compact Systems (2004) Ltd.*, 2006 BCSC 885.

[27] In earlier times, courts applied the concept of "strict" construction in diverse areas of law. It was postulated that statutes affecting certain types of interests should be more narrowly construed than others. Areas that were said to call for strict construction included penal laws, laws granting powers to municipalities, taxation statutes, and statutes derogating from property rights. *Clarkson* is a case from that era, and is typical of decisions calling for "strict construction" of statutes.

[28] The era of strict construction is now largely behind us. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, the Court adopted Elmer Driedger's "modern rule" of statutory interpretation as the best encapsulation of the correct approach to statutory interpretation in Canada:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[29] In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, the Court noted that the Driedger approach conforms to the requirements of s. 12 of the Federal *Interpretation Act*, R.S.C. 1985, c. I-21. Section 8 of the Provincial *Interpretation Act*, R.S.B.C. 1996, c. 238, is in almost identical terms:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[30] While *Bell ExpressVu* did not entirely eliminate the concept of strict construction, it did (at paras. 28–30) relegate it to a limited and secondary role in statutory interpretation. Strict construction is a concept that is only applied if, after applying the modern rule of statutory interpretation, there remains “real” ambiguity in a statutory provision and the provision falls within a category of statutes that traditionally were strictly construed.

[31] In the post-*Bell ExpressVu* environment, this Court has refrained from applying principles of strict construction where the modern rule suffices to interpret a statute. This has been so even in areas that traditionally called for a strict construction approach, such as:

- penal statutes (e.g. *R. v. Seipp*, 2017 BCCA 54 at paras. 41-42, aff’d 2018 SCC 1);
- taxation statutes (e.g. *Ontrea Inc. v. British Columbia*, 2009 BCCA 101 at para. 15, citing *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20);
- municipal powers (e.g. *Langford (City) v. Dos Reis*, 2015 BCCA 55 at para. 6, citing *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19); and
- property rights (e.g. *The Owners Strata Plan LMS 2768 v. Jordison*, 2013 BCCA 484 at paras. 17-19, 25).

[32] The Supreme Court of Canada has also refrained from routinely applying principles of strict construction, even to cases where statutory regimes interfere with property rights. In *Canada 3000 Inc., Re; Inter‑Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24 at para. 84, the Court affirmed that the *Bell ExpressVu* approach applies in these situations. The *Builders Lien Act* is a statute that resembles, in many ways, the statutes that were in issue in *Canada 3000*.

[33] Certain passages of the judgment of this Court in *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 [*Peri Formwork*], may appear to support a different approach to the *Builders Lien Act*. In particular, at para. 62 of that decision, the Court cites *Clarkson* and says that “because the *Act* creates new rights, the threshold question of entitlement is strictly construed; it is only once entitlement is established that the *Act* is to be construed liberally and with consideration to its remedial purpose.” Taken in isolation, this passage appears to suggest a retreat from the *Bell ExpressVu* approach in favour of the tradition of strict construction.

[34] In my view, *Peri Forwork* does not signal such a retreat. The decision is entirely consistent with *Bell ExpressVu*. In *Peri Formwork*, this Court began by applying Driedger’s modern rule of statutory interpretation to the sections of the statute that were in issue. It carefully analyzed the purpose of the statute, the language of the provisions under consideration, and their specific role in the statutory scheme. While the Court did consider that certain provisions needed to be construed narrowly, it did so only after a thorough analysis of the Act. It found that a narrow construction of some “entitlement” provisions was “consistent with concern for certainty and fairness to all stakeholders in the construction industry” (at para. 62), which was fundamental to the interpretation of the statute.

[35] The provisions of the *Builders Lien Act* in issue in this litigation are not particularly complex. They are professionally drafted, and the language used is appropriately precise. A purposive interpretation of the provisions, keeping in mind the evident statutory goals of “certainty and fairness to all stakeholders in the

construction industry" does not result in "real ambiguity" as that phrase is used in *Bell ExpressVu*.

[36] The statute provides, in s. 2, that a subcontractor has a lien for unpaid work and materials in relation to an "improvement", a defined term under the statute. The unpaid work at issue in this litigation is clearly in relation to the boiler installation, and so comes within s. 2.

[37] It seems clear that s. 4, in speaking of a "subcontract … under which a lien may arise under this Act" is referring to a subcontract for the performance of work or the supply of materials falling within s. 2 of the statute. Thus, the holdback provision of the *Builders Lien Act* is applicable to payments under a subcontract that provides for the performance of work or supply of materials to an improvement.

[38] Iberdrola contends that, in order to determine whether a holdback was required, the Court must analyse the various agreements at issue in this case. I agree that that is the most appropriate approach to this case.

The Settlement and Payment Agreements as Loans

[39] Iberdrola asserts that the only subcontracts on which it was required to maintain holdbacks were the original boiler contracts. It takes the position that nothing in the Settlement Agreements or the Payment Agreements served to amend or modify the original boiler contracts. Rather, it characterizes the Settlement and Payment Agreements simply as loan agreements. It denies that they were (or were part of) any agreement for the supply of work and materials.

[40] I have considerable difficulty with the proposition that the Settlement Agreements and the Payment Agreements were simply loan arrangements. Iberdrola points to certain features of the agreements that contemplate setoff or repayment of the amounts advanced, and says that these are enough to show conclusively that the agreements were loans. Those provisions, however, cannot be examined in isolation. As the respondents point out, there are several features of the

agreements that suggest that they were not simply loan agreements. Among those features are the following:

- The money advanced under the agreements is not referred to as a "loan", nor are the parties referred to as "lender" or "borrower";
- Instead, the money paid by Iberdrola is referred as an "advance" on contractual obligations and Iberdrola and FSE are referred to as "purchaser" and "contractor";
- There are no provisions for interest, nor is there any payment schedule; and
- There is no security given in exchange for the advancement of funds.

[41] The Settlement Agreements and Payment Agreements were certainly not typical loans. In my view, a more detailed analysis of them indicates that they were advances on contracts that did engage s. 4 of the *Builders Lien Act*. I turn to a more detailed analysis of the agreements. In doing so, I note that none of the parties provided detailed analyses of the agreements in their written arguments. For the most part, they did not differentiate among the agreements in their initial submissions. The Court was left to canvass the language of the different agreements with counsel in the course of the hearing of the appeal.

The "Settlement Agreements"

[42] The terms of the five Settlement Agreements were, for the purposes of this litigation, materially identical. Each agreement referred to Iberdrola as "the Purchaser", to FSE as "the Contractor", and to the subcontractor who entered into the agreement as "the Subcontractor". Each Settlement Agreement set out an "Outstanding Amount", being the amount owing on the subcontract. For the purposes of this litigation, the key terms of the Settlement Agreements were as follows[4]:

[4] I quote from the Eaton Industries (Canada) Company Settlement Agreement, describing the minor differences in the other Settlement Agreements in footnotes.

> 1. Payment of the Outstanding Amount.
>
> The Purchaser undertakes to pay the Subcontractor the Outstanding Amount, on behalf and on the account of the Contractor ….
>
> …
>
> Unless the Purchaser fails to pay the Outstanding Amount as set forth herein, the Subcontractor undertakes to continue to perform the Subcontract diligently and waives any right it might otherwise have or have had to suspend performance or terminate the Subcontract.[5]
>
> By making payment of the Outstanding Amount, the Purchaser does not assume any of the obligations or incur any liability of the Contractor under the Subcontract[6], which obligations and liability shall remain with the Contractor.
>
> 2. Set off of payments under the Contract
>
> …
>
> The Contractor … accepts and agrees that the sum paid by the Purchaser for the Outstanding Amount shall be set off or deducted from any amount which is due or may become due by the Purchaser to the Contractor under the Contract at any time by simple written notice from the Purchaser to the Contractor and hereby unconditionally and irrevocably waives any and all claims, actions and rights to object or in any way contest any such set off or deductions.
>
> …
>
> To the fullest extent permitted by law, Contractor will indemnify, defend and hold harmless the Purchaser … from and against all … liens … asserted against [the Purchaser] … in connection with, relating to or arising out of the payment of the Outstanding Amount ….
>
> …
>
> 4. General
>
> …
>
> iii) Except as specifically set out in this Agreement, the Contract and the Subcontract shall remain unchanged …. In addition, for the avoidance of doubt: (a) nothing in this Agreement shall be deemed to create any direct contractual obligation running from the Purchaser to the Subcontractor or vice versa ….

[43] Each Settlement Agreement, in my view, encompassed two essential arrangements. The first was an arrangement between Iberdrola and the

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[5] In the Tyrod Industries and Prime Quality Construction Settlement Agreements the words “save and except for any right arising from a future default on the part of the Contractor” appear at the end of this clause.

[6] In the Steelgrid and Advance Ross Settlement Agreements, the opening words of this paragraph are replaced by “The payment of the Outstanding Amount by the Purchaser is without assuming any of the obligations or incurring any liability of the Contractor under the Subcontract,”

subcontractor, under which Iberdrola would pay the subcontractor directly. The subcontractor, in turn, would continue to work. The second arrangement was between Iberdrola and FSE. Under that arrangement, Iberdrola discharged obligations of FSE, in exchange for a right to set off the amounts paid against future entitlements of FSE.

[44] Payments made under the Settlement Agreements are properly characterized as amounts paid on account of the various subcontracts to which they applied, and not as payments under the boiler contract. Iberdrola made the payments directly to FSE's subcontractors, and the payments related to work and invoices under their specific subcontracts, not under the contract between Iberdrola and FSE.

[45] Holdbacks should have been retained from the payments under s. 4 of the *Builders Lien Act*, because the payments were made on behalf of "the person primarily liable on [the] subcontract" (FSE) and were "made on account of the … subcontract price". Under s. 4(9) of the statute, however, the holdback on such payments was subject to a lien only in respect of a claim "by or under the person from whom the holdback was retained." As the holdbacks were required to be retained from FSE's subcontractors (not from FSE itself), only claimants whose claims arose under the specific subcontracts involved would have a claim against the holdback funds.

[46] None of the claimants in this litigation claim that they performed work or provided materials under the subcontracts involved in the Settlement Agreements. In the result, they cannot make a claim directly in respect of amounts advanced to subcontractors as a result of those agreements.

[47] The chambers judge included the Settlement Agreement payments in his calculations of the required holdback on Iberdrola's contract with FSE. For the reasons I have given, they should not have been included. The judge made a palpable and overriding error in finding that money that ought to have been held back from the payments to subcontractors under the Settlement Agreements was subject to a trust in favour of the claimants in this litigation. I would, therefore, reduce

the amount of the holdback by 10% of the Settlement Agreement payments on each project. The required holdback on the Fort St. James project must be reduced by $271,271 and the holdback on the Merritt project must be reduced by $172,942.

[48] FSE, itself, received no payments under the Settlement Agreements until such time as Iberdrola exercised its rights of setoff under those agreements (thus “paying” FSE by reducing its liabilities to Iberdrola).

[49] While the details are not clear on the record before this Court, we were advised that Iberdrola exercised its right of setoff under the Settlement Agreements in respect of two invoices and in respect of one change order. Iberdrola says that it has retained holdbacks on those setoff funds, and that they are included in its holdback calculations. It is not clear to me whether those holdback calculations assigned holdbacks on the setoff funds to “Milestone payments made to FSE” and “Change orders paid” or to “Milestones achieved but not invoiced”. To the extent that they may have been assigned to the latter category (which did not play any role in the judge’s assessment of the amount of the holdback), they will have to be accounted for in calculating the holdback. The determination of this matter should be straightforward for the parties, and I leave it to them to do the accounting. If it becomes necessary to involve the Court in this issue, the parties may advise the Registrar.

The Initial Payment Agreements

[50] Unlike the Settlement Agreements, the Payment Agreements were not arrangements entered into by FSE’s subcontractors. Instead, the Payment Agreements were two-party agreements between Iberdrola (described as “Purchaser”) and FSE (described as “Contractor”).

[51] Initially, there were two Payment Agreements, one in respect of the Fort St. James project, and one in respect of the Merritt project. Those agreements included the following terms:

Whereas

…

b) The Contractor is facing some financial problems to pay its subcontractors and suppliers (collectively, the “Subcontractors”) in connection with the performance of its obligations under the Contract.

c) In order to help the Contractor to comply with its financial obligations towards its Subcontractors, the Purchaser is ready to make some advance payments on the account of the Payment Milestones set forth in the Contract pursuant to the terms of this agreement.

…

1. Advance Payment by Purchaser

The Parties agree that the Purchaser will advance the payment of some of the Payment Milestones … as required for the Contractor in order to timely pay its Subcontractors in connection to the Project according to the following terms:

i) … [T]he Contractor shall deliver to the Purchaser the list of all the outstanding invoices received from its Subcontractors … in connection with the Project, together with a copy of the relevant invoices.

ii) The Purchaser shall review the list of invoices … and inform the Contractor … of the Subcontractor’s invoices approved for payment … (the “Approved Invoices”)

iii) The Contractor shall be entitled to issue an invoice to the Purchaser for an amount equivalent to the Approved Invoices, as advanced payment of the Payment Milestones under the Contract (the “Advance Payment”) ….

iv) The Purchaser shall pay each Advance Payment … to the Dedicated Bank Account opened by the Contractor in accordance with Clause 2.

2. Dedicated Bank Account

… [T]he Contractor shall open a bank account (the “Dedicated Bank Account”), which shall be managed by the joint approval of [representatives of the Contractor and the Purchaser].

…

The Dedicated Bank Account shall be funded with the Advance Payments paid by the Purchaser according to Clause 1 of this Agreement.

The funds deposited in the Dedicated Bank Account will be used solely for the payment of the Approved Invoices by the Contractor to the Subcontractors.

…

3. Set off of the Advance Payments

The Parties agree that the sum paid by the Purchaser as Advance Payment shall be set off or deducted from any amount which is due or may become due by the Purchaser to the Contractor under the Contract at any time by simple written notice from the Purchaser to the Contractor and the Contractor

> hereby unconditionally and irrevocably waives any and all claims, actions and rights to object or in any way contest any such set off or deductions ….
>
> In case that at the earlier of i) the payment of the last payment milestone of the Contract or ii) the termination of the Contract, the total aggregate amount of the Advance Payments … has not been totally set off, the Purchaser shall be entitled to request the Contractor to pay back the amount not set off …. In such case, the Contractor shall repay the excess ….
>
> …
>
> 5. Indemnity
>
> To the fullest extent permitted by law, Contractor will indemnify, defend and hold harmless the Purchaser … from and against all … liens … asserted against [the Purchaser] … in connection with, relating to or arising out of the payment and/or the set off and deduction of the Advance Payment ….
>
> …
>
> 8. General
>
> …
>
> iii) Except as specifically set out in this Agreement, the Contract shall remain unchanged …. In addition, for the avoidance of doubt: (a) nothing in this Agreement shall be deemed to create any direct contractual obligation running from the Purchaser to the Subcontractor or vice versa ….

[52] While Iberdrola contends that these agreements did not have the effect of modifying its contractual arrangements with FSE, I am unable to accept that assertion. The clear import of the initial Payment Agreements was that they provided for advances on the contract price – in other words, these agreements changed the terms upon which payment on the contract would be made. While the payments were made at different times than they would have been under the original contractual terms, they remained "payments made on account of the contract price" and so were subject to a holdback requirement. A party cannot avoid its obligations under the *Builders Lien Act* simply by agreeing to make payments under a contract earlier than originally planned.

[53] While it is true that Iberdrola had certain rights to be repaid for amounts advanced under the Payment Agreements, those rights did not turn the agreements into mere loan transactions. Further, because no rights of setoff were ever exercised under the Payment Agreements, those rights did not affect the amount that had to be held back. While Iberdrola may have had a right to sue FSE in respect of some of

the money advanced (which right has now become simply a claim in the insolvency proceedings), that right does not relieve it of the obligations it has under s. 4 of the *Builders Lien Act*.

The Subsequent Payment Agreements

[54] As I have indicated, the Second and Third Payment Agreements had different terms than the initial Payment Agreements. The Second and Third Payment Agreements were entered into against the background of FSE's increasingly bleak financial prospects, and the continued pressure on Iberdrola to complete the projects in a timely manner.

[55] The terms of the Second and Third Payment Agreements were less clearly suggestive of advances on the contract price than were the terms of the initial Payment Agreements. As well, the provisions of the Second and Third Payment Agreements dealing with repayment are somewhat more consistent with the idea that the agreements were loans.

[56] In determining how the holdback provisions of the *Builders Lien Act* apply to the Second and Third Payment Agreements, it is necessary to consider not only the express terms of the agreements, but also their practical effects. In context, it is difficult to characterize the payments made under these agreements as simple advances on the contract price. It must have been apparent to the parties that such advances would never be covered by the work to be accomplished. It is equally difficult to characterize them as simple loans, however, as it must also have been apparent to the parties that there was no realistic possibility that FSE would be in a position to repay the money.

[57] The chambers judge reached the conclusion that, in entering into the various agreements with FSE, Iberdrola was, in effect, conceding that the contract price had to be increased. The work could simply not be done without increasing the amount that Iberdrola was paying FSE. The judge characterized the resulting agreements as being an "amendment" or "abandonment" of the initial fixed-price contract.

[58] In my view, the judge's interpretation of events enjoys support in the evidence, and ought not to be interfered with. It is consistent with the approach to contractual interpretation mandated by *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53.

[59] While I agree with the appellant that the evidence does not support the contention that the contract was "abandoned", it does appear to have been amended. Iberdrola agreed to advance further funds on the contract, beyond the original fixed price. It recognized that the funds were required to pay for the work being done, and advanced them as part of the contract. While it did, in the Payment Agreements, secure a right to recover the funds from FSE, it must have known that it would have little prospect of actually doing so. This interpretation is in line with reading the words of the Payment Agreements "consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47.

[60] I therefore agree with the chambers judge's conclusion that money advanced on the Second and Third Payment Agreements constituted payments made on account of the contract price. Again, the fact that Iberdrola acquired some rights to sue FSE or to make claims in its insolvency does not alter the fact that the amounts were advanced as part of the contract price.

[61] I note that the appellant argues that the amounts advanced under the Payment Agreements should be considered to be "overpayments" on the contract, and not subject to a holdback requirement. In support of that proposition, it cites *Vancouver City Savings Credit Union v. Elliott* (1991), 49 C.L.R. 294, [1991] B.C.J. No. 3781 (S.C.). In my view, that case is not of assistance. It concerned a mere overpayment on a contract price rather than an express modification of the terms of payment as we have in this case.

[62] Iberdrola makes a technical argument to the effect that, even if the chambers judge was correct in finding that the parties purported to amend the contract, such an amendment was a nullity, because there was no new consideration granted by

FSE. As I read the Second and Third Payment Agreements, it is at least arguable that consideration flowed from FSE to Iberdrola, as FSE gave Iberdrola certain rights to call for repayment of past debts that Iberdrola did not previously have. In any event, given the recent judgment of this Court in *Rosas v. Toca*, 2018 BCCA 191, it is not apparent that an absence of fresh consideration would have been fatal to the validity of the Second and Third Payment Agreements.

[63] I accept that the Payment Agreements (including the Second and Third Payment Agreements) contained some provisions that could be used to characterize them as loan contracts. Their primary purpose, however, was to create modified arrangements for payment of the contract price. They recognized that the cost of the project had increased, and provided a mechanism by which Iberdrola would pay that cost, and retain only the right to make civil claims against FSE after the work had been completed. The amounts advanced on the Payment Agreements were properly subject to a statutory holdback. The judge made no error in so finding.

Conclusion

[64] I would dismiss the appeal, except that I would find that the amounts advanced under the Settlement Agreements did not give rise to a holdback against which the claimants are able to claim.

[65] In the result, I would:

a) reduce the amount of the holdback in the Prince George Action (for the Fort St. James project) from the US$6,553,223 found by the chambers judge to US$6,281,953; and

b) reduce the amount of the holdback in the Kamloops Action (for the Merritt project) from the US$7,422,046 found by the chambers judge to US$7,249,104.

[66] These amounts are subject to what I have said in this judgment about accounting for amounts of the Settlement Agreements that were formally set off against amounts owing by Iberdrola to FSE.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Madam Justice Dickson"

Court of Queen's Bench of Alberta

Citation: SemCanada Crude Company (Re) 2009 ABQB 397

Date:20090630
Docket: 0801 08510
Registry: Calgary

**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
SemCanada Crude Company, SemCAMS ULC, SemCanada Energy
Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 319278 Nova Scotia Company
and 1380331 Alberta ULC**

**Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine**

Introduction

[1] This is an application by SemCAMS ULC ("SemCAMS") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA"). SemCAMS brings its application in respect of a purported set-off made by Trilogy Energy LP ("Trilogy") against SemCAMS for amounts owing for raw natural gas sold by Trilogy to SemCAMS. At issue is whether Trilogy is entitled to set-off.

Relevant Facts

[2] As I noted in my Reasons for Judgment in ***Re SemCanada Crude Company**,* [2009] A.J. No. 450, 2009 ABQB 252, SemCAMS and SemCanada Crude Company were granted initial orders pursuant to the CCAA on July 22, 2008. Subsequent bankruptcy proceedings of other affiliated companies were procedurally consolidated with proceedings under the CCAA on July 30, 2008.

[3] SemCAMS is the operator of four natural gas processing plants and natural gas gathering systems and pipelines in Alberta. The four plants are known as the Kaybob South Amalgamated Plant Nos. 1 and 2 (the "KA Plant"), Kaybob South No. 3 Gas Plant (the "K3 Plant"), the West Whitecourt Gas Plant (the "WWC Plant") and the West Fox Creek Plant (the "WFC Plant").

These Plants, together with associated pipelines and gathering systems, are referred to as "Facilities"; each individually is referred to as a "Facility".

[4] Trilogy is an oil and natural gas producer with properties located in the Kaybob and Grande Prairie areas of Alberta. Trilogy is a limited partnership. Its general partner is Trilogy Energy Ltd. and its limited partner is Trilogy Holding Trust. Both Trilogy Energy Ltd. and Trilogy Holding Trust are wholly owned by Trilogy Energy Trust.

[5] Each Facility (other than four noted later in these reasons) is owned by various co-owners (the "Joint Owners"), each of whom owns an undivided percentage of the Facility. SemCAMS has an ownership interest (to varying degrees) in each Facility. SemCAMS also acts as the operator (and is referred to herein in such capacity as the "Operator") of each Facility pursuant to construction, ownership and operation agreements (the "CO&O Agreements"). Under the CO&O Agreements, SemCAMS as Operator maintains the Facilities and gathers and processes natural gas on behalf of the Joint Owners. Each Joint Owner is entitled to utilize a share of the throughput capacity of a Facility in proportion to its ownership interest. Any excess capacity in a Facility is allocated first to Joint Owners (then referred to as "Owners in Excess") and then used to process natural gas owned by third parties for a fee. Both capital fees and operating expenses are collected under the Gas Processing Agreement for the Joint Account for the benefit of Joint Owners.

[6] Four of the Facilities are entirely owned or leased by SemCAMS and there are no CO&O Agreements associated with those Facilities. Trilogy owes $68,404.46 (approximately 1.3% of the total Trilogy indebtedness at issue in this application) with respect to these Facilities. SemCAMS concedes that Trilogy is entitled to set-off against this indebtedness, without conceding that Trilogy may be allowed to set-off further indebtedness relating to these four Facilities.

[7] SemCAMS as Operator under 24 CO&O Agreements gathers and processes raw natural gas for Trilogy as a third party at 17 of the Facilities pursuant to various agreements (the "Gas Processing Agreements"). In addition, Trilogy is a Joint Owner in three of the pipeline Facilities and its raw natural gas is processed at those Facilities pursuant to the CO&O Agreements for those Facilities. In aggregate, Trilogy owes approximately $5.3 million plus interest to SemCAMS as Operator for services provided under these Agreements at all the Facilities.

[8] Each Facility has a separate Joint Account which the Operator administers. The Joint Account is a separate accounting that is managed by the Operator on a Facility by Facility basis for the purpose of tracking the collections and distribution of funds among Joint Owners, third party users of the Facility and service providers to the Facility. Administering the Joint Account includes tracking all revenues and expenses for the Joint Account and the Operator is continuously debiting and crediting the Joint Account as transactions occur in respect of each Facility.

[9] As part of the proceedings under the CCAA, I granted a "Joint Account Order" on October 8th, 2008 which allowed SemCAMS as Operator authority to pay out of cash flow its obligations relating to the Joint Account of each of its Facilities. In short, the Order allows SemCAMS as Operator to make payments for the benefit of the Joint Accounts that would otherwise have been stayed under the CCAA. SemCAMS submits that this Order recognizes the unique status of the Joint Accounts and the role of the Operator.

[10] The details of the monthly accounting entries and adjustments that must be made for each Facility under the CO&O Agreements and the Gas Processing Agreements are set out later in these reasons.

[11] In April 2008, Trilogy sold raw natural gas to SemCAMS in its own corporate capacity as buyer pursuant to an agreement called the "Inlet Purchase Agreement". Under the Inlet Purchase Agreement, ownership of the natural gas transferred to SemCAMS, rather than remaining with Trilogy as would have been the case under either a CO&O Agreement or a Gas Processing Agreement. Trilogy had been warned by SemCAMS, as Operator at the KA Plant, that excess capacity was diminishing. Trilogy entered into the Inlet Purchase Agreement to ensure that its natural gas would be processed in priority to other third parties and to other Joint Owners, rather than taking the risk that the entire throughput capacity of the Facility in question would be used by the Joint Owners. Certain amounts (approximately $4.1 million as of the filing date under the CCAA) are owing from SemCAMS to Trilogy in respect of this sale.

Issues

[12] The issues in the application are whether there is a trust relationship between the Operator and the Joint Owners under the CO&O Agreements, and whether Trilogy is entitled to assert contractual, legal or equitable set-off.

Analysis

[13] Trilogy has purported to exercise set-off by withholding amounts due to SemCAMS *qua* Operator under the CO&O Agreements and Gas Processing Agreements against amounts owing by SemCAMS *qua* purchaser for the purchase of natural gas under the Inlet Purchase Agreement.

[14] Trilogy's purported set-off includes claims arising under three types of agreements:

a) the three Trilogy CO&O Agreements relating to the Facilities in which Trilogy is a Joint Owner;
b) the 24 Gas Processing Agreements entered into between Trilogy and SemCAMS as Operator relating to Facilities in which Trilogy is not a Joint Owner; and,
c) the Inlet Purchase Agreement.

The Trilogy CO&O Agreements

[15] Under the Trilogy CO&O Agreements, whether as Joint Owner or Owner in Excess, Trilogy retains title to its natural gas at all times. SemCAMS as Operator processes Trilogy's gas on Trilogy's behalf. Once the natural gas is gathered or processed through a Facility, Trilogy takes the natural gas for its own use.

The Operator invoices Trilogy (as Joint Owner) for the following at each Facility in a given month:

(a) a proportionate share of operating expenses calculated on the basis of Trilogy's recent historical average throughput; and
(b) a proportionate share of capital expenditures incurred by the Joint Owners.

In a month where Trilogy is an Owner in Excess, the Operator would also invoice Trilogy for the following at each Facility:

(a) Trilogy's share of operating expenses incurred on behalf of Joint Owners during the month based on Trilogy's share of volume processed through the Facility; and
(b) capital fees based on throughput and gas composition as set out in the CO&O Agreement for the particular Facility.

Once a year, these estimated amounts invoiced will be adjusted to reflect actual throughput and composition. The Joint Owners and third party users that have underpaid at a given Facility or who have been allocated excess product (the "Equalization Payors") are invoiced for the amount they underpaid. The invoiced amount is paid to the Operator of such Facility for the sole purpose of redistribution, on a *pro rata* basis, to the Joint Owners and third parties that have overpaid at such Facility or who were under-allocated product (the "Equalization Recipients"). These payments in their totality are referred to as equalization payments ("Equalization Payments").

The payments made to Equalization Recipients are funded by the Equalization Payors at the applicable Facility. The Operator acts as a conduit for the redistribution of the funds, and pays out funds when sufficient Equalization Payments are received from Equalization Payors to justify distribution. The payment of Equalization Payments to Equalization Recipients is conditional upon these funds being received by the Operator from Equalization Payors.

All amounts owed by Trilogy pursuant to the Trilogy CO&O Agreements are to be paid to the Operator for the Joint Account, and the Operator acts as a conduit to facilitate payments.

In a given month, Trilogy (as a Joint Owner) may be entitled to credits from the Operator on account of operating expenses and capital fees invoiced to third party users for the previous month's throughput. Trilogy may also be entitled to credits for the sale of certain products, such as sulphur, sold by the Operator to third parties on behalf of the Joint Owners. Once a year Trilogy may also be entitled to receive an Equalization Payment following the calculation of the thirteenth month adjustment. Where funds are actually collected by the Operator for and on behalf of Trilogy, such funds are held in trust until paid to Trilogy.

The Gas Processing Agreements

[16] Under these Agreements, Trilogy as a third party user retains title to its natural gas at all times. It has a lower priority of processing than an Joint Owner and can be shut out of a Facility if the Joint Owners use all of their capacity in a given month.

SemCAMS as Operator collects operating expenses from third party users based on throughput for the processing of natural gas for and on behalf of the Joint Owners. The Operator also collects capital fees from third party users based on rates that are set out in the CO&O Agreement for the applicable Facility or as approved by Joint Owners.

As a third party user, Trilogy is required to pay to the Operator the following charges in respect of each Facility at which it processes gas in a given month:

(a) the operating expenses incurred by the Joint Owners in proportion to Trilogy's proportionate share of total throughput for the Facility during the prior month; and
(b) capital fees based on throughput and composition of the natural gas processed on Trilogy's behalf during the prior month.

Once a year, the Operator may also invoice Trilogy to reflect Equalization adjustments.

When third party users are invoiced, Joint Owners are credited their proportionate share of the capital fees. At the same time, Joint Owners are also credited for their proportionate share of the operating expenses charged to third party users (for which Joint Owners were invoiced in the previous month). Both operating expenses and capital fees collected are for the Joint Account.

In a given month, Trilogy may also be entitled to credits from the Operator on account of the sale of certain products, such as sulphur, that the Operator sells to third parties on behalf of third party users. Moreover, once a year Trilogy may also be entitled to a credit to reflect the thirteenth month adjustment calculations, if it has overpaid throughout the year, or was under-allocated product. All funds owing to Trilogy as a third party user are debited from the Joint Account.

The Inlet Purchase Agreement

[17] Pursuant to the Inlet Purchase Agreement, SemCAMS *qua* Purchaser purchased raw natural gas from Trilogy, taking title, at all inlets to the KA Plant. The Agreement provides

specifically that SemCAMS will be using its Working Interest Owner capacity and priority to process this gas.

Trilogy does not retain title to the gas. It is processed and then sold by SemCAMS to third party purchasers. The sales price includes a premium. Capital fees and operating expenses are deducted, giving rise to one monthly payment by SemCAMS to Trilogy.

Trust Relationship

[18] SemCAMS submits that the CO&O Agreements create a trust relationship between it as Operator and the Joint Owners. SemCAMS takes the position, consistent with industry practice and norms, that any funds it collects, either from Joint Owners or from third parties, is held in trust in the Joint Account for the particular Facility.

[19] SemCAMS relies on the leading Alberta case that applies the established tests for the existence of a trust to the relationship between an Operator and Joint Owners, ***Bank of Nova Scotia v. Société Générale*** (Canada) (1988), 87 A.R. 133 (C.A.), (commonly referred to as "*Sorrel*") at paras. 19-20.

The central issue in *Sorrel* was whether the 1981 Canadian Association of Petroleum Landmen Operating Procedure evinced an intention to create a trust relationship among the operator and the joint owners. In concluding that a trust relationship existed, the Court first identified the subject-matter of the trust as monies held by the operator and the object as the joint owners. Second, the Court examined the entire agreement as a whole and found certain characteristics that demonstrated an intention to create a trust relationship. As characteristics of a trust relationship "pervaded" the agreement, certainty of intention to form a trust was found to exist notwithstanding the absence of an express trust provision.

The indicia that demonstrated an intention to create a trust in *Sorrel* included the following (at paras. 10, 11, 13 and 17):

(a) the express intention that the operator acted for the benefit of the joint owners;
(b) the operator was vested with wide powers to act for and on behalf of the joint owners in the management and control of the jointly owned properties;
(c) the operator's authority over funds was restricted to purposes of the agreement that governed the relationship among the operator and joint owners;
(d) the funds handled by the operator could not be used for its own use, but only for the benefit of the joint owners; and
(e) each joint owner owned its proportionate share of the resources produced from the well operated for the joint account.

The Court in *Sorrel* also noted that the ability to commingle funds would not necessarily negate a trust relationship: para 10 & 13. Thus, Trilogy's submission that, while SemCAMS maintains a "separate accounting record" for each Facility, this is not actually a separate account, does not necessarily determine the issue of whether the CO&C Agreement creates a trust relationship. As noted by Slatter, J.A. in ***Brookfield Bridge Lending Fund Inc. v. Karl Oil and Gas Ltd.***, 2009 ABCA 99, at para. 11. "(w)hether commingled or not, the trustee may only expend trust funds on purposes authorized by the trust".

[20] In Brookfield, Berger, J.A. (in dissent on other issues) commented at para. 27 that "(i)t is trite law that an operator is in a fiduciary position with respect to receipts and revenues held on behalf of non-operators."

[21] Nine of the CO&O Agreements contain express trust conditions. There is no difficulty in finding that they create a trust and that SemCAMS as Operator is in a fiduciary position with respect to the Joint Owners. The remaining seven CO&O Agreements do not contain the same express trust provisions, but I am satisfied that the characteristics of a trust relationship pervade all of the agreements. It is not necessary that I determine with finality whether these seven CO&O Agreements create a trust relationship, since I am satisfied that they all create a relationship in which the funds collected by the Operator are collected for the Joint Account on behalf of and for the benefit of the Joint Owners of the Facility. This includes, specifically, the three CO&O Agreements to which Trilogy is a party.

Contractual Set-Off

[22] None of the Gas Processing Agreements or the Trilogy CO&O Agreements provide Trilogy with a right of set-off, expressly or implicitly, although some of the Gas Processing Agreements provide SemCAMS as Operator with a non-reciprocal set-off right with respect to any other agreement between the Operator and Trilogy as producer. All of these agreements contain "entire agreement" clauses which preclude any express or implied covenant not included within these agreements.

[23] The Inlet Purchase Agreement, through a standard commodity purchase agreement attachment incorporated by reference, provides as follows:

> 10.4.b The Non-Defaulting Party shall net or aggregate, as appropriate, all: (i) Termination Payments; (ii) Costs; and (iii) Unpaid Amounts, to a single liquidated amount payable by one party to the other party (the single resulting amount being the "Net Settlement Amount").
>
> 10.4c At its sole option and without Notice to the Defaulting Party, the Non-Defaulting Party may net or setoff against any Net Settlement Amount owing by the Non-Defaulting Party to the Defaulting Party any amounts owing to the Non-Defaulting Party by the Defaulting Party <u>under any other agreement between the parties</u> (the single resulting amount being the "Final Liquidation Amount"). (emphasis added.)

[24] Trilogy submits that it is clear from this language and the surrounding circumstances that it was intended that Trilogy would have the right to set-off amounts owing to SemCAMS under the Processing Agreements against amounts owing by SemCAMS to Trilogy under the Inlet Purchase Agreement. However, it is clear that SemCAMS was contracting in its own capacity as buyer of the gas under the Inlet Purchase Agreement, and was contracting as Operator of the Facilities in the Gas Processing Agreements. Trilogy submits that its relationship with SemCAMS in entering into the Gas Processing Agreements should not be defined or determined by terms of CO&O Agreements to which Trilogy was not a party, but this ignores the references in the Gas Processing Agreements to SemCAMS or its predecessor operators acting as "Operator for and on behalf of" or "as contract operator for and on behalf of" or "in its own right and also as contract operator for and on behalf of" the Joint Owners of the Facilities in question. In nearly every Processing Agreement, SemCAMS or its predecessors are defined after the recitals as "Operator" and that term is used in the balance of the Agreement.

[25] Trilogy's argument also ignores the fact that part of the indebtedness sought to be set-off was incurred pursuant to CO&O Agreements with respect to Facilities in which Trilogy is itself a Joint Owner and through which it must be considered to be familiar with the role of the Operator *vis-a-vis* the other Joint Owners. Trilogy denies knowledge of SemCAMS capacity when acting as a Operator under CO&O Agreements to which it is not a party, but the deponent for Trilogy in the following exchange during cross-examination on his Affidavit made it clear that Trilogy's management understands the concept of operatorship:

> Now, sir, you mentioned that you, meaning Trilogy, own and also operate other gas plants?
>
> Page 62
>
> A We operate five gas plants. [...]
>
> Q Okay. And with the ones where there is co-ownership with other working-interest owners, are you the operator?
>
> A Yes.
>
> Q Okay. And do you receive the revenue from - - in respect of those plants for the joint account of the owners?
>
> A Yes.
>
> Q Okay. And do you process third-party gas at those plants?
>
> A Yes, we do.
>
> Q And that, too, is received for the joint account of the owners?
>
> A Yes.
>
> Q And do you treat those funds as trust funds for the benefit of the working-interest owners?
>
> A I do not know if - - I don't know if we hold them into a trust account for the working-interest owners. I don't know if we have a trust account or a general account set up.

> Q I'm not asking if whether you commingle the funds, sir,
> or keep them in a separate account. But do you treat
> those funds as funds that are held for the benefit of
> Page 63
> the working-interest owners for which you have to
> account for them to the working-interest owners?
> A Yes.

[26] For Trilogy to succeed on its argument that the set-off provision in the Inlet Purchase Agreement extends to the Gas Processing Agreements and the Trilogy CO&O Agreements, it would have to establish that the set-off language was broad enough to cover agreements in which SemCAMS was contracting as an Operator, or, at least, that sufficient ambiguity exists in the contract to make evidence of the surrounding circumstances or the intention of the parties a relevant consideration.

[27] The Inlet Purchase Agreement read as a whole gives rise to no such ambiguity. SemCAMS as a party is contracting in its own capacity and not on behalf of Joint Owners of any of the Facilities, even the KA Plant to which the Inlet Purchase Agreement applies. In fact, the purpose of the Inlet Purchase Agreement is to avoid such an implication, which would defeat the purpose of giving Trilogy the ability to avoid the risk of being shut out of the KA Plant as a third party user inherent in the Gas Processing Agreements.

[28] In conclusion on this issue, Trilogy is not entitled to assert a contractual right of set-off.

Legal Set-Off

[29] Legal set-off requires liquidated debts that are mutual cross-obligations: ***Canadian Imperial Bank of Commerce v. Tucker Industries Inc.*** (1983), 149 D.L.R. (3d) 173 (B.C.C.A.) at para. 6, cited with approval in ***Holt v. Telford***, [1987] 2 S.C.R. 193 (S.C.C.) at para. 25. Mutual cross-obligations are cross-claims between the same parties and in the same right: ***Citibank Canada v. Confederation Life Insurance Co.*** (1996), 1996 CarswellOnt 3219, 42 C.B.R. (3d) 288 (Ont. Gen. Div.) at para. 35, affirmed (1998), 37 O.R. 226 (Ont. C.A.).

[30] While the Trilogy indebtedness is liquidated debt, Trilogy cannot rely upon legal set-off as the SemCAMS indebtedness under the Inlet Purchase Agreement and the Trilogy indebtedness under the Trilogy CO&O Agreements and the Gas Processing Agreements are not between the same parties and not in the same right. Whether debts are in the same right depends upon whether the debtor and creditor are liable solely to each other or to each other jointly with third parties. The British Columbia Court of Appeal in ***McMahon v. Canada Permanent Trust Co.*** (1979), 32 C.B.R. (N.S.) 258 (B.C.C.A.) at para. 9 made the following comments on the subject of mutuality:

> . . . A person in his individual capacity is not in the same right as he is when acting as trustee for another. Hence, it is trite law that, subject to certain limited exceptions, an amount owed by a

> person in his capacity as trustee holding property, credits, or funds for another or others cannot combine them with, or set them off against, a personal debt owed to him in his personal capacity by the beneficiary or beneficiaries of the trust. See *Garnett v. McKewan* (1872), L.R. 8, Exch. 10. In such a case there is no mutuality as one account is held in a fiduciary capacity and the other in a personal capacity. The same situation arises where there is not a trust in the strict sense of the word, but one account is set up or exists for a "special purpose" which could be held to deprive it of "mutuality" with another account held with a different or no special purpose. With respect to this concept, the following words of Lord Simon of Glaisdale in *National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd.,* [1972] 2 W.L.R. 455 (H.L.) at 466 are illuminating:
>
>> I would prefer to say that money is paid for a special (or specific) purpose so as to exclude mutuality of dealing within section 31 [of the *Bankruptcy Act*, 1914 (4 & 5 Geo. 5), c.59] if the money is paid in such circumstances that it would be a misappropriation to use it for any other purpose than that for which it is paid. (emphasis added.)

[31] Even if SemCAMS contracting as Operator was not acting as a trustee for the Joint Owners under the CO&O Agreements and the Gas Processing Agreements, it was at a minimum acting as administrator of an account set up for a special purpose. The Joint Owners would surely consider it a misappropriation if money designated for such account was used for the unauthorized purpose of setting-off SemCAMS' debt in its individual capacity.

[32] Thus, whether or not SemCAMS when contracting as Operator was acting as a trustee or on behalf of a "special purpose" Joint Account, the debt owed by SemCAMS in its individual capacity under the Inlet Purchase Agreement cannot be set-off against the debt owed by Trilogy to SemCAMS as Operator under the Gas Processing Agreements or as Operator and Joint Owner under the Trilogy CO&O Agreements.

[33] Trilogy submits, however, that its debt owing under the Gas Processing Agreements and the Trilogy CO&O Agreements can be set-off against SemCAMS' share of revenues in the Joint Accounts. It makes this argument on the basis of the proposition that if a party acts as an agent and debts arise between the third party and the principal, the third party is entitled to set-off the debts.

[34] Trilogy relies on the case of ***Royal Trust v. Holden*** (1915), 8 W.W.R. 500 (B.C.C.A.). This was a matrimonial matter where a divorced husband attempted to set-off amounts owed to him by his ex-wife for amounts he was to pay to her under an agreement whereby he paid monthly maintenance payments for her benefit through a trustee. Two members of the British Columbia Appeal Court found for the husband, one on equitable grounds and the other on the basis that the question of a separate state did not really arise at all on the facts. Two other justices dissented, commenting that the maintenance payments were to be paid for a specific purpose and that mutual debts could not arise. As the Court was equally divided, the appeal by the ex-wife was dismissed. The case has been criticized as "not the strongest of decisions" (*The Law of Set-Off in Canada,* Aurora, Canada Law Book, 1993 at 232), and it is noteworthy that it involved a very simple trust with a single beneficiary. Other authority suggests that if a beneficiary's interest in a trust is not readily ascertainable, a set-off will not be allowed: ***Middleton v. Pollock*** (1875), L.R. 20 Eq. 29 at p.34.

[35] Trilogy submits that SemCAMS' share of the revenues of the Joint Accounts ought to be ascertainable . While certainly the entitlement of SemCAMS to its share of the revenues from the Facilities will ultimately be determined through the operation of the Joint Accounts, it is clear from the evidence that this accounting is complex and subject to year-end recalculation and adjustment. The interest of SemCAMS in the Joint Account of any specific Facility is not readily ascertainable, and would require accounting involving multiple Joint Owners. This complexity precludes the operation of set-off in these circumstances.

[36] Trilogy also submits that the evidence indicates that SemCAMS is being personally reimbursed for operating expenses when acting as Operator, and that therefore, Trilogy should be entitled at the least to set-off the roughly $3.5 million of debt attributable to operating expenses. Trilogy makes this argument based on certain ambiguous evidence of the president of SemCAMS when being cross-examined on his affidavits. This ambiguity was subsequently clarified in responses to undertakings and in the affidavit of the Controller of SemCAMS. It is clear that operating expenses are paid and recovered through the use of the Joint Account. Joint Owners are invoiced for total operating expenses for a given Facility in a given month, and third party users are not invoiced until the following month. Joint Owners are credited when third party users are invoiced. At this point, Joint Owners would be prejudiced by the potential of non-payment by third party users. Funds are typically received from third parties in the next month and are credited to the Joint Account.

[37] In conclusion on this issue, Trilogy is not entitled to assert legal set-off.

Equitable Set-Off

[38] The Supreme Court of Canada set out the principles applicable to equitable set-off in ***Holt v. Telford***, [1987] 2 S.C.R. 193 at para. 33 as follows:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: *Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063.
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim: *Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066.
4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*.
5. Unliquidated claims are on the same footing as liquidated claims: *Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.).

The Alberta Court of Appeal stated in ***Re: Blue Range Resource Corp.*** (2000), 261 A.R. 162, 84 Alta. L.R. (3d) 65, [2000] 11 W.W.R. 117 (Alta. C.A.) at para. 19 that “the important point for invoking equitable set-off is the close connection of the transactions.”

[39] The claims at issue in this application do not arise out of the same contract. According to the principles set out in ***Telford,*** this is not necessary. Equitable set-off does, however, require the cross-claims sought to be set-off by Trilogy to be so clearly connected with the claim of SemCAMS "that it would be manifestly unjust to allow [SemCAMS] to enforce payment without taking into consideration the cross-claim.": ***Telford***, at para. 35. Wilson, J. for the Court in *Telford* commenting on the requirement of connection notes at para.27 that "an individual may set off against the assignee a money sum which arose out of the same contract or series of events which gave rise to the assigned money sum or was closely connected with that contract or series of events". At para.34, she notes that "... cases involving debts that arise from the same contract or closely related contracts form an exception to the general rule". Thus, in ***Telford***, even though there were two distinct mortgages, they were part of a single land exchange deal and were thus found to be sufficiently connected to meet the requirements for an equitable set-off. At para.39, Wilson, J. commented that "... [the mortgages] were made with reference to one another. It would be unfair to enforce only one side of the land exchange agreement.”

[40] With respect to the requirement of connection, the Court in ***Telford*** quotes Lord Denning in ***Fed. Commerce and Navigation Co.****, supra* at p.1078 as follows:

> But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

[41] This, in this case, I must consider with respect to the requirement of connection whether the debts sought to be set-off arise from closely-related contracts or a closely-related series of events, from the same or a closely related transaction or from inter-related contracts.

[42] The party asserting a claim of set-off, in this case Trilogy, has the burden of proof of establishing the close connection between the cross-claims and that it would be manifestly unjust not to allow set-off. The remedy is rooted in the need to achieve fairness between the parties: ***Canada Trustco Mortgage Co. v. Sugarman*** (1999), 179 D.L.R. (4^{th}) 548 at para. 17.

[43] Firstly, Trilogy submits that SemCAMS and Trilogy are parties to multiple, complex contracts relating to the processing of natural gas and that all the debts that arise under these various contracts are related. This founders on the fact that the contracts relate to 20 separate Facilities. The Joint Owners of the Facilities are not the same, even if SemCAMS acts as Operator for all of them.

[44] There is no cross-accounting as between Facilities. There are 29 different contracts that were entered into over about ten years. The only relationship among the Trilogy CO&O Agreements and the Gas Processing Agreements is that all of these contracts relate to the gathering and processing of Trilogy's natural gas through various Facilities owned by different sets of Joint Owners, but all operated by SemCAMS.

[45] By contrast, the Inlet Purchase Agreement is the only agreement of its kind among the others, not only because SemCAMS contracted as purchaser of the gas in its' own right, but because it is inconsistent with the pattern of contracting with an Operator for Joint Owners represented by the other contracts, and in fact was entered into deliberately to avoid that situation and its implications for security of access to processing capacity.

[46] In addition, while mutuality is not required in equitable set-off, the lack of mutuality of parties distinguishes the Trilogy CO&O Agreements and the Gas Processing Agreements from the Inlet Purchase Agreement such that it cannot be said that all the debts are related.

[47] Secondly, Trilogy submits that the Gas Processing Agreements and the Inlet Purchase Agreement are not distinct contractual obligations, because the Inlet Purchase Agreement incorporates and builds on certain previously existing Gas Processing Agreements. It derives this argument from the following reference in the Inlet Purchase Agreement:

> Processing Fees will be netted off, as follows:
>
> **Processing Fees:** Trilogy will be charged the same capital fees as set out in the executed processing agreements between SemCAMS ULC and Trilogy Energy L.P. listed below: [contracts listed].

However, this provision, read in the context of the agreement as a whole, merely references how the final price paid by SemCAMS for the natural gas it purchases in a given month is to be calculated, by deducting from the sales price certain amounts, including capital fees benchmarked to four previously executed Gas Processing Agreements and operating expenses attributable to the gas sold. There is no other reference to the Gas Processing Agreements in the Inlet Purchase Agreement and certainly nothing to suggest that any of them are incorporated into the Inlet Purchase Agreement. The Inlet Purchase Agreement is not a continuation of the Gas Processing Agreements. It is not contingent on them, and there are no cross-termination provisions.

[48] Trilogy also notes that, although SemCAMS sold the gas after it was processed, the purchasers in most cases continued to be the purchasers Trilogy formerly sold to under the Gas Processing Agreements. This is true, and in fact, the Inlet Purchase Agreement provides that Trilogy will assign its existing sales contracts to SemCAMS, although it retains the right to approve new sales contracts that SemCAMS may enter into with third parties. This assignment emphasizes, rather than detracts from, the concept that SemCAMS, takes title to the gas, in contrast to the Gas Processing Agreements.

[49] As noted previously, Trilogy entered into the Inlet Purchase Agreement to ensure a market for its gas by a method that was unavailable through the Gas Processing Agreements, under which it was vulnerable to being shut out of processing capacity. The Inlet Purchase Agreement thus replaced the previous Gas Processing Agreements with a different scheme that was more beneficial to Trilogy (and also to SemCAMS).

[50] Trilogy submits that the Inlet Purchase Agreement contains a contractual right of set-off of fees that would otherwise have been charged under the Gas Processing Agreements. To

characterize the netting provision in this way is misleading: it is in fact merely a reference to a benchmark for the purpose of a formulaic calculation of the sales price.

[51] Trilogy also attempts to draw a connections between the Gas Processing Agreements and the Inlet Purchase Agreement by noting that they all relate to the processing and sale of the same natural gas, such that the result is essentially the same. This ignores the benefits that both parties derived under the Inlet Purchase Agreement that were not available under the previous Gas Processing Agreements at that Facility. The net result cannot be considered a manifestation of similarity when the purpose of the Inlet Purchase Agreement was to change how matters were conducted under the Gas Processing Agreements.

[52] Thirdly, Trilogy comments that the only reason SemCAMS could enter into the Inlet Purchase Agreement was that it could take advantage of its position as a non-producing Operator with a substantial working interest in the Facilities. This is irrelevant to the question of connection.

[53] Fourthly, Trilogy submits that it decided to enter into the Inlet Purchase Agreement because it thought it had the right of set-off to the Gas Processing Agreements. The intention of one party is irrelevant in the face of contractual language that does not give effect to this intention. The intention of Trilogy that there would be contractual set-off, if such intention existed, cannot show a connection among the agreements if it is not properly effected.

[54] Fifthly, Trilogy submits that "having held itself out as an agent, it would be inequitable ... to countenance SemCAMS strategy to retroactive (*sic*) bifurcate its debts into those *qua* Purchaser and those *qua* Operator with SemCAMS previously notifying Trilogy that this was occurring." This argument fails for a number of reasons. SemCAMS clearly contracted in its own capacity in the Inlet Purchase Agreement. Not only is that clear from the face of the contract, but the efficacy of the arrangement required it. Trilogy is not inexperienced in the gas processing field. Whether or not it considers an Operator a trustee, it understands the implications of that position. There is no evidence that it entered into the Inlet Purchase Agreement without understanding that this was an alternative to the previous Gas Processing Agreements.

[55] In summary, the debts sought to be set-off do not arise from closely-related contracts. They do arise from a series of events that span approximately a decade, but do not arise from the same transaction. They involve a number of different Facilities and a number of different, albeit sometimes overlapping, Joint Owners. There can be said to be connection between the four Gas Processing Agreements relating to the KA Plant that were replaced by the Inlet Purchase Agreement (at least for the few months that the Inlet Purchase Agreement was operable), but the transactions were otherwise not connected except in the widest sense of all involving the gathering and processing of Trilogy's natural gas through Facilities operated by SemCAMS.

[56] Considering all of these factors, I am not satisfied that Trilogy has established a sufficiently close connections among the debts to establish the right of equitable set-off. Even if it had, however, the debts owing by Trilogy to SemCAMS as Operator under the Trilogy CO&O Agreements and the Gas Processing Agreements must be so closely connected with the debt Trilogy owes SemCAMS under the Inlet Purchase Agreement that it would be manifestly unjust to allow SemCAMS to enforce payment without taking into account the cross-claims.

[57] Given the differences in the contracts, both in purpose and in the contracting parties, it cannot be said that it would be manifestly unjust to Trilogy to enforce its indebtedness under the Inlet Purchase Agreement. The Inlet Purchase Agreement was a special-purpose contract, out of the pattern of previous contracts. In addition, the remedy of equitable set-off must not result in any form of inequity: ***Canadian Trustco Mortgage Co. v. Sugarman***, *supra,* at para. 18.

[58] SemCAMS submits that it would be inequitable to the Joint Owners who would be unjustly deprived of amounts rightfully owed to them if Trilogy's set-off claim is allowed. That would certainly be the case if equitable set-off was allowed against SemCAMS in its capacity as Operator. Trilogy argues that there is no evidence that the Joint Owners would be prejudiced if Trilogy does not pay its indebtedness. The evidence of what may be the outcome of such a failure to pay must be found in the CO&O Agreements governing the relationship between SemCAMS as Operator and the Joint Owners. SemCAMS submits that if the Trilogy indebtedness turns out to be unrecoverable, there would have to be an adjustment to the Joint Account. Neither Trilogy nor SemCAMS provided an analysis of the 17 CO&O Agreements to support these arguments, as the issue arose during the course of the hearing, but it is improbable to suppose that the entire contractual risk of non-payment by Trilogy would be borne by SemCAMS if the set-off is against SemCAMS in its capacity as Operator.

[59] I note that, in at least two CO&O agreements to which Trilogy is a party, the agreements provide that if the Operator has not received full payment of Joint Owner's share of costs and expenses within three months, the other Joint Owners will be billed for a proportionate share of the unpaid amount. The remedies available to an Operator will depend on the specific wording of the CO&O Agreement in issue and the details of the Facility's accounting procedure, but I am satisfied by the evidence before me that there would be some adverse impact on the other Joint Owners in a Facility if Trilogy is allowed to set-off indebtedness owed to it by SemCAMS in its personal capacity against SemCAMS as Operator.

[60] If Trilogy is submitting that an equitable set-off could be effected only against SemCAMS share of to revenues from the Joint Account, as it unsuccessfully argued in an attempt to establish the mutuality necessary for legal set-off, other problems arise. If an Operator of a Facility is required by the principles of equitable set-off to facilitate set-off against the account of any Joint Owner, it would create significant difficulty to working-interest owners and Operators. Such a result would allow creditors to pursue Operators for debts owed by Joint

Owners, which would materially complicate the operation of the Joint Account. Issues would arise with respect to the year-end equalization process if funds have in the meantime been paid out to creditors of Joint Owners on the basis of estimated charges and credits. This result would wreak havoc with what is understood, at the least, to be a special purpose account, and cannot be justified under the guise of equitable set-off to any greater degree than under the guise of legal set-off.

[61] Trilogy seeks to bolster its argument with respect to the availability of set-off directly against SemCAMS as a Joint Owner under the CO&O Agreements by submitting that the rights and obligations of the Joint Owners are several and not joint, referencing a provision of the CO&O Agreements that confirms that there is no intention to create a partnership and that the duties, obligations and liabilities of the Joint Owners are intended to be separate and not joint. Thus, Trilogy, suggests, it should be possible to look through the CO&O Agreements to isolate SemCAMS' interest.

[62] SemCAMS replies that it is clear that the Facilities are jointly owned and held in trust by the Operator for the Joint Owners and that the Trilogy indebtedness is owed to the Joint Account and is thus the property of the Joint Owners. The clause referred to by Trilogy relates to obligations among the Joint Owners and not obligations between the Joint Owners and the Operator. I accept that the Joint Account is jointly owned, and not severally as implied by Trilogy, and that, even though the capital fee portion of what is owed by third party users of the Facilities to the Joint Account may eventually be credited to SemCAMS in its capacity as Joint Owner, this does not overcome the accounting difficulties and complexities previously noted.

[63] SemCAMS submits that the argument made by Trilogy in support of equitable set-off can be summarized to be that it should be possible to determine, eventually, how much of the revenues of each Facility are attributable to SemCAMS and that, therefore, fairness should apply to allow a set-off. SemCAMS points out that to allow such a set-off would result in SemCAMS being required to continue as Operator of the Facilities for no remuneration until there has been the set-off of, not just the Trilogy indebtedness in the amount of roughly $4.2 million, but also the set-off of other creditors with similar arrangements with SemCAMS in its purely corporate capacity to the extent of roughly $50 million. SemCAMS argues that it would be impossible for it to continue in its core business of acting as Operator of the Facilities under those terms and that this would jeopardize the outcome of the CCAA proceedings and creditor recovery.

[64] SemCAMS submits that the Court should be cautious in assessing a set-off claim in the CCAA context, quoting the British Columbia Court of Appeal in ***Cam-Net Communications v. Vancouver Telephone Co.***, [1999] B.C.J.. 2355 at para. 22 (endorsed in principle by the Ontario Court of Appeal in ***Algoma Steel Inc. v. Union Gas Ltd.*** (2003), 63 O.R. (3d) 78 at par. 14):

> Using, or rather misusing, the law of set-off is one example of how persons with a claim against the company in reorganization might attempt to escape the CCAA compromise. A party claiming set-off, as Cam-Net notes in its factum, realizes its claim on a dollar-for-dollar basis while other creditors, who participated in the CCAA proceedings, have their claims reduced substantially. For this reason, the legislative intent animating the CCAA reorganization regime requires that courts remain vigilant to claims of set-off in the reorganization context.

[65] While this call for a CCAA court to be vigilant is consistent with the broad and purposeful interpretation of the provisions of the CCAA generally, Trilogy submits that it is not the law in Alberta, given the comment by the Alberta Court of Appeal in ***Blue Range Resource Corp.**, supra,* at para.13 that concerns about the priority of other creditors should be irrelevant in the face of s.18.1 of the CCAA. However, Paperny, J. in ***Re Canadian Airlines Corp.*** (2001), 294 A.R. 253, 92 Alta. L.R. (3d) 140, 14 B.L.R. (3d) 258, [2001] 7 W.W.R. 383 (Alta. Q.B.) at para. 70 commented as follows:

> Although Blue Range suggests that it is inappropriate to consider prejudice to other creditors in prohibiting set-off, the court did not go so far as to say that a court in determining a close connection is prohibited from considering whether the intention of the CCAA will be entirely defeated.

[66] In considering whether it would be manifestly unjust to require Trilogy to pay its indebtedness under the Inlet Purchase Agreement, it is appropriate to take into account that there is no precedent compelling an Operator to effect set-off by substituting itself for the debtor or by "streaming-through" the set-off to its account as Joint Owner, and that the implications of such a ruling would require Operators to facilitate the collection of debts through set-off of all Joint Owners, causing material difficulty in the operation of Joint Accounts. These factors alone lead to the conclusion that, even if Trilogy were able to establish a sufficiently close connection of the Trilogy indebtedness to the indebtedness owed by SemCAMS under the Inlet Purchase Agreement, it would not be able to satisfy the test of manifest unfairness. In addition, however, it is appropriate to consider in this case on the issue of fairness of such a set-off the potentially adverse consequences of such a requirement of set-off to the ability of SemCAMS to present an acceptable plan of arrangement under the CCAA.

[67] In conclusion on this issue, I find that Trilogy is unable to assert equitable set-off.

[68] As I have not found any basis for Trilogy's claim of set-off, I do not need to consider whether contractual or legal set-off is available within the CCAA context as between pre-filing debts and post-filing debts.

Equalization Payments, Audit Queries and Blue Mountain

[69] During the hearing, issues relating to equalization payments raised by Trilogy were adjourned *sine die* pursuant to a proposal acceptable to both parties, without prejudice to the right of SemCAMS to contest the matter at a later date.

[70] Trilogy also raised the issue of an amount of money it submits it is owed relating to an audit of a particular project at the Kaybob South Plant No. 3. The audit results were presented to SemCAMS as Operator in January, 2009. Under the Gas Processing Agreement, the Operator has six months to respond, and the Agreement makes provision for resolution of any dispute arising from the audit. This issue is premature, but in any event, it would engage SemCAMS as Operator and should be dealt with pursuant to the provisions of the relevant Gas Processing Agreement.

[71] Part of the indebtedness of Trilogy owing under the Gas Processing Agreements is owed by an affiliate of Trilogy, Trilogy Blue Mountain LP. Given the decisions I have reached, it is not necessary to draw a distinction between these agreements and the Gas Processing Agreements that involve Trilogy, except to note that the claim of Blue Mountain to entitlement to set-off is substantially weaker than that of Trilogy in every respect.

Conclusion

[72] The application of SemCAMS for a declaration that the amounts due under the Trilogy CO&O Agreements and the Gas Processing Agreements, plus applicable interest, less the amounts due for services rendered in relation to the Facilities that are entirely owned by SemCAMS, is granted and Trilogy is not entitled to assert set-off of indebtedness owed by SemCAMS under the Inlet Purchase Agreement against this indebtedness, either existing or future. Trilogy is directed to pay this indebtedness within fifteen days of receiving an adjusted accounting of the amounts owing.

[73] If the parties are unable to agree on costs, they may make submissions.

Heard on the 21st day of May, 2009.
Dated at the City of Calgary, Alberta this 30th day of June, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

A. Robert Anderson, Q.C.,
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Ashley Taylor, Stikeman Elliott LLP
for Bank of America

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trevali Mining Corporation (Re),* 2024 BCSC 2252

Date: 20241213
Docket: S226670
Registry: Vancouver

Between:

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

and

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57, as amended and the *Business Corporations Act*, S.N.B. 1981, c. B-9.1, as amended

and

In the Matter of a Plan of Compromise and Arrangement of Trevali Mining Corporation and Trevali Mining (New Brunswick) Ltd.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment
(Glencore Set-Off)

Counsel for FTI Consulting Canada Inc., as the Monitor of Trevali Mining Corporation and Trevali Mining (New Brunswick) Ltd., and as the Receiver of certain assets of Trevali Mining (New Brunswick) Ltd.:	J. Nitikman, K.C. E. Watson H. Cho, Articled Student
Counsel for Glencore Canada Corporation:	A. Koshal S. Douville L. Williams
Counsel for the Attorney General of Canada, on behalf of His Majesty the King in Right of Canada:	A. Sabzevari
Place and Date of Hearing:	Vancouver, B.C. October 18, 2024

Place and Date of Judgment:	Vancouver, B.C. December 13, 2024

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INTRODUCTION

[1] In August 2022, the petitioners, Trevali Mining Corporation (“TMC”) and Trevali Mining (New Brunswick) Ltd. (“TNB”) were granted creditor protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. On January 9, 2023, TNB was placed in receivership. FTI Consulting Canada Inc. is the monitor in the *CCAA* proceedings and the receiver of certain assets of TNB (in both capacities, the “Receiver”).

[2] The Trevali corporate group were in the business of owning and/or operating mines around the world through a number of direct and indirect subsidiaries. TNB operated the Caribou mine in New Brunswick.

[3] Trevali’s revenues were generated through their dealings with and sales to various members of the Glencore group, which included Glencore Canada Corporation (“Glencore”).

[4] On this application, the Receiver seeks an order that Glencore pay it the sum of approximately $1.5 million, which equates to the amount of the harmonized sales tax (HST) that is said to be owing under invoices relating to TNB’s sale and delivery of materials to Glencore prior to and just after the receivership.

[5] Glencore claims that it is entitled to set-off the HST amount as against other liabilities owing by TNB to it. The Receiver disputes that set-off is available to Glencore with respect to the HST.

[6] All counsel involved describe the issue as unique in that it appears to be a novel point which has not been the subject of judicial consideration until now.

BACKGROUND FACTS

[7] In 2020/2021, TMC and Glencore’s parent company, Glencore AG, entered into various “Offtake Agreements”, by which TMC agreed to sell certain quantities of metals (zinc and lead) (the “Metals”) to Glencore at certain prices under certain conditions. Glencore AG assigned its rights under the Offtake Agreements to

Glencore and Glencore assumed Glencore AG's duties and liabilities under those Agreements.

[8] Despite TMC being the contracting party under the Offtake Agreements, it is clear that TNB was the party who mined the Metals in New Brunswick and sold them to Glencore. Accordingly, the parties agree that it can be considered that TNB, rather than TMC, was the vendor of the Metals to Glencore and is the proper party to the Offtake Agreements.

[9] The Offtake Agreements are complex documents. However, the key provision for the purpose of this application is that they allowed for a right of set-off as between the parties, as follows:

> **21. SET OFF**:
>
> Either party may at any time without notice to the other party set off any of its liabilities to the other party against any liabilities of the other party to itself (in either case howsoever arising and whether any such liability is present or future, liquidated or unliquidated and irrespective of the currency of its denomination) and may for such purpose convert or exchange any currency. Any exercise by the parties of its rights under this clause shall be without prejudice to any other rights or remedies available to the parties under this Contract or otherwise.

[the "Set-Off Clause"]

[10] Between December 2021–October 2022, TNB sold Metals to Glencore as required by the Offtake Agreements.

[11] As a result of those deliveries, Glencore owed the purchase price for those Metals to TNB. The invoicing for Glencore's purchase of the Metals was done in stages. Upon delivery, a provisional invoice was rendered, sometimes followed by further provisional invoice(s). Only when the Metals were weighed or measured was the final purchase price determined, resulting in the rendering of a final invoice. As various invoices were issued by TNB, the amounts due by Glencore would be adjusted up or down.

[12] In addition to the Metals' purchase price, Glencore became liable to pay TNB the amount of HST in accordance with the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended [*ETA*]. In New Brunswick, the HST amount is 15% of the purchase price, representing 5% GST and 10% provincial sales tax. The HST amounts on the invoices were also adjusted up or down (and debited and credited) as the invoicing procedures took place.

[13] TNB failed to deliver some Metals to Glencore, as required by the Offtake Agreements. As a result of this breach of contract, Glencore incurred various costs to: firstly, replace the Metals that it would have otherwise purchased from TNB; and, secondly, ship the replacement metals to the proper locations (the "Replacement Costs"). The Replacement Costs include costs Glencore threw away as a result of not receiving the unsold Metals from TNB.

[14] As a result of the above:

a) Glencore owed TNB approximately US$8.7 million under the final invoices issued in December 2022 and March 2023 for the purchases of the Metals;

b) The final invoices on those purchases included approximately $1.5 million in HST (the "HST Amount"); and

c) TNB owed contractual damages to Glencore, equal to the Replacement Costs.

[15] In August 2022, TNB was granted protection under the *CCAA*.

[16] On August 18 and September 8, 2022, Glencore issued two Notices of Set-off to TMC, setting off amounts owing by Glencore under the Offtake Agreements with the Replacement Costs. The amounts that Glencore set off included the HST Amount.

[17] On September 15, October 7 and November 4, 2022, Glencore sent revised Notices of Set-Off to exclude the HST. This was done at TNB's request, on the basis that Glencore owed the HST to the Canada Revenue Agency (CRA), not TNB.

[18] On January 23, 2023, CRA advised TNB that it was proposing to assess TNB for the net HST Liability plus interest to that date and penalties.

[19] On January 24, 2023, TNB was placed into receivership and the Receiver was appointed.

[20] Glencore received internal tax advice that it owed the HST to TNB, not CRA, so that set-off of the HST Amount was appropriate. As a result, on April 14, 2023, in response to TNB's final invoices, Glencore provided an updated Notice of Set-off. That Notice was to the effect that Glencore was electing, under the Set-Off Clause, to satisfy its net obligation to pay the final invoice amount by setting it off against the Replacement Costs. In other words, by doing so, Glencore sought to set-off the HST Amount, in addition to the purchase price for the Metals.

[21] On April 21, 2023, Glencore filed a Proof of Claim with the Monitor claiming approximately $6.6 million in Replacement Costs, as against TMC or TNB. The Monitor did not dispute this claim. Schedule A to Glencore's Proof of Claim asserted a claim for approximately US$4.2 million in Replacement Costs as being:

> … obligations owing from [TMC] to [Glencore] under the Offtake Agreements after [Glencore] exercised its set-off rights to satisfy its obligations owing to [TMC] thereunder ….

[22] Thereafter, the Receiver took no issue with Glencore asserting set-off of the Replacement Costs as against the purchase price for the Metals. The Receiver disagreed that set-off was appropriate with respect to the HST Amount.

[23] On September 13, 2023, the Monitor demanded payment of the HST Amount from Glencore. Glencore refused on the basis that it had paid its gross HST liability to TNB by way of set-off against the Replacement Costs.

[24] By Notices of Assessment dated March 29, 2023, CRA assessed TNB for failing to collect HST from Glencore. The Assessments cover TNB's GST/HST reporting periods from March 2019 to October 2022, resulting in TNB owing $1,546,331 to CRA.

POSITIONS OF THE PARTIES

[25] There is no dispute between the parties that any contractual rights of set-off that existed between TNB and Glencore prior to the *CCAA* proceedings and the receivership may equally be asserted now as against the Receiver.

[26] However, the Receiver says that Glencore is not entitled to set off the HST Amount against TNB in respect of the Replacement Costs and that Glencore must pay an amount equal to the HST Amount in cash to TNB.

[27] The Receiver says that Glencore does not owe the HST Amount to TNB in TNB's personal capacity; rather, TNB is required to collect the HST Amount received from Glencore as agent and trustee for CRA, such that contractual set-off under the Set-Off Clause does not apply to the HST Amount.

[28] Glencore disputes the Receiver's claims for three reasons. Firstly, Glencore says that TNB is unable to resile from any right of set-off under the Offtake Agreements, given past practices. Secondly, Glencore says that the HST must be paid to TNB, not CRA. Thirdly, Glencore says that the result sought by the Receiver would be commercially unreasonable and without precedent.

[29] CRA agrees with the Receiver that set-off is not available to Glencore since the HST Amount is owing to CRA, not TNB.

THE ISSUES

[30] The issues are:

a) Who is liable to pay the HST Amount and to whom?

b) Is Glencore entitled to exercise its contractual set-off rights?

c) Is TNB/the Receiver estopped from asserting that no right of set-off exists? and

d) Is the result sought by the Receiver commercially reasonable?

[31] I will deal with one preliminary matter that is not controversial.

[32] The Offtake Agreements state that they are governed by the law of England. Glencore does not assert that English law applies to the issues on this application; nor has Glencore taken any steps to prove English law as a question of fact.

[33] In that event, this Court must apply Canadian law to the issues, including issues of tax law and set-off: *Christopher v. Zimmerman*, 2001 BCSC 1249 at paras. 178-179, citing *Old North State Brewing Co. v. Newlands Services Inc.*, (1998) 58 BCLR (3d) 144 at 154 (C.A.), 1998 CanLII 6512 (BC CA); *van Erp v. van Erp*, 2015 BCSC 203 at para. 58.

LIABILITY TO PAY THE HST AMOUNT

[34] This issue requires a detailed review of the legislative scheme under the *ETA* in relation to HST. I will simply use “CRA” in respect of any references to His Majesty the King in right of Canada, the Crown or the Receiver General.

[35] Goods and services tax (“GST”) is imposed by Part IX of the *ETA* and specifically by s. 165(1):

> **Imposition of goods and services tax**
>
> **165(1)** Subject to this Part, every recipient of a taxable supply made in Canada shall pay <u>to Her Majesty in right of Canada</u> tax in respect of the supply calculated at the rate of <u>5%</u> on the value of the consideration for the supply.
>
> [Emphasis added.]

[36] Provincial taxes are also imposed by each province. Some provinces, known as “participating provinces”, have agreed to allow the CRA to collect provincial sales tax for them through the *ETA*. This is known as “harmonized sales tax” (“HST”) and is set out in subsection 165(2):

> **Tax in participating province**
>
> **165(2)** Subject to this Part, every recipient of a taxable supply made in a participating province shall pay to Her Majesty in right of Canada, in addition to the tax imposed by subsection (1), tax in respect of the supply calculated at the tax rate for that province on the value of the consideration for the supply.
>
> [Emphasis added.]

[37] As above, the HST rate in New Brunswick is 15%.

[38] Subsection 123(1) of the *ETA* defines various words and terms found in the above provisions, such as “recipient”, “taxable supply”, “commercial activity”, “supply”, “business” and “person”. Nothing turns on those definitions here.

[39] In short, when any corporation (TNB) sells goods (the Metals) in New Brunswick under the Offtake Agreements, it is making a “taxable supply” and the person who is liable to pay for those goods (Glencore) must also pay HST to CRA, equal to 15% of the sales price of the goods.

[40] The *ETA* also addresses the means by which the HST is to be paid to CRA.

[41] Although ss. 165(1) and (2) of the *ETA* provide that the person who received the goods (the recipient) must pay the HST to CRA, that person does not pay CRA directly. Rather, the recipient pays the HST to the supplier, who is required to collect the HST from the recipient. The supplier holds the HST in trust for CRA until it files its next HST return, at which time it remits the HST to CRA, net of any permitted deductions (“input tax credits” or “ITCs”).

[42] The capacity in which a supplier receives or collects HST paid by a recipient is expressly set out in ss. 221(1) and 222(1) of the *ETA* – namely, as agent and trustee for CRA:

> **Collection of tax**
>
> **221(1)** Every person who makes a taxable supply shall, as agent of Her Majesty in right of Canada, collect the tax under Division II payable by the recipient in respect of the supply.
>
> **Trust for amounts collected**

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

[43] In addition, s. 278(2) of the *ETA* provides that Glencore, as the person required to pay HST under s. 165, is not required to pay when it is to be collected by another person (i.e. TNB under s. 221 of the *ETA*).

[44] There is no doubt that Glencore was liable to pay the HST under s. 165. In addition, there is no doubt that TNB was required to collect and remit the HST to CRA under ss. 221 and 222. The Receiver and Glencore are agreed that, in the normal course, TNB would collect the HST paid by Glencore and remit the HST to CRA.

[45] However, the provisions of this complex scheme for HST under the *ETA* stand to be examined in terms of the role, responsibilities and liabilities of all three participants – Glencore (recipient), TNB (supplier) and CRA (ultimate beneficiary) – as is relevant to the set-off issue that arises here.

[46] Firstly, Glencore points out that, once the supplier collects the HST, it does not simply transfer the funds to CRA. Sections 225 and 228 of the *ETA* provide that the supplier is required to remit "net tax", meaning that it can offset the amounts it has collected by the amount of ITCs it is entitled to recover, and then remit that net amount to the Crown. I agree that TNB could have sought to reduce the amount of HST paid to CRA by claiming ITCs. However, I do not see TNB having that option as altering Glencore's liability to pay HST under the *ETA*.

[47] Secondly, Glencore says that if the Receiver is correct that Glencore has not paid the HST, its recourse would only potentially arise under s. 224 of the *ETA* which allows TNB to bring an action. Section 224 provides:

> **Right of supplier to sue for tax remitted**
>
> **224** Where a supplier has made a taxable supply to a recipient, is required under this Part to collect tax from the recipient in respect of the supply, has complied with subsection 223(1) in respect of the supply and has accounted for or remitted the tax payable by the recipient in respect of the supply to the Receiver General but has not collected the tax from the recipient, the supplier may bring an action in a court of competent jurisdiction to recover the tax from the recipient as though it were a debt due by the recipient to the supplier.
>
> [Emphasis added.]

[48] As such, the *ETA* does not impose an obligation on a recipient to pay the HST to a supplier *unless and until* the supplier has paid the HST to CRA. If the supplier cannot collect the HST from the recipient, then the supplier must use its own funds to pay CRA and may then sue the recipient to recover the HST under s. 224. TNB has not paid this amount to CRA so it is unable to invoke this provision.

[49] As stated in *Quebéc (Revenue) v. Caisse populaire Desjardins de Montmagny,* 2009 SCC 49 at para. 26, "while it is true that the recipient owes the tax to the Crown, a supplier who has remitted the tax owed by the recipient but has not collected it has a cause of action against the recipient" [Emphasis added.].

[50] Glencore argues that the *ETA*, including s. 224, is a "complete code" for the collection and remittance of HST. Glencore further argues that the Receiver is attempting to short-circuit s. 224 which allows TNB to sue Glencore.

[51] However, in my view, s. 224 does not alter the fundamental liability of the recipient (Glencore) to pay the HST to CRA. Section 224 only allows a supplier (TNB) to sue the recipient "*as though* it were a debt due by the recipient". That provision does not replace Glencore's liability to pay HST under s. 165 to CRA with a debt owed to TNB or transmogrify Glencore's debt to CRA into a debt legally owed to TNB as the supplier.

[52] In addition, as the Receiver argues, even if TNB had paid the HST to CRA and then sued Glencore to recover, under s. 224 Glencore would still rely on the Set-Off Clause. In other words, the matter would circle back to the fundamental

issue as to whether the nature of Glencore's liability to pay HST to CRA is allowed under the Set-Off Clause, which is the issue that the Receiver has legitimately and properly requested be resolved by this Court in these insolvency proceedings.

[53] In addition, the *ETA* allows CRA to assess *both* the supplier and the recipient. Section 196(1)(a) allows for the assessment of the supplier. Here, CRA has assessed TNB, as set above. Section s. 296(1)(b) also allows CRA to assess the recipient, even though CRA does not generally do so.

[54] Both parties refer to the publication of David Sherman, who is described as a leading GST/HST commentator in Canada. David Sherman's Analysis (Taxnetpro) appears to be updated online fairly regularly (the "Sherman Analysis").

[55] In the Sherman Analysis (updated January 2024), Mr. Sherman discusses s. 296(1)(b) in terms of CRA having the ability to assess a recipient, but rarely using that power:

> **Operation of 296(1)(b)**
>
> Paragraph 296(1)(b) allows the assessment of "tax payable" by a person <u>under Division II</u>, IV or IV.1.
>
> Division II tax is the "normal" GST or HST payable by a "recipient" (purchaser or lessee) <u>under subsections 165(1) and 165(2).</u> <u>In most cases this is collectible by the supplier</u>, and the CRA will not normally assess the purchaser directly.
>
> [Emphasis added.]

[56] In the Sherman Analysis (updated April 2023), Mr. Sherman then discusses that CRA may pursue the recipient purchaser for HST if the supplier does not collect the HST. He states:

> … If the recipient does not pay the tax … [CRA] may assess the recipient for the tax pursuant to paragraph 296(1)(b), though this is rarely done …
>
> …
>
> **D. -- Is the Purchaser Liable if the Vendor Does Not Collect Tax?**
>
> Where the vendor collects the tax, the vendor does so <u>as agent of Her Majesty in right of Canada</u>, as stated in subsection 221(1). If the vendor does not collect the tax, however, <u>the purchaser is still required to pay it</u> if the conditions of section 165 require that tax be paid. Under subsection 278(2), the purchaser is not required to pay the amount to [CRA] if it is required to be

> collected by another person under section 221. However, paragraph 296(1)(b) allows [CRA] to assess the purchaser for tax payable. …
>
> The CRA rarely assesses a purchaser. …
>
> In *Carlson & Associates Advertising Ltd. v. Canada*, [1997] G.S.T.C. 32 (T.C.C.) ; aff'd [1998] G.S.T.C. 25 (F.C.A.), [CRA] assessed a purchaser for GST that it had never paid to vendors, and in respect of which it had claimed input tax credits. The Tax Court upheld the assessment, on the grounds that paragraph 296(1)(b) allows the Minister to assess any tax payable by a purchaser, and the Federal Court of Appeal upheld the Tax Court decision.
>
> [Emphasis added.]

[57] Finally, as on the issue of the interplay of these various provisions (ss. 165, 221, 278(2) and 224), Mr. Sherman emphasizes that the recipient's obligation is to pay HST to CRA, *not the supplier*:

> The recipient is obliged under section 165 to pay the tax, but is not obliged by that section to pay the tax *to the supplier*. The requirement is to pay the tax to [CRA], and subsection 221(1) requires the supplier to collect the tax as agent of [CRA]. Under subsection 278(2), in fact, the recipient is technically required to make payment to [CRA]! The only statutory obligation on the recipient to pay GST to the supplier, rather than directly to [CRA], will arise as a result of section 224.
>
> [Emphasis original.]

[58] Both parties also refer to *Royal Bank of Canada v. The Queen*, 2007 TCC 281 [*Royal Bank*] which discusses the "duality of liability" or "co-existing" liabilities that arise from the *ETA*. The court stated:

> [66] … If someone is liable to pay and someone else is liable to remit, dual liability is essential.
>
> […]
>
> The emphasis added highlights two co-existent liabilities. However, the nature of each liability is different. The liability of the *recipient* is a liability to "pay" tax that arises as a consequence of being a recipient of a taxable supply. The liability of the supplier is to "remit" to the Receiver General the amount of tax collected *or collectable* from the recipient to whom the supplier has made a supply. The remittance liability is a gun to the supplier's head – "collect and remit or remit the tax yourself and then seek reimbursement from the recipient as provided in section 224". A failure to remit results in the supplier being assessed pursuant to paragraph 296(1)(a).
>
> [Emphasis in original.]

[59] However, the court in *Royal Bank* clarified that CRA's ability to assess the supplier in respect of its remittance liability – described as the "collection issues" - does not affect the payment liability of the recipient:

> [74] Returning to the Respondent's double taxation argument, the point that continues to stand out is the need for rules governing the potential duality of liability to the Crown for GST of suppliers and recipients in respect of the same supply. That potential may be of concern but it does not amount to the type of double taxation that offends general principles of taxation. As to the recipient, RBC in this case, there should be no concern that it could be subject to double taxation. The foregoing analysis of subsection 278(2) hopefully gives some comfort in this regard. Whether it is the Crown or the supplier that is the direct beneficiary of a collection action against a recipient, there can only be one payment obligation. If that comfort is not sufficient, case authorities confirm, in any event, that there is no real likelihood that this Court or any other would require a recipient to pay the same tax twice.
>
> [75] Regardless of these observations, the resolution of collection issues does not impact on the correctness of the assessment against the Appellant. It has received a taxable supply and may be assessed under section 296. The prior assessment of CAIL does not preclude the subsequent assessment of RBC for the same supply.
>
> [Emphasis added.]

[60] The above provisions make clear that it is the recipient (Glencore) who is liable to pay HST under s. 165 and who is assessable under s. 296(1)(b). That amount is a "tax debt" owed to CRA and recoverable by legal action: *ETA*, s. 313 (1.1) and (2). In addition, CRA can assess Glencore for HST even though it has already assessed the supplier (TNB) for the same amount on the same supply. Glencore's liability to CRA to pay the HST does not cease to exist simply because CRA has assessed TNB, instead of Glencore.

[61] Lastly, in support of its argument that the recipient owed the HST to the supplier, and not CRA, Glencore refers to *Airport Auto Limited v. The Queen*, 2003 TCC 683 [Airport Auto]. That case addressed the nature of the agency relationship between suppliers and CRA with respect to sales tax. The issue was whether CRA could collect tax from a recipient who had already paid the tax to the supplier, but where that supplier had failed to remit the tax to CRA. The answer was "no":

> [18] … I do not see anything in the wording of subsection 221(1) that creates an agency relationship other than a typical one as would be

> contemplated under Agency law. The wording of the section is clear. It makes the Crown a beneficiary for the monies collected by the vendor of a supply. Applying simple agency law here, once the taxpayer has paid the tax to the vendor, who is established as an agent of the Crown pursuant to subsection 221(1), the purchaser has in effect paid the tax. The result is that the vendor does in fact hold these monies, once paid by a purchaser, as an agent of the Crown and the Crown becomes a beneficiary in respect to these monies.
>
> [19] …Subsection 221(1) refers to a vendor collecting the "tax payable", but in this case the tax was paid. Once a taxpayer acquires a supply and pays the tax on the supply to the vendor, the taxpayer's responsibility to pay this tax is extinguished. …

[62] Glencore's reliance on *Airport Auto* does not support its overall contention. The case stands only for the proposition that, when a person pays their creditor's agent, that debt is extinguished. That is consistent with the comments in *Royal Bank* about double taxation. The case does not support Glencore's submission that the recipient "owes" the tax to the supplier, instead of CRA, an argument that directly contradicts s. 165 of the *ETA*.

[63] Glencore also argues that there is no mechanism in the *ETA* to pay CRA directly. That may be so, but as *Airport Auto* demonstrates, that liability is extinguished by paying CRA's agent (here, TNB) – something Glencore has failed to do.

[64] Also, if Glencore is not able to exercise set-off under the Set-Off Clause with respect to its HST liability to CRA, asserting that set-off as against CRA's agent for collection does not assist Glencore.

[65] I agree with the Receiver that the above *ETA* provisions – particularly ss. 165(1) and (2) – support that HST is not payable to or collectible by the supplier (TNB). The HST is not a debt owing by the recipient to the supplier. HST is owed to CRA and the supplier simply collects the HST for and on behalf of the CRA as its agent and under the requirement that, upon receipt, it must hold the tax in trust for CRA until it is remitted to CRA (net of any ITCs).

CONTRACTUAL SET-OFF

[66] Glencore does not assert a right of set-off under the principles of legal or equitable set-off. Rather, it relies solely on contractual set-off; in other words, the Set-Off Clause. That being said, the core principles of legal set-off are relevant to the interpretation of the Set-Off Clause.

[67] One of the requirements for legal set-off is mutuality, in that there must be "mutual cross-obligations" arising between the parties: *Citibank Canada v. Confederation Life Insurance Co.*, [1996] O.J. No. 3409 (S.C.J.), 1996 CanLII 8269 (ON SC) at para. 37; aff'd [1998] O.J. No. 114 (C.A.), 1998 CanLII 955 (ON CA) at para. 6. In equitable set-off, the requirement of mutuality is "relaxed", but not eliminated: *Canada Trustco Mortgage Co. v. Sugarman*, [1998] O.J. No. 114 (C.A.), 1999 CanLII 9288 (ON CA) at para. 18.

[68] The mutuality requirement is that the cross-claims must be owed to the other party in that same right or capacity. The case law is clear that mutual debts mean debts due "from either party to the other": *Telford v. Holt*, [1987] 2 S.C.R. 193, 1987 CanLII 18 (SCC) at 295, cited in *Wilson v. Fotsch*, 2010 BCCA 226 at para. 68.

[69] Accordingly, the mutuality condition for legal set-off is not met if the debt is not owed to the other party, but to a third person: *Re Associated Investors of Canada Ltd*., 102 A.R. 249, 1989 CanLII 3199 (AB KB) at para. 5(1); *Canadian Imperial Bank of Commerce v. Twin Richfield Oils Ltd.*, 129 A.R. 161, 1992 CanLII 6284 (AB KB) at para. 27(1).

[70] In that same vein, debts owed to a person in a trust situation cannot be set-off as against personal liabilities of the trustee, because the mutuality requirement is not present since the claims do not exist "in the same right": *Colonial Furniture Co. (Ottawa) Limited v. Saul Tanner Realty Limited*, 52 O.R. (3d) 539, 2001 CanLII 24148 (ON CA) at para. 16.

[71] In BC, this concept of mutuality has been consistently applied. In *McMahon v. Canada Permanent Trust Company*, 17 B.C.L.R. 193, 1979 CanLII 769 (BC CA), the court stated:

> [9] … The basic rule is that <u>set-off (in effect the combination of accounts) is only available short of agreement, express or implied, when the debts or accounts are mutual, between the same parties in the same right</u>. It is not necessary that debts which are mutual must be of the same nature: see Houlden and Morawetz, Bankruptcy Law of Canada (1960), p. 160 et seq. "Mutual debts" are debts or claims due from one to another which are ascertainable and which are in the same right. <u>A person in his individual capacity is not in the same right as he is when acting as trustee for another. Hence, it is trite law that, subject to certain limited exceptions, an amount owed by a person in his capacity as trustee holding property, credits or funds for another or others cannot combine them with or set them off against a personal debt owed to him in his personal capacity by the beneficiary or beneficiaries of the trust</u>: see *Garnett v. McKewan* (1872), L.R. 8 Exch. 10. <u>In such a case there is no mutuality as one account is held in a fiduciary capacity and the other in a personal capacity</u>. …
>
> [Emphasis added.]

[72] See also *Miller Contracting Ltd. v. Smith*, 1985 CarswellBC 1580 (S.C.) at paras. 11-12; *Voong v. GPUN Broadway Investment Inc*., 2017 BCSC 1521 at para. 72; Kelly R. Palmer, *The Law of Set-Off in Canada* (Aurora: Canada Law Book Inc., 1993) at p. 226-227; Philip R. Wood, *English and International Set-Off* (London: Sweet and Maxwell, 1989) at 1050-1051, paras. 21-32 to 21-35.

[73] As stated in *McMahon* at para. 9, mutuality is a fundamental requirement for set-off "short of agreement, express or implied".

[74] Again, the key portion of the Set-Off Clause in relation to Glencore's rights of set-off were stated to be:

> [Glencore] may at any time without notice to [TNB] set off any of [Glencore's] liabilities to [TNB] against any liabilities of [TNB] to [Glencore] (in either case howsoever arising and whether any such liability is present or future, liquidated or unliquidated …

[75] Certainly, the Set-Off Clause expands what would otherwise be the requirements of legal set-off as to what different types of claims may be set-off. Legal set-off does not allow liquidated debts to be set-off as against damages

claims. Here, the Set-Off Clause allows set-off as against both liquidated debts and unliquidated claims. In that sense, I agree with Glencore's counsel that the Set-Off Clause is expansive in addressing the nature of claims that are included – and is inclusive of Glencore's damage claim for the Replacement Costs.

[76] However, issues of mutuality remain. What then, is the meaning of the phrase "Glencore's liabilities to [TNB]", as found in the Set-Off Clause, in relation to the issue of mutuality?

[77] Normal interpretation principles apply. The Court must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.

[78] In my view, the plain and ordinary meaning of the phrase "Glencore's liabilities to [TNB]" means Glencore's debts owed to TNB in TNB's own right (i.e. personal capacity) and not in any representative capacity held by TNB (such as its role under the *ETA* to collect HST on behalf of CRA). I am unable to read the Set-Off Clause as negating the usual requirement for mutuality in legal set-off or even relaxing the mutuality requirement, such as in equitable set-off.

[79] I have found as above that ss. 165(1) and (2) of the *ETA* provide that HST is due from Glencore to CRA. Section 221(1) provides that TNB must collect HST in its capacity as CRA's agent and s. 222(1) states that TNB is collecting HST as CRA's trustee. In that event, Glencore does not owe the HST Amount to TNB in its personal capacity and, therefore, not in the same capacity or right in which TNB owes the Replacement Costs to Glencore.

[80] I agree with the Receiver that Glencore cannot apply contractual set-off under the Set-Off Clause with respect to the HST Amount in relation to Glencore's claims for the Replacement Costs.

ESTOPPEL

[81] Glencore argues that the Receiver/TNB is estopped from denying that it can apply set-off under the Set-Off Clause because TNB had previously and routinely set-off HST under the Offtake Agreements.

[82] As I discussed above under Background Facts, the amounts debited and credited after the first invoices via the provisional and then final invoices regularly adjusted for HST amounts depending on the interim assessments and final weighing of the Metals.

[83] Glencore argues that the Receiver/TNB should be estopped from claiming that Glencore cannot set-off the HST Amounts, citing *Ryan v Moore*, 2005 SCC 38. In *Ryan* at paras. 53-59, the Court discusses estoppel by convention, the essential elements of which must be proven:

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[84] Firstly, I agree there was a shared assumption between Glencore and TNB that the parties could set-off HST in the ordinary course reconciliation process relating to the invoices. That made sense as an efficient and effective way to adjust for those amounts and avoid a multitude of payments as those HST adjustments were made. However, there is no evidence of any "shared assumption" in relation to Glencore setting off any of its damage claims, as it now seeks to do for the Replacement Costs.

[85] Secondly, I fail to see how Glencore's submission of a proof of claim in April 2023 in the insolvency proceedings seeking amounts from TNB can be said to

constitute reliance. In fact, in fall 2022, Glencore agreed with TNB that no set-off arose under the Set-Off Clause, giving rise to Glencore's revised Notices of Set-Off which excluded the HST Amount. Only months later did Glencore reverse its position.

[86] Thirdly, Glencore claims it would be unjust and unfair to allow the estate of TNB, having previously set-off HST, to resile from its previous position and refuse to permit Glencore to obtain the benefit of the Set-Off Clause. Again, I disagree. The Receiver does not dispute Glencore's set-off of amounts as they relate to the purchase price of the Metals. It is only the HST Amount that is in issue. In my view, it would be unfair to the estate to burden it with a debt owed by Glencore to CRA, while essentially allowing Glencore to recover the full amount of its claim to that extent from the estate assets.

[87] In conclusion, I do not agree that the Receiver/TNB is estopped from asserting its claim against Glencore.

COMMERCIAL UNREASONABLENESS

[88] Glencore also argues that the order sought is commercially unreasonable and, if granted, would disrupt all manner of ordinary commercial transactions.

[89] For obvious reasons, this argument is grounded, not in legal argument, but more policy driven concerns. While the former is certainly a matter that can be addressed by the Court, the latter is not. It is not clear to me that an allegation alone of "commercial unreasonableness" gives rise to any specific relief.

[90] I frankly see little need for Glencore's concerns that this decision will disrupt a substantial amount of commercial activity in Canada, as it relates to the collection and payment of HST. Certainly, CRA did not express any such concerns, which is telling, given its role in the administration of the *ETA*. I am satisfied that the facts here are unique, particularly as to the application of the bespoke Set-Off Clause between these two sophisticated parties and the background of TNB's insolvency.

[91] Finally, Glencore argues strenuously that the order sought is without precedent. That may be so, but to the extent that this decision may have some impact in the future, it does not mean that the relief is therefore unavailable.

[92] A lack of precedent for such relief does not, in and of itself, dictate the result. To suggest otherwise would entirely negate the ability of judges to address new matters and issues, which is an important aspect of our legal system. I can do no better than agree with Lord Denning, who famously said in *Packer v. Packer*, [1953] 2 All E.R. 127 (C.A.) at 129:

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere.

CONCLUSION

[93] Glencore objects to any payment of the interest and penalties that were assessed against TNB by CRA. Glencore says that the interest and penalties occurred as a result of TNB's failure to file tax returns on time and failure to remit to CRA as required.

[94] I would not accede the Glencore's argument. Any interest and penalties payable arose not just from a failure to file tax returns, but a failure to pay CRA upon the filing of the tax return. This was all as a direct result of Glencore not remitting the HST to TNB. Those amounts should be paid by Glencore.

[95] I order that Glencore remit to the Receiver the amount demanded in its letter dated September 13, 2023, plus applicable interest and penalties assessed by CRA.

[96] As the successful party, the Receiver is awarded its Scale B costs against Glencore to be assessed or agreed by the parties.

"Fitzpatrick J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Yukon Zinc Corporation (Re),*
2015 BCSC 836

Date: 20150520
Docket: S152166
Registry: Vancouver

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

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Yukon Zinc Corporation

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. April 10,17, 24, May 4, 2015
Place and Date of Judgment:	Vancouver, B.C. May 20, 2015

Introduction

[1] The Petitioner, Yukon Zinc Corporation ("Yukon Zinc"), commenced these restructuring proceedings just recently on March 13, 2015, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] Yukon Zinc is the owner of the Wolverine mine (the "Mine"), located at kilometer 192 on Robert Campbell Highway, Yukon Territory, which primarily produced zinc and silver. Production at the Mine began in 2011 but, even since that short time, it has struggled financially. Eventually, operations ceased in mid-January 2015.

[3] There is significant debt owing by Yukon Zinc. The present dispute concerns the claims of two parties: Transamine Trading S.A. ("Transamine"), who claims to have bought zinc concentrate that came from the Mine; and Procon Mining and Tunnelling Ltd. ("Procon"), who supplied mining services and equipment and materials to Yukon Zinc at the Mine.

[4] Transamine and Procon both now claim entitlement to 14,126.17 metric tonnes of zinc concentrate which is in various locations: Firstly, at the Mine; secondly, in a bulk terminal in Stewart, British Columbia awaiting shipment to Asia; and, finally, in certain trucks in transit between the Mine and Stewart or in Stewart itself. Transamine's claim is primarily based on the contention that title to this concentrate was transferred to it some time ago. Transamine also alleges that Procon has already specifically released any interest in this concentrate and it seeks specific performance of what it alleges was an agreement to that effect.

[5] Procon's claim is based on a miner's lien filed in Yukon, which it contends has priority over Transamine's claim. Procon also raises the preliminary issue as to whether this Court should decline jurisdiction in respect of the resolution of the issues, taking the position that the matter is more appropriately heard by the Yukon Territory Supreme Court.

[6] Transamine asserts that it is urgent that this matter be heard. The value of the concentrate is considerable, estimated to be $8 million US. In addition, without shipment of the concentrate, Transamine is in potential difficulty with its own lender, who financed the acquisition of the concentrate, and expected certain shipping deadlines to be met. Sale commitments to customers in Korea require delivery by May 31, 2015. In addition, Transamine points to the fact that further time will be required to ship some of the concentrate from the Mine to Stewart, British Columbia, particularly given the changing road conditions in the spring.

[7] Even Yukon Zinc points to urgency in the sense that the terminal operator in Stewart, who is holding a substantial amount of the concentrate, is potentially able to charge significant stand-by fees if shipments are not made. Transamine, if able to ship, will pay any such fees, but will claim those fees from Yukon Zinc and thereby increase the debts owing by it.

[8] Given that the matter has been brought forward on an urgent basis, Procon does not seek an adjournment.

[9] It is useful to separately discuss the circumstances of the respective claims of Transamine and Procon before considering the nature of those claims and the past and present intersection and priority of the claims.

<u>Transamine's Contractual Claims</u>

[10] Transamine is a commodities trading company that specializes in the purchase and sale of non-ferrous raw materials.

[11] Throughout the summary of the evidence, I will refer to wet metric tonnes ("WMT"), and dry metric tonnes ("DMT"), which are measures of volume in relation to concentrate. There is a difference in volume (approximately 7%), in respect of WMT based on moisture content. This is, in part, the reason why some of the volumes are not quite exact, since the accurate tonnage of concentrate is only known upon final weighing and determination of moisture content. As counsel put it during argument,

you do not buy water, so shipment volumes are in WMT, while purchase volumes are in DMT.

[12] Commencing in late 2013, Transamine entered into various contracts with Yukon Zinc, providing for the shipment of zinc concentrate from the Mine by truck to the terminal facilities of Stewart Bulk Terminals Ltd. (“SBT”), located in Stewart, British Columbia. From Stewart, the concentrate was to be loaded in vessels for transportation to Transamine’s customers located in Asia. Transamine financed its acquisition of the concentrate through Banque Cantonale Vaudoise ("BCV Bank").

[13] Transamine was one of Yukon Zinc’s customers for its zinc concentrate and the monitor, PricewaterhouseCoopers Inc. (the “Monitor”), indicated that Transamine’s concentrate was held separate and apart from concentrate held for other customers. Significantly, the Monitor’s counsel advised that, after December 3, 2014, the only zinc concentrate held by Yukon Zinc was for Transamine.

[14] Under normal circumstances, trucks carrying the concentrate would arrive at SBT’s facilities approximately two weeks after leaving the Mine.

[15] The first of the two relevant contracts is Draft Purchase and Prepayment Agreement for Zinc Concentrate No. TTSA 369 (“Contract 369”), dated December 6, 2013, for the purchase of 15,000 DMT of concentrate. By Contract 369, shipments of 5,000 tonnes were required for each of the first, second and fourth quarters of 2014.

[16] Holding certificates are important documents in this dispute, and the relevant holding certificates in this case would be issued by both Yukon Zinc and SBT, who are described as “deposit keepers” in those certificates.

[17] In Contract 369, the definition of “holding certificate” was:

> Immediately upon taking the zinc concentrate into its custody and at such other times as Transamine or its bank(s) may from time require the Terminal Operator of the Storage Warehouse at load port shall issue or reissue to [Transamine] a Holding Certificate in the form set out in Schedule 1, countersigned by an independent inspector chosen by [Transamine].

[18] Schedule 1 is a form to be completed by SBT upon arrival of the concentrate at the terminal in Stewart. It includes a separate declaration by Transamine's independent inspection company, SGS Canada Inc. ("SGS"). SGS's separate report is referenced in the holding certificate, and the report and the holding certificate are to be read together.

[19] By the terms of the SBT holding certificates, SBT acknowledged that the holding certificates:

> [C]ontain[ed] terms and conditions upon which [SBT] shall hold or continue to hold, to the fullest extent that it is legally and/or physically able, Zinc Concentrate estimated … wmt (the "Goods") free of payment and unencumbered at the irrevocable and unconditional disposal of [BCV Bank] for the account of [Transamine].

[20] The SBT holding certificates further provide:

> 1. [SBT] shall hold the Goods at [SBT].
> 2. The Goods shall be kept safely and securely at all times at the Location, segregated from all other items and clearly marked in the name of [BCV Bank] for the account of [Transamine].
> 3. [Transamine] and/or any inspector nominated by [Transamine] shall have the right at any time or times to inspect the Goods and to take samples thereof and [SBT] shall grant access to the Goods for any such purpose immediately upon request.
> 4. [SBT] shall not move, release for production or make any disposition of any of the Goods without the written authority of [BCV Bank].
> 5. [SBT] shall not, to the fullest extent that it is legally and/or physically ab e, permit the Goods to be subject to any mortgage, pledge, sale or lien or encumbrance of whatsoever nature without the written authority of [BCV Bank].
> 6. [SBT] undertakes to assist [Transamine] and/or [BCV Bank] in obtaining permits, licenses or authorizations which may be or become necessary for [Transamine] and/or [BCV Bank] to enjoy possession of the Goods and in particular to export the Goods to any destination in the world. Any costs associated with this requirement will the responsibility of [Transamine] and/or [BCV Bank] and not [SBT].
>
> …
>
> 8. The contract contained in or evidenced by this Holding Certificate is governed by and construed in accordance with Federal Laws of Canada, in particular the Provincial laws of British Columbia, Canada law and [SBT] hereby agrees that any dispute arising under or in connection with it shall, at the option of [Transamine] or [BCV Bank]

> be referred to the Federal Courts of Canada in British Columbia or the Supreme Court of British Columbia.

[21] The second of the relevant contracts (defined below as "Contract 380"), also provided for "holding certificates" to be issued, with the added provision that they would be issued by both SBT and Yukon Zinc. The Yukon Zinc holding certificates also included a separate declaration by SGS. By the terms of the Yukon Zinc holding certificates, Yukon Zinc refers to the underlying contracts by which it:

> [S]hall confirm having received and undertake to hold or continue to hold, to the fullest extent that it is legally and/or physically able, Zinc Concentrate, estimated at … (the "Goods") unencumbered as otherwise expressly permitted under the [contracts] at the irrevocable and unconditional disposal of [BCV Bank] for the account of [Transamine].

[22] The Yukon Zinc holding certificates are similar to the SBT holding certificates under both contracts and provide:

> 1. [Yukon Zinc] shall hold the Goods at [the MIne].
> 2. The Goods shall be kept safely and securely at all times at the Location, segregated from all other items and clearly marked in the name of [BCV Bank] for the account of [Transamine].
> 3. [Transamine] and/or any inspector nominated by [Transamine] shall have the right at any time or times to inspect the Goods and to take samples thereof and [Yukon Zinc] shall grant access to the Goods for any such purpose immediately upon request.
> 4. [Yukon Zinc] shall not move, release for production or make any disposition of any of the Goods without the authority of [BCV Bank].
> 5. Title to all the Goods in storage shall at all times remain with [Transamine] and be subject only to liens granted by [Yukon Zinc] to [Transamine], by [Transamine] to [BCV Bank] , or as otherwise expressly permitted under the Purchase and Prepayment Agreement. [Yukon Zinc] shall not dispose of, sell, lend, rent or give the Goods as guarantee or security, including pledge, lien or encumbrance of whatever nature with the written authority of [Transamine] and [BCV Bank].
> 6. [Yukon Zinc] undertakes to assist [Transamine] and/or [BCV Bank] in obtaining permits, licenses or authorizations which may be or become necessary for [Transamine] and/or [BCV Bank] to enjoy possession of the Goods and in particular to export the Goods to any destination in the world. Any costs associated with this requirement will the responsibility of [Transamine] and/or [BCV Bank] and not [Yukon Zinc].
>
> …

> 8. The contract contained in or evidenced by this Holding Certificate is governed by and construed in accordance with laws of the Province of British Columbia and the federal laws of Canada applicable therein, and [Yukon Zinc] hereby agrees that any dispute arising under or in connection with it shall, at the option of [Transamine] or [BCV Bank] be referred to the Federal Courts of Canada in British Columbia or the Supreme Court of British Columbia.

[23] The accompanying SGS report that arises in relation to both types of holding certificates is entitled a “stock inspection report”. By this report, SGS confirms that it has visually inspected certain commodities located at the Mine or SBT’s facilities in Stewart, being the concentrate, on a certain date and time. SGS confirms that the concentrate is held “separately from any other cargo on the premises” and stored in a stockpile of a certain quantity. The location of the stockpile(s) is noted along with some description of the concentrate and its estimated quantity.

[24] Contract 369 provided for payment by Transamine for the concentrate. Clause 9.1 relates to “payment procedures”, and sets out that a first provisional payment of 95% of the “provisional invoice value” shall be made by Transamine at the port of loading as against a SBT Holding Certificate. Under Contract 369, a second “provisional payment” was due later and a final payment was due once “all elements are known”.

[25] In addition to the provisional payment provisions noted above, clause 9.1.6 of Contract 369 specifically addresses a “prepayment facility” which allows Yukon Zinc to request a prepayment in respect of each of the shipments. The “prepaid amount” is defined as the amount of the “prepayment” which, in turn, is defined as $2 million US, made or to be made by Transamine under Contract 369. Yukon Zinc was able to request such a prepayment under certain conditions and upon the satisfaction of certain conditions precedent. The prepaid amount was to bear an interest rate from drawdown to the date of the bill of lading. If the concentrate, or sufficient concentrate, was not delivered in accordance with Contract 369, then Yukon Zinc was to reimburse Transamine for the “pending volume” with interest and a fee.

[26] On the important title issue asserted by Transamine, Contract 369 contains the following clause:

> 10. TITLE AND RISK
>
> 10.1 Title to the Concentrate shall pass from Seller to Buyer the earlier of: i) the receipt by Seller of the Prepaid Amount and/or ii) the receipt of the First Provisional Payment in accordance with Clause 9.1.
>
> [Emphasis added.]

[27] On August 19, 2014 and pursuant to clause 9.1.6 of Contract 369, Transamine paid $2 million US to Yukon Zinc, being the prepayment or prepaid amount for the third and last 5,000 DMT of concentrate due under Contract 369. The evidence establishes that this amount was well in excess of the estimated or provisional amount due for this last shipment.

[28] In early September 2014, Transamine and Yukon Zinc began negotiations on a second contract for the purchase of more concentrate. This second contract was to provide for an initial shipment of 10,000 DMT in mid-September 2014, which, together with the remaining shipment under Contract 369, would provide a total shipment of 15,000 DMT for Transamine's customers in Korea. As with the shipments under Contract 369, the shipments under the new contract were to be financed by Transamine with BCV Bank who was to take security as against the contracts. Arrangements with BCV Bank were such that credit approval of the financing was to expire on March 31, 2015.

[29] Negotiations on this new contract were delayed because issues arose with respect to certain claims by Procon.

[30] Earlier, on January 20, 2014, Yukon Zinc had executed a security agreement by which Procon had been granted a mortgage and charge on certain equipment and accessions. The registration of the security interest granted at the Personal Property Registry (the "PPR"), was made on January 23, 2014. There appears to have been some confusion on Procon's part about the scope of the security agreement, since an amendment to the registration at the PPR was made on April 14, 2014, to add "concentrates" to the collateral description.

[31] Of more significance was that Procon had filed a miner's lien against Yukon Zinc on December 17, 2013 (the "December 2013 Lien"), under the *Miners Lien Act*, R.S.Y. 2002, c. 151 (the "*MLA*"). Procon also filed a further miner's lien on September 8, 2014, in the amount of $17,869,168 in respect of amounts said to be due on August 16 and 31, 2014, and including estimated demobilization costs and other amounts not yet invoiced (the "September 2014 Lien"). The September 2014 Lien was asserted against certain quartz claims held by Yukon Zinc and as against:

> [A]ll minerals severed and recovered from the Project, including but not limited to all of Yukon Zinc Corporation's present and after-acquired concentrates and inventory wheresoever situate[.]

[32] By September 19, 2014, 10,000 WMT of zinc concentrate had been identified by SGS in its stock inspection report as being held separately from other materials at the Mine, in that it was stored in a stockpile of 15,000 DMT. Javier Villegas of Transamine stated that this 10,000 DMT was to be purchased by Transamine under the new contract, Contract 380. The remaining 5,000 DMT was purchased by Transamine under a subsequent contract that is not at issue.

[33] On September 24, 2014, Yukon Zinc issued an invoice for an "advance payment" under the anticipated second contract with Transamine. This invoice referenced 10,940.919 WMT which, after deducting the wet weight, resulted in a volume of 10,000 DMT. Specific reference is made in the invoice to an assay report prepared by Yukon Zinc which identified the specific zinc and silver content. The zinc, silver and other element values identified in both the invoice and assay report were all consistent with the agreed-upon values set out in clause 4.1 of Contract 369 and what was to be incorporated into clause 4.1 of Contract 380.

[34] Both Contract 369, and the anticipated new contract, provided that risk would pass to Transamine when the concentrate passed the ship's rail at the port of loading: Contract 369, clause 10.2; Contract 380, clause 10.2. Both contracts also addressed insurance. By clause 11.1, Yukon Zinc was required to place insurance for a certain value of the concentrate shipped, which was to be in place from the time that the concentrate was at the Mine or at SBT, until reaching the final

destination at the “port of discharge”. In addition, these clauses provided that insurance would be placed in favour of Transamine for a certain value in relation to the value of the concentrate shipped and give Transamine the “right to claim and collect from the underwriter”.

[35] By September 23, 2014, Yukon Zinc had obtained an insurance certificate in favour of Transamine in respect of 10,000 DMT of concentrate. On September 26, 2014, an endorsement was obtained which made any loss payable to the BCV Bank.

[36] Ultimately, Yukon Zinc and Transamine resolved the lien issues with Procon, which I will discuss in more detail below. Further, having identified the first 10,000 DMT of concentrate that could be shipped immediately under the new contract, Contract 380, Transamine and Yukon Zinc entered into that second contract.

[37] Transamine formally entered into Purchase and Prepayment Agreement for Zinc Concentrate No. TTSA 380 (“Contract 380”), on October 1, 2014, for the purchase of 60,000 DMT of concentrate. Contract 380 anticipated the first shipment of 10,000 tonnes would be made in the first quarter of 2015, although the attached note indicated “[p]urchase made in September 2014”. The schedule also referred to a later shipment in the second half of 2015 and continuing shipments throughout 2016/2017.

[38] As with Contract 369, Contract 380 provided that Transamine could pay for the concentrate through “provisional payments” (clauses 9.1.2 to 9.1.5), or a “prepayment” (clauses 9.1.6 to 9.1.7). In addition, Contract 380 provided for an “advance payment” under clause 9.1.8. Clause 2.2 provided that:

> This Agreement will be effective subject to the successful Advance Payment Facility under Clause 9.1.8 for the SPOT 10,000 dmt EX-Yukon Wolverine Mine in September 2014.

[39] Clause 9.1.8 provided that the advance payment, being 80% of the “provisional invoice value” of the applicable shipment, would be made by Transamine against a holding certificate issued by Yukon Zinc and countersigned by SGS.

[40] On the title issue, similar to Contract 369, Contract 380 provided:

> 10. TITLE AND RISK
>
> 10.1 Title to the Concentrate shall pass from Seller to Buyer free and clear of all liens, claims, mortgages, charges, security interests or other encumbrances whatsoever, except as permitted herein, the earlier of: i) the receipt by Seller of the Prepaid Amount and/or ii) Advance Payment Facility against Holding Certificate at Wolverine Mine in accordance with Clause [9.1.8] and/or iii) the receipt of the First Provisional Payment in accordance with Clause 9.1. On or before the passage of title to the Concentrate, the Seller shall deliver to the Buyer evidence of the discharge of all liens, claims, mortgages, charges, security interests or other encumbrances whatsoever over the Concentrate, in form satisfactory to the Buyer.
>
> [Emphasis added.]

[41] As agreed between Transamine, Yukon Zinc and Procon, Procon's lien was to be addressed before any shipment under Contract 380 took place. Clause 10.2 of Contract 380 specifically provided that, notwithstanding clause 10.1, the first 10,000 DMT of concentrate could be delivered, subject to certain liens described in Schedule 5, but provided that Yukon Zinc would cause the release and discharge of such liens. The issues relating to Procon's two liens were specifically addressed in clause 10.2(a) in that:

> [T]he Procon Lien Claims … shall be paid in full and discharged from the proceeds of the 1st advance payment hereunder (made in respect of the first 10,000 dmt of Concentrates sold hereunder), with discharges delivered to [Transamine's] counsel concurrently therewith[.]

[42] On October 1, 2014, Yukon Zinc executed a commercial security agreement in favour of Transamine which was registered at the PPRs of both Yukon and British Columbia. The secured obligations were the payment and performance of Yukon Zinc's obligations under Contract 380 and the collateral related to the initial 10,000 DMT of concentrate purchased under Contract 380. The commercial security agreement specifically provided that Yukon Zinc would discharge all liens, including that of Procon, in accordance with the previous arrangements.

[43] On October 1, 2014, Yukon Zinc issued its holding certificate in respect of 10,000 DMT held at the Mine pursuant to Contract 380. The evidence establishes that this could only have related to the amount held and identified earlier by SGS on

September 19, 2014. That holding certificate, as with all others issued by Yukon Zinc, stated that the concentrate was “at the irrevocable and unconditional disposal of [BCV Bank] for the account of [Transamine]” and that title was held by Transamine.

[44] Days later, Transamine acquired the funds for the purchase of 10,000 DMT under Contract 380 from BCV Bank. In accordance with the requirements of BCV Bank, the earlier holding certificate issued by Yukon Zinc under Contract 380 was amended on October 6, 2014, to reflect that it was issued “to the order of [BCV Bank]”. The amended holding certificate still indicated that title to the concentrate purchased under Contract 380 shall, at all times, remain with Transamine, subject to liens in favour of Transamine or BCV Bank.

[45] On October 3, 2014, Transamine paid $5,142,864 US to Yukon Zinc, being the advance payment for 10,000 DMT of concentrate, as described in Yukon Zinc’s October 6, 2014, holding certificate, which was to be delivered to Stewart from the Wolverine Mine by the first quarter of 2015 under Contract 380.

[46] In accordance with extensive negotiations between Yukon Zinc, Transamine and Procon, an agreement was reached that resulted in the release by Procon of its liens and the issuance of a “no interest letter”. Issues arise in relation to the effect of that agreement, as I will discuss below. On October 8, 2014, Procon was paid the agreed-upon amount, being $2,958,341, in accordance with these arrangements. In addition, and as agreed by Yukon Zinc and Transamine, all other liens or charges referenced in Contract 380 were released or eventually expired.

[47] Thereafter, efforts were made by Transamine and BCV Bank to commence the shipments of the concentrate. Consistent with its secured interests in the contracts, BCV Bank issued four successive and separate directions to Yukon Zinc, in each case to release 2,500 WMT of concentrate held under the October 6, 2014, holding certificate, onto trucks for delivery to SBT in Stewart. Those directions were forwarded on October 31, 2014, December 5, 2014, December 12, 2014 and January 12, 2015, respectively.

[48] The first three directions were processed such that 7,500 WMT of concentrate was delivered to Stewart on December 9 and 29, 2014. Separate holding certificates were then issued by SBT confirming receipt. The fourth direction, dated January 12, 2015, was issued by BCV Bank but has only been partially fulfilled, such that 143 WMT was delivered to Stewart and unloaded, while 327 WMT remains on trucks in Stewart, and 2,378 WMT is still at the warehouse at the Mine.

[49] Four holding certificates were subsequently issued by SBT confirming the receipt of 5,000 WMT and 2,500 WMT, 2,500 WMT, and 1,278 WMT of concentrate. As with the holding certificates issued by Yukon Zinc, by these certificates, SBT agreed to hold the concentrate at the irrevocable and unconditional disposal of BCV Bank and for the account of Transamine. By these SBT holding certificates:

a) 2,500 WMT and 1,278 WMT (total 3,778 WMT) of concentrate identified under stock inspection reports 1608-4144 and 1608-4175 arrived in Stewart by December 29, 2014, and February 5, 2015, respectively, under Contract 369; and

b) 7,500 WMT of concentrate identified under stock inspection reports 1608-4126 and 1608-4145 arrived in Stewart by December 9 and 29, 2014, under Contract 380.

[50] By December 31, 2014, 10,564 WMT had been delivered to SBT in Stewart, 10,000 of which were held under SBT holding certificates (7,500 for Contract 380 and 2,500 for Contract 369). The last 564 WMT was also held at SBT by that date but the SBT holding certificate was not issued until February 5, 2015.

[51] On January 13, 2015, Transamine and Yukon Zinc entered into Offset Agreement No. 1. By that agreement, and given the issuance by SBT of its holding certificates in respect of 7,500 WMT of concentrate, Transamine paid an additional advance payment of $598,542.27 US pursuant to clause 9.1.8(b) of Contract 380. Upon making this payment, Transamine had then paid or settled 100% of the adjusted provisional invoice value for this concentrate.

[52] On January 13, 2015, operations at the Mine stopped. At that time, 3,559 WMT of concentrate was on site and ready to be shipped to Transamine under either Contract 369 or Contract 380. Yukon Zinc was then in the process of continuing to ship the concentrate to SBT.

[53] As I will describe below, Procon filed its miner's lien on January 15, 2015. Beginning on January 21, 2015, trucks continued to haul the concentrate from the Mine to Stewart and 1,184.64 WMT was moved on or before January 31, 2015. Of that amount, 713.96 WMT was unloaded and SBT issued a holding certificate, 143.51 WMT was "dumped" at SBT, and 327.17 remains on trucks at Stewart.

[54] In summary, 14,126.17 WMT of concentrate remains in issue. Specifically:

a) by December 31, 2014, 10,564 WMT had been delivered to SBT;

b) after Procon's lien was filed on January 15, 2015, 1,184.64 WMT were moved from the Mine to Stewart;

c) 11,749.56 WMT of concentrate is presently held in Stewart at SBT's facility or on trucks for the account of Transamine (3,778 DMT under Contract 369 and 7,970.17 DMT toward Contract 380); and

d) the last 2,378 WMT remains at the Mine under the October 6, 2014, holding certificate issued by Yukon Zinc in relation to Contract 380, which would fulfill the shipping commitment under Contract 380 in respect of the initial shipment of 10,000 DMT.

[55] Mr. Villegas describes in his affidavit that both contracts provide that the final purchase price for the concentrate will be determined over a "quotational period" under clause 8. Yukon Zinc and Transamine have agreed to set the month of May 2015, as the quotational period. Should the average zinc and silver prices, over the quotational period, exceed the amount already paid, Transamine will owe Yukon Zinc the difference in price. If zinc and silver prices follow an upward trend in 2015, it

is possible that, by May 2015, the price will be sufficiently high to require Transamine to pay Yukon Zinc an additional sum.

[56] Transamine points out that, under both Contract 369 and 380, all costs relating to the hauling, storage and shipping of the concentrate to Stewart are to Yukon Zinc's account. Nevertheless, Transamine is prepared to front such costs, to be payable from any excess amount owing by it to Yukon Zinc or, alternatively, claimed against Yukon Zinc in these proceedings.

[57] Transamine contends that it has paid for 15,000 DMT of concentrate, of which 14,126.17 WMT of concentrate has been produced. Most of the concentrate is in Stewart awaiting shipment, with some remaining concentrate being held at the Mine to the account of Transamine in accordance with Yukon Zinc's October 6, 2014, holding certificate.

<u>Procon's Lien Claim</u>

[58] Procon is in the business of providing mining contracting services. Procon performed underground production mining and development work for Yukon Zinc.

[59] Procon's claim is based on a general service agreement entered into between it and Yukon Zinc on January 1, 2011. By this agreement, Procon was to provide certain mining and development services for Yukon Zinc in respect of the Mine.

[60] Procon states that, throughout its relationship with Yukon Zinc, Yukon Zinc failed to make timely payment of amounts due to Procon. Beginning in May 2012, Procon began registering a series of miner's liens against Yukon Zinc. Four claims of liens would be registered, including the most recent one which is in issue.

[61] The September 2014 Lien claimed for invoiced amounts owing from mid to late August 2014, not yet invoiced amounts, and also a substantial amount for demobilization of workers, equipment and materials from the Mine.

[62] It appears that issues arising from the relationship between Procon and Yukon Zinc go both ways. At least some of the amounts claimed by Procon are in

dispute. In addition, Yukon Zinc has advanced certain allegations against Procon. On October 31, 2014, Yukon Zinc filed a notice of civil claim against Procon in this Court. Yukon Zinc alleged that the registration of the security interest against concentrates, and the registration of the miner's lien in September 2014, were done maliciously and intentionally. Yukon Zinc claims under defamation and libel and conspiracy to injure by unlawful means. Yukon Zinc principally claims damages, an apology and an injunction.

[63] The miner's lien in issue was registered by Procon in Yukon on January 15, 2015 (the "2015 Procon Lien"). In the 2015 Procon Lien, Procon claims amounts due on January 14, 2015, in the amount of $6,582.210. This registration, of course, was after most of the concentrate had either arrived in Stewart or was underway to Stewart by truck.

[64] As with September 2014 Lien, the 2015 Procon Lien was registered against "[a]ll minerals severed and recovered from the Project", with the "Project" being the various quartz claims held by Yukon Zinc which comprise the Mine.

[65] Contrary to a statement in the 2015 Procon Lien as to when the amounts claimed were due (January 14, 2015), the most current evidence of Jim Dales, president of Procon, is that a minor amount ($3,737.58) was owing by Yukon Zinc from late August 2014, and that further amounts totalling $4,064.254.10, are owing from numerous invoices from September 30, 2014 through to January 15, 2015.

[66] On March 12, 2015, Procon filed an action in the Yukon Territory Supreme Court. The respondents include both Yukon Zinc and Transamine. In part, the relief sought is a declaration that Procon has a valid and subsisting miner's lien:

> … upon the estates or interests of [Yukon Zinc] in and to … all minerals, as defined in the [Miners Lien Act], severed or recovered from the Mine in the hands of [Yukon Zinc.]

[67] It is not disputed that, under the *MLA*, Yukon Zinc is the "owner" of the Mine as a "mine", and was the "owner" when the minerals were severed from the Mine, or that zinc is included in the definition of "mineral".

[68] A further miner's lien was filed by the trucking company, P.S. Sidhu Trucking Ltd. on March 9, 2015 for $865,921.35 in respect of amounts owing from October 2014 to February 2015 for trucking services (the "Sidhu Trucking Lien"). As with Procon, the lien is filed against the Mine and "minerals severed".

<u>Discussion</u>

(a) Jurisdiction

[69] The resolution of this application requires the court to address, in the first instance, the jurisdiction for the relief sought.

[70] Needless to say, issues may arise in *CCAA* proceedings that raise the question as to whether they are appropriately decided in the insolvency proceedings or in another forum. As stated by Mr. Justice Walker in *Pope & Talbot Ltd (Re)*, 2009 BCSC 1014 at para. 72, the "starting point" for a determination of jurisdiction simpliciter or territorial competence is the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA*").

[71] Procon does not dispute that this Court has jurisdiction in respect of the relief claimed by Transamine as against Yukon Zinc and Procon. The exercise of this Court's jurisdiction has full force and effect across Canada and may be enforced across Canada: *CCAA*, ss. 16, 17.

[72] Procon has certainly submitted to this Court's jurisdiction in British Columbia and Procon is ordinary resident in this jurisdiction: *CJPTA*, s. 3(b), (d).

[73] There is also no dispute that territorial competence is established under the "real and substantial connection" test outlined in the *CJPTA*, s. 3(e). Relevant factors under s. 10 of the *CJPTA* are as follows:

> 10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
>
> …
>
> (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
>
> > (i) property in British Columbia that is … movable property …,
>
> …
>
> (e) concerns contractual obligations, and
>
> > (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
> >
> > (ii) by its express terms, the contract is governed by the law of British Columbia[.]

[74] In this case, most of the concentrate in question is located in British Columbia.

[75] Further, but for the rights arising from the 2015 Procon Lien filed in Yukon, which undoubtedly are to be determined in accordance with the *MLA*, all of the contracts in question provide for the application of the law of British Columbia.

[76] Various contracts between Procon and Yukon Zinc consistently provide that the law of British Columbia is to be applied. These include an earlier indebtedness acknowledgement and payment agreement from January 2014, and Procon's security agreement from that same time. Further, Procon's general service agreement is to be construed in accordance with the law of British Columbia.

[77] Similarly, the vast majority of the contractual arrangements between Yukon Zinc and Transamine provide for the application of the law of British Columbia. Contract 369 provides for the "Laws of England and Wales" to apply, but Contract 380 provides for the law of British Columbia to apply. Both types of holding certificates are to be governed by and construed in accordance with the law of British Columbia.

[78] In addition to the specified presumed bases for jurisdiction, there is a substantial connection between British Columbia, Transamine's claim and Procon's position in respect of that claim, notwithstanding the interprovincial aspects of the issues.

[79] However, Procon asserts that this Court should exercise its discretion and decline to exercise jurisdiction in favour of all issues being addressed by the Yukon court and, in particular, in the lien action already commenced by Procon in Yukon. The relevant factors under the *CJPTA*, s. 11(1) include:

> 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[80] I would note, in relation to the first factor in s. 11(2)(a), that the issues have been brought forward on a summary basis and on the basis of affidavit evidence. As I have stated, despite the fact that the matter was brought on quickly, Procon has responded to the application and does not seek an adjournment. By all accounts, all relevant facts are before the court for a determination of the various issues. No

doubt that has been aided by the fact that Procon's witnesses are located in British Columbia.

[81] The convenience of the parties, particularly Yukon Zinc and Transamine, is plain to see. A timely resolution of these issues will also have an impact on the course of the restructuring. I have already referred to the substantial stand-by fees that will be incurred by Yukon Zinc if shipments are not made. Further, if there is default in shipping, Transamine will no doubt file a substantial claim in the *CCAA* proceedings which will factor into the positions taken by Transamine as a creditor in the course of those proceedings.

[82] The issues arising under s. 11(2)(b), (c) and (d) are best addressed together.

[83] At the outset, I would observe that it is usually very beneficial in insolvency proceedings such as this to corral all issues to be decided in one "collective" proceeding. This recognizes the benefits of one court having a unified approach to the resolution of the issues in aid of achieving the objectives of a successful restructuring under the *CCAA*. This general approach was discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, where Deschamps J. stated:

> [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.

[84] In *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] 27 C.B.R. (3d) 148 (Ont. Gen. Div.), Farley J. was addressing a similar situation to what is found here. Curragh Inc. was subject to bankruptcy proceedings in Ontario but its main asset was a Yukon mine against which various persons had filed liens. Within what the court described as its "overall jurisdiction" under the bankruptcy legislation (at 150), Farley J. fashioned a middle ground that left the overall jurisdiction with the Ontario court but still allowed for certain issues to be determined by the Yukon court in respect of miner's lien claims against the real property interests there:

> This legislation [the MLA] and its concept of the lien affecting the output of the mine or mining claim is apparently unique to the Yukon Territory. It was felt appropriate to have the courts of the Territory deal with the interpretation and entitlement of those provisions. Certainly their approach is the preferable one when looked at from the aspect of one court accordingly due deference to another with a "closer" connection to the situation and this course alleviates the necessity of having to deal with the MLA through opinions on foreign law.
> …
>
> It would therefore seem to me that I should not do anything which would interfere with the determination of the right which persons claiming under the MLA would have against the Faro mine (i.e. its output).
>
> (at 156-157).

[85] The result in *Canada v. Curragh* can be distinguished on the basis that Farley J. applied the general rule that a court should not adjudicate the right or title to real property not situated within its borders: *Tezcan v. Tezcan* (1987), 46 D.L.R. (4th) 176 at 179 (B.C.C.A.). No issues arise on this application in relation to the Mine, in that they apply only to personal property (i.e., the concentrate) that arose from the Mine.

[86] Further, the issues that arise do not relate to the validity of the 2015 Procon Lien (which is presumed for the purpose of this application), but on the interrelationship between any lien rights and the rights asserted by others, namely

Transamine and BCV Bank. In *Yukon Energy Corp. v. Curragh Inc.*, [1994] Y.J. No. 132 (S.C.), Hudson J. stated:

> [30] Neither the statue nor the authorities contemplate a contest between lien claimants and other creditors. It is simply a question of the entitlement of the lien claimants pursuant to statute.

[87] Consistent with the usual practice, the initial order granted in these proceedings on March 13, 2015, provided for a stay of Procon's lien rights: paras. 14-16. The only exception was set out in paragraph 16(iv) of the initial order, allowing Procon to commence a Yukon proceeding by the statutory deadline in order to preserve its lien rights pursuant to the *MLA*, s. 8. However, no further step in the lien proceedings, beyond service of the petition, was allowed without leave of this Court, which has not been sought.

[88] It is not disputed that these types of issues are well within the jurisdiction of the court in these restructuring proceedings. The relief sought by Transamine relates to its status in relation to Yukon Zinc, and the outcome of its application has the potential to substantively affect the course of these proceedings.

[89] As for the law to be applied to the various issues, it is clear that whatever forum is used to resolve these issues, there will be a blend of both British Columbian contract law and Yukon miner's lien law. The majority of the concentrate is located in British Columbia and was in this Province well before the 2015 Procon Lien was registered. Further, the contract rights are to be decided in accordance with British Columbian law, particularly as to if, and if so, when, title to the concentrate passed from Yukon Zinc to Transamine.

[90] This is not akin to the situation discussed in *Ecco Heating Products Ltd. v. J.K. Campbell & Associates Ltd.*, [1990] 48 B.C.L.R. (2d) 36 (C.A.), where the major issue arose under builder's lien legislation in British Columbia and where the court referred to the "extensive existing relevant jurisprudence" in British Columbia: at 43-44. It is common ground here that there is no case law on the issues of scope and priority under the *MLA* that arise here, let alone relevant Yukon jurisprudence.

[91] It is quite apparent that some issues arise under the *MLA* and, in particular, issues relating to Procon's rights in relation to the concentrate remaining in Yukon which is claimed by Transamine under British Columbian law. Transamine argues that this Court can take judicial notice of the *MLA*: see *Evidence Act*, R.S.B.C. 1996, c. 124, s. 24(2)(e). In any event, Procon has fully researched the issues as they arise under the *MLA* and made submissions on them. To turn the tables on Procon, if I were to decline jurisdiction in favour of the Yukon courts, there equally would be issues as to the Yukon court interpreting and applying British Columbian law on the contract issues.

[92] It would be impossible in the circumstances to bifurcate the issues based on the applicable law. Even if bifurcation was available, it would be neither a practical nor an efficient strategy in resolving the issues between Yukon Zinc, Procon and Transamine.

[93] The possibility of leaving the issues relating to the concentrate remaining in Yukon to be decided by the Yukon court, also poses some potential difficulties as raised in the *CJPTA*, s. 11(2)(d). Those property and title issues may give rise to conflicting decisions in the event that this Court proceeded to address the concentrate within the borders of British Columbia. However, I am not aware that any other party, or Yukon lien claimant, takes the position that it has priority over the concentrate claimed by Transamine, whether in British Columbia or Yukon.

[94] It appears to be the case that there is other concentrate held by Yukon Zinc at the Mine against which Procon's lien, and perhaps that of others, may have attached. Nothing in the relief sought by Transamine purports to affect anyone's rights in relation to that other concentrate, or any other assets against which Yukon liens may have been filed. My decision in this matter is based on the particular circumstances relating to the Transamine arrangements. In that event, there is little risk that any decision here would affect the outcome of other issues that arise in Yukon.

[95] The last remaining factor relates to the fair and efficient working of the Canadian legal system as a whole: *CJPTA*, *s.* 11(2)(f). There is no ideal solution here that would see the issues resolved quickly and efficiently to the benefit of all parties and, particularly, Yukon Zinc, whose need for an answer is more acute (although Transamine would equally argue that it stands to be seriously prejudiced if there is delay in a resolution).

[96] I am sensitive to the expertise of the Yukon court in terms of applying the *MLA* and employing the procedures under the *MLA* in adjudicating the issues that arise. However, I consider, as did Farley J. in *Canada v. Curragh*, that there is a middle ground available here that would do the least violence with regard to the jurisdiction of the Yukon court in that respect.

[97] Accordingly, I acknowledge and agree that the Yukon court is likely the more appropriate forum for the purpose of adjudicating the validity of the 2015 Procon Lien, particularly in light of the substantial issues that Yukon Zinc raises in that respect. I would reemphasize that it has been assumed, for the limited purposes of this application, that the 2015 Procon Lien is valid.

[98] There is also the matter of the Sidhu Trucking Lien that has been filed, although I am not aware that any action has been commenced. If the lien is valid, it may be the case that issues arise as to how those two liens are to be addressed in relation to each other. Finally, Procon and Sidhu Trucking's rights, in relation to the Mine and any other minerals that might be situated in Yukon, would appear to be matters that may be addressed by the Yukon court, if necessary. On this point, I note that there is currently no application before me to lift the *CCAA* stay of proceedings to allow this to occur and my conclusions in this respect are, at this stage, preliminary.

[99] However, with respect to this dispute, I do not consider that the Yukon court is the more appropriate forum. I would not exercise my discretion to refuse to exercise this Court's jurisdiction to decide the issues raised on this application.

(b) *MLA* (Part 1) - Scope of Legislation

[100] Aside from the preliminary matter of jurisdiction, one of the first issues to arise relates to whether the 2015 Procon Lien could, in any event, attach to the concentrate that was already in British Columbia at the time of registration.

[101] At the conclusion of the hearing on April 24, 2015, and after full arguments on that particular issue, I granted the order sought by Transamine, by which it was granted the right to deal with the 10,564 WMT that was located in Stewart before January 15, 2015, without regard to the 2015 Procon Lien and the other charges granted in these proceedings. Reasons were to follow.

[102] The *MLA* provides for the creation of a lien in s. 2:

> 2(1) A contractor or subcontractor who provides services or materials to a mine
>
> (a) preparatory to the recovery of a mineral;
>
> (b) in connection with the recovery of a mineral; or
>
> (c) for an abandonment operation in connection with the recovery of a mineral,
>
> is given a lien by this subsection and, notwithstanding that a person holding a particular estate or interest in the mine or mineral concerned has not requested the services or materials, the lien given by this subsection is a lien on
>
> (d) all the estates or interests in the mine or mineral concerned;
>
> (e) the mineral when severed and recovered from the land while it is in the hands of the owner;
>
> (f) the interest of the owner in the fixtures, machinery, tools, appliances and other property in or on the mines or mining claim and the appurtenances thereto.
>
> (2) In all other respects, this *Act* applies to the lien existing by virtue of subsection (1) notwithstanding that the lien extended by clauses (e) and (f) is a lien on an interest in personal property.

[103] Again, it is acknowledged in this case that Yukon Zinc is an “owner” as defined in the *MLA*, s. 1. Assuming that the s. 2 lien arose in favour of Procon while it was providing services to Yukon Zinc, the validity of that lien was dependent on Procon taking action to validate it. If it was not “deposited” or “registered” within 45 days of the last work done, the lien ceased to exist: *MLA*, ss. 4-6. Further, an action

to enforce the lien was required to be filed within 60 days of deposit to maintain the lien, failing which it ceased to exist: *MLA*, s. 8.

[104] In this case, by the time Procon deposited or registered its lien on January 15, 2015, some 10,564 WMT of concentrate had left Yukon and was located in British Columbia.

[105] Procon takes the position that the *MLA* applies to any concentrate that arose from its services in relation to the Mine, wherever it might be located in the world, only limited by the phrase as to whether it is “in the hands” of Yukon Zinc: *MLA*, s. 2(1)(e). Procon was unable to refer to any Canadian authority in which an *in rem* statutory lien was enforced against property outside of the territorial limits of the province or territory granting it and which had been so by the time of registration of the lien.

[106] In *E.B. Horsman & Son v. Sigurdson and Toronto-Dominion Bank* (1979), 13 B.C.L.R. 20 (S.C.), a lien was asserted by a material supplier of goods that were placed on land outside of British Columbia. The supplier claimed against trust funds paid by the owner. Kirke Smith J. stated:

> Prima facie, provincial statutes do not have extra-territorial operation — Driedger, The Construction of Statutes (1974), p. 166. No intention, expressed or to be inferred, that it should be construed otherwise appears in this statute.
>
> (at 24).

E.B. Horsman was followed in *Batoni Construction Inc. v. Anthomax Mechanical Ltd.*(1997), 146 D.L.R. (4th) 243 (Ont. C.A.).

[107] Procon relies on *Unifund Assurance Co. of Canada v. Insurance Corporation of British Columbia*, 2003 SCC 40, where the Court states that “[i]t is well established that a province has no legislative competence to legislate extraterritorially”: para. 50. However, on the issue of applicability of statutes outside of the jurisdiction, Binnie J. stated:

> 56 Consideration of constitutional *applicability* can conveniently be organized around the following propositions:

> 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
>
> 2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
>
> 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
>
> 4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.
>
> [Emphasis in the original.]

[108] Procon asserts that there is a "sufficient connection" between the concentrate that was in British Columbia at the end of 2014 and the 2015 Procon Lien by reason of the fact that: (i) the concentrate came from the Mine and was "recently" located there; (ii) the lien arose from services and materials in relation to the Mine in Yukon; and, (iii) the concentrate was purchased by Transamine who had specific knowledge of the possibility of such a lien being filed. Procon asserts that limiting the lien to concentrates in Yukon would be an unjust outcome, since it would allow an owner of a mine to locate its extracted minerals outside the jurisdiction to avoid application of a lien.

[109] Procon's other argument – that this interpretation is consistent with the recognition of security interests in moveables across Canada – is not an apt one. Each common-law province, and the territory of Yukon, have personal property security legislation that regulates the creation and enforcement of security interests within their respective jurisdictions. That legislation includes applicable law provisions, and also specific provisions that allow for the recognition of those security interests upon transfer of assets between jurisdictions: see, for example, *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "*BC PPSA*"), ss. 5 to 8.1. There is no such legislative scheme in British Columbia in relation to the recognition and enforcement of *in rem* liens imposed by other jurisdictions, including Yukon.

[110] I also consider that Procon's position has the potential to create significant uncertainty in relation to potential commercial transactions in British Columbia relating to the purchase of concentrate that has come from Yukon. If an owner has relocated some of its concentrate out of Yukon, and is making efforts to sell or finance it, one would expect such a transaction to involve an investigation of what other property interests might be present, which may involve a consideration of and search under the *BC PPSA*.

[111] Under s. 30 of the *BC PPSA*, express protection is given to a buyer of goods sold in the ordinary course of business in relation to security interests given by the seller. Procon's argument that its lien attaches to such concentrate anywhere in the world would not afford any such protections for such a buyer. Similarly, a British Columbia financier taking security against such goods in British Columbia, who did not know of the origin of the concentrate, might also advance funds and then be faced with a prior-ranking lien from Yukon. This is particularly concerning because, at the time of these parties dealing with the concentrate outside of Yukon, the lien may not even have been registered: *MLA*, s. 6.

[112] The only case authority that comes close to considering this issue is *Anvil Range Mining Corp. (Re)*, [1999] Y.J. No. 129, 1 C.L.R. (3d) 292 (S.C.). There, Hudson J. considered the scope of the attachment of a Yukon lien against various assets, including equipment situated in Alaska: see para. 8. The lien was found not to apply to such assets on other grounds. Hudson J. doubted that Yukon lien law could apply outside the territory but, in any event, he found the issue moot: paras. 59-60.

[113] In my view, when considering the *MLA* in its entirety, there is no intention – express or inferred – that the enforcement provisions have extraterritorial effect. As I have stated, these enforcement proceedings are required to be taken in the Yukon Territory Supreme Court, which has jurisdiction to make orders in relation to determining the validity of the lien, and also addressing the property interests against which the lien has been filed.

[114] The s. 2 lien against the Mine itself is clearly tied to property within Yukon as is the interest of the owner in "fixtures, machinery and tools, appliances and other property *in or on* the mines or mining claim": *MLA*, *s.* 2(f). In my view, the phrase "in the hands of the owner" in s. 2(e), when read in relation to the jurisdiction of the Yukon court to address enforcement as against severed minerals, can only relate to such severed minerals within that jurisdiction. This would allow lien claimants to enforce their claims against a stockpile of ore or concentrate that might be located in a location shed that is not "in" the mine, but located elsewhere in the territory assuming it was still "in the hands of the owner".

[115] In conclusion, I see no basis upon which Procon can enforce its lien rights as against assets held in British Columbia at the time of the filing of the 2015 Procon Lien on January 15, 2015.

(c) Nature of Transamine's Claim

[116] Transamine takes the position that it purchased all of the concentrate in issue as a *bona fide* purchaser for value. Yukon Zinc's counsel supports the position that title to the concentrate has been transferred to Transamine. Procon disputes that title had passed to Transamine at the time of registration of the 2015 Procon Lien.

[117] The test for determining whether and when transfer of title to property occurs is set out in Part 3 of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410 (the "*SGA*"):

> 21 If there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.
>
> 22 (1) If there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at the time the parties to the contract intend it to be transferred.
>
> (2) For ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
>
> 23 (1) Unless a different intention appears, the intention of the parties as to the time at which the property in the goods is to pass to the buyer is governed by the rules set out in this section.
>
> …

> (7) If there is a contract for the sale of unascertained or future goods by description, the property in the goods passes to the buyer when goods of that description and in a deliverable state are unconditionally appropriated to the contract
>
> (a) by the seller with the assent of the buyer, or
>
> (b) by the buyer with the assent of the seller.
>
> (8) For the purposes of subsection (7), the assent may be express or implied, and may be given either before or after the appropriation is made.
>
> (9) If, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for transmission to the buyer, and does not reserve the right of disposal, the seller is deemed to have unconditionally appropriated the goods to the contract.

[118] Under s. 1, "specific goods" means “goods identified and agreed on at the time a contract of sale is made”.

[119] I will address the sale issues arising under Contract 380 and 369 separately.

(i) Contract 380

[120] By the provisions in the *SGA*, s. 22(2), the court must have regard to the “terms of the contract”. It is significant here that Contract 380 expressly provided in clause 10.1 that title to the concentrate would pass at the time of the advance payment which was received by Yukon Zinc on October 3, 2014.

[121] On the issue of ascertainment, by September 19, 2014, SGS, as the independent inspection agency for Transamine, had confirmed the agreed amount of 10,000 WMT as being held separately at the Mine and it was “properly identified” in accordance with Transamine’s instructions. The assay results of the amounts held conformed to the required element values in Contract 380.

[122] Analogous circumstances are found in *NEC Corp. v. Steintron International Electronics Ltd.*, [1985] B.C.J. No. 611, 59 C.B.R. (N.S.) 91 (S.C.), where goods were set aside and marked with the name of the buyer. McLachlin J, as she then

was, concluded that the goods were ascertained as having been "identified in accordance with the contract": para. 4. See also *Western Canada Pulpwood & Lumber Co. (Re)*, [1930] 1 D.L.R. 652 (Man. C.A.), where Fullerton, J.A. found ascertainment of certain logs purchased under contract where it was subsequently scaled for the purchaser and branded with the purchaser's mark.

[123] At the time of SGS's inspection on September 19, 2014, the 10,000 WMT had been identified as included within a stockpile of 15,000 WMT. Procon argues that it has not been proven that the 10,000 WMT were ever separated from the stockpile as having been ascertained for Contract 380. However, the uncontradicted evidence of Mr. Villegas is that the other 5,000 WMT were "purchased" by Transamine under a different contract that is not in issue. Accordingly, it could only be the case that the remaining 10,000 WMT in that stockpile was what was identified by Yukon Zinc in its October 6, 2014, holding certificate as being held for the account of Transamine under Contract 380 and which had been separately inspected and identified by SGS.

[124] In addition, I accept the evidence of Mr. Villegas that it could only have been from this stockpile that the 7,500 WMT were shipped to Stewart, along with the 470.68 WMT being held, or previously held, in trucks in Stewart.

[125] At the time of the shutdown of operations at the Mine, 3,559 WMT were in the possession of Yukon Zinc at the Mine. Procon argues that ascertainment of the remaining concentrate at the Mine has not been proven since Transamine cannot say which concentrate was appropriated to either Contract 380 or Contract 369.

[126] Procon argues, but I am not convinced, that it is necessary to distinguish clearly between Contract 369 and 380 in terms of ascertainment or appropriation to each contract of the concentrate that remained at the Mine as of January 13, 2015. This conclusion (and the analysis of the exhaustion of the 15,000 WMT stockpile, as per Mr. Villegas), is ably supported by the discussion in G.H.L. Fridman, *Sale of Goods in Canada*, 5th ed. (Toronto: Thomson Carswell, 2004) at 83:

> What is needed for ascertainment, said an English judge, is that the buyer should be able to say, "Those are my goods". This requirement is satisfied if

> he can say, "*All* those are my goods". There is no need to be able to say that any particular goods came from any particular source. So, if there are several parcels of goods on board a ship, and all the parcels are sold to the same buyer, there is no need to state which parcel is appropriated to which particular contract with the same buyer, in order to ascertain which goods pertain to which contract. Furthermore, if there [are] other goods on board subject to contracts with other buyers, the unloading of such goods will result in the ascertainment of the particular buyer's goods by a process of exhaustion. What is left on the ship, as long as it all pertains to contracts with the same buyer, will be ascertained for the purposes of the section, and will be the property of that buyer.

[127] Mr. Villegas indicates that the Mine's operations were stopped for maintenance in early January 2015, and that Yukon Zinc and Transamine agreed that shipments would recommence after January 12, 2015. Nancy Yuan, of Yukon Zinc, agrees that Yukon Zinc had agreed to deliver the concentrate on this schedule. Further, the evidence of both Mr. Villegas and Ms. Yuan is that, at the relevant time in January 2015, all of the concentrate was being produced and processed exclusively for Transamine. Ms. Yuan indicates that this was the case in respect of concentrate produced after December 31, 2014, and that all such concentrate had been "purchased by Transamine".

[128] Accordingly, if Mr. Villegas had attended at the Mine in late December or early January 2015, he would have said that all of the concentrate located there belonged to Transamine, whether under Contract 369 or 380.

[129] Further, I would refer to Procon's own authority, *Grainex Canada Ltd.(Trustee of) v. Canbra Foods Ltd.,* [1987] 11 B.C.L.R. (2d) 1 at 25 (C.A.), which held that goods would have been ascertained when "carloads" were shipped, and perhaps even before, if the carloads were in the course of being prepared. In my view, this evidence supports that Yukon Zinc was in the process of delivering the remaining concentrate under Contract 380 and 369 before January 15, 2015.

[130] There is also considerable evidence that, after the advance payment was made on October 3, 2014, under Contract 380, Yukon Zinc had little control over the concentrate, save for abiding by the instructions of Transamine and BCV Bank in respect of shipping it. I have already set out the provisions of the Yukon Zinc holding

certificate which make clear its agreement that the concentrate is being held for Transamine and BCV Bank. Yukon Zinc expressly agreed to deal with the concentrate only in accordance with the instructions of BCV Bank, and BCV Bank's express instructions were later given to release the concentrate to the trucks. There is no indication that Yukon Zinc did anything other than act in accordance with these instructions. With respect to the shipments received by SBT, the SBT holding certificates similarly indicate that they are being held for the account of Transamine and BCV Bank, not Yukon Zinc. Yukon Zinc is not a party to the SBT holding certificates.

[131] In *Sale of Goods in Canada* at 219-20, Fridman describes the effect of delivery to a carrier by which there is deemed to have been unconditional appropriation of the good to contract under the *SGA*, s. 23(9):

> Where the contract authorizes or requires the seller to send the goods to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer is *prima facie* deemed to be delivery of the goods to the buyer, whether the carrier has or has not been named by the buyer. In other words, the carrier is presumed to be the bailee or agent of the *buyer*, not the seller, thereby making delivery to the carrier an effective discharge of his duty to deliver on the part of the seller.

In this case, Yukon Zinc's delivery of the concentrate to the trucks was required under the terms of the contracts and both holding certificates were consistent with the concentrate being held to the account of Transamine, not Yukon Zinc.

[132] Procon argues that title did not pass, since Contract 380 provided that risk to the concentrate did not pass to Transamine until it passed the ship's rail at the "port of loading". In addition, Yukon Zinc was required, by the terms of the contract, to maintain insurance in respect of the concentrate as well as liability insurance. I do not, however, see that these provisions detract from the express words in clause 10.1 regarding the passage of title. This is a "CIF" contract (cost-insurance-freight), in that the purchase price includes the cost of insurance while in transit to Transamine as purchaser, which insurance is paid by the seller, in this case Yukon Zinc: *Sale of Goods in Canada* at 435.

[133] Contract 380 makes it clear that risk is not equated with title: see *Inglis v. James Richardson & Sons Limited*, [1913] 14 D.L.R. 137 at 144 (Ont. C.A.); *George Smith Trucking Co. v. Golden Seven Enterprises Inc.* (1989), 34 B.C.L.R. (2d) 43 at 48 (C.A.). This would be analogous to a bailment situation where the person holding the goods does not have title, but certainly has the risks associated with the holding of the goods. The *SGA*, s. 25 expressly recognizes the ability of the parties to agree to allocate risk on a basis not tied to the transfer of title.

[134] Finally, I accept the uncontradicted evidence of both Mr. Villegas and Ms. Yuan that the remaining amount of 2,378 WMT at the Mine is being held by Yukon Zinc under Contract 380. As of the end of 2014, Transamine was the only Yukon Zinc customer for zinc concentrate. Accordingly, prior to the filing of the 2015 Procon Lien, this amount of concentrate was intact and segregated at the Mine. On that basis, there is no need to refer to the authorities cited by Transamine and Procon in respect of ascertainment of a specific amount within a larger bulk amount held.

[135] Procon also argues that, under Contract 380, Transamine held a security interest, not an ownership interest in the concentrate. This argument is easily rejected.

[136] Procon refers to the well-known principle under personal property security legislation that whether a transaction creates a security interest is not dependent on the form of the transaction or even title but, rather, depends on the substance of the transaction: *BC PPSA*, s. 2(1)(a), *Personal Property Security Act*, R.S.Y. 2002, c. 169, s. 2; *Giffen (Re)*, [1998] 1 S.C.R. 91 at 106; *Contech v. Enterprises Inc. v. Vegherb, LLC*, 2015 BCCA 99 at paras. 21-22.

[137] The express terms of Contract 380 indicate that it is a “purchase” agreement. In support of its position, Procon points to the provisions that allow for the pre-payment or advance payment facilities. While Procon refers to these arrangements as “financial arrangements”, I do not see that they detract from the fundamental nature of the transaction which was that Transamine was purchasing the

concentrate from Yukon Zinc. The fact that Transamine was prepaying some, or all of the purchase price, was no doubt simply a mechanism to alleviate cash-flow issues on Yukon Zinc's part. Importantly, from Transamine's point of view, this allowed it to secure title to the concentrate and the rights that flow from that ownership. Indeed, those transactions allowed Transamine to pledge title to the concentrate to BCV Bank with the knowledge and agreement of Yukon Zinc, a factor that also supports my conclusions as to the nature of the transaction, and that Transamine and Yukon Zinc intended that title would pass as soon as the concentrate was ascertained.

[138] The only other factor raised by Procon, in relation to Contract 380, relates to Transamine's commercial security agreement dated October 1, 2014, which was registered at the British Columbia and Yukon PPRs. This agreement, however, was registered in accordance with the *SGA*, s. 30 in order to protect Transamine in the situation where Yukon Zinc, having sold the concentrate, continued in possession of the goods. By registration, Transamine put the world on notice of its interest in the concentrate so as to prevent any subsequent sale by Yukon Zinc to another person. The commercial security agreement specifically provided that the obligations of Yukon Zinc thereunder were "limited to [Yukon Zinc's] obligations to be performed in respect of the sale and delivery of the Collateral to [Transamine]."

[139] "Collateral" was specifically defined as 10,000 DMT of zinc concentrate as contemplated in Contract 380. This registration does not support that the original purchase agreement was, in substance, a financing agreement.

[140] I conclude that Transamine's status under Contract 380 was as purchaser. Further, all of the concentrate under Contract 380 was ascertained well before the Mine shut down on January 13, 2015, and was ready for delivery by that date. Therefore, the concentrate had been unconditionally appropriated to that contract: *SGA*, s. 23(7), (8). Further, I conclude that the evidence overwhelmingly supports that Yukon Zinc and Transamine intended that title to the concentrate would pass and did pass upon ascertainment. This ascertainment would have occurred no later

than the shipment of the 5,000 WMT from the stockpile (leaving the 10,000 WMT under Contract 380), or shipment from the Mine by Yukon Zinc, both of which occurred prior to January 13, 2015.

(ii) Contract 369

[141] Similar issues to those discussed above arise under Contract 369. Generally speaking, I would reject Procon's arguments raised with respect to Contract 369, for the same reasons as above.

[142] Contract 369, dated December 2013, expressly provides for the transfer of title upon payment. Mr. Villegas confirms that the pre-payment of $2 million took place in August 2014, under Contract 369. There were different circumstances relating to the availability of the concentrate than those under Contract 380, in that it is conceded that, at the time Contract 369 was entered into, the last 5,000 DMT had not been produced.

[143] There are only two different scenarios that arise in relation to shipments under Contract 369:

a) 2,500 and 564.15 WMT were shipped to SBT and received on or about December 29, 2014. Yukon Zinc did not issue a holding certificate for these amounts as Contract 369 did not provide for that process. However, SBT issued a holding certificate for 2,500 WMT, and would later issue one on February 5, 2015, for 564.15 WMT. As such, at least as early as December 29, 2014, all of this concentrate was ascertained as being for the benefit of Transamine and had been delivered to SBT in accordance with the instructions of Transamine and BCV Bank. The clear intention of Yukon Zinc and Transamine was that title would pass after the prepayment and upon ascertainment; and

b) 713.96 WMT of concentrate was trucked from the Mine to Stewart. between January 21 and 26, 2015. However, this concentrate must have been at the Mine and identified for Transamine by the date of the Mine

> shutdown before January 13, 2015. It was also ready for shipment. As such, when considered in the context of the express terms of clause 10.1, Yukon Zinc and Transamine intended that title would transfer upon such ascertainment. Again, Ms. Yuan's and Mr. Villegas' evidence amply supports this conclusion.

[144] As with Contract 380, I conclude that, by January 13, 2015, all concentrate under Contract 369 had either been delivered to SBT for Transamine's account, or identified at the Mine as being held by Yukon Zinc and appropriated to Contract 369. Accordingly, ascertainment or unconditional appropriation to the contract had occurred, and in accordance with the overall intention indicated by Contract 369, the conduct of the parties and the overall circumstances, title to Transamine had passed by that date.

(d) *MLA* (Part 2) - Priority of Procon's Lien

[145] I have rejected Procon's argument that title to Transamine did not pass and that Transamine was, in any event, the holder of a security interest and therefore an "encumbrancer".

[146] Transamine takes the position that it is a *bona fide* purchaser who took title without notice of any lien rights arising from the registration of the 2015 Procon Lien. Procon takes the further positions that firstly, even if Transamine purchased the concentrate, Transamine did so with notice of Procon's potential lien rights and that, therefore, it is not *bona fide*; and secondly, that, in any event, Transamine's interest is subject to the 2015 Procon Lien since the concentrate was still "in the hands of" Yukon Zinc at the time of the registration of the lien.

[147] The scheme of the *MLA* is not unlike other lien legislation found in the provinces and territories of Canada.

[148] I am aware of the well-known statutory interpretation authorities, including *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42. Procon also refers to the *Interpretation Act*,

R.S.Y. 2002, c. 125, s. 10. However, the application of those principles is subject to more specific authorities that arise in the context of lien legislation: *Canbar West Projects Ltd. v. Sure Shot Sandblasting & Painting Ltd.*, 2011 ABCA 107 at para. 14.

[149] In *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 4 at paras. 58-61, the court discussed one important purpose of the legislation as being to ensure that contractors and workers are paid for services or materials supplied. Another important goal is to bring about commercial certainty in terms of lien rights that might arise from projects where other stakeholder interests may also arise: para. 61. As Garson J.A. stated:

> 62 The jurisprudence is clear that because the Act creates new rights, the threshold question of entitlement is strictly construed; it is only once entitlement is established that the *Act* is to be construed liberally and with consideration to its remedial purpose. … This principle is consistent with concern for certainty and fairness to all stakeholders in the construction industry.

See also *Access Mining Consultants Ltd. v. United Keno Hill Mines Limited*, 2000 YTSC 541 at para. 5; *Ross v. Ross Mining Ltd.*, 2011 YTSC 91 at paras. 40-42; aff'd 2012 YTCA 8.

[150] As stated by Lambert J.A. in *British Columbia* (*Workers' Compensation Board) v. Canadian Imperial Bank of Commerce* (1998), 48 B.C.L.R. (3d) 27 at 47(C.A.), the scope of a statutory lien derives from the statute itself:

> A statutory lien arises from the provisions of a statute and has the scope and enforceability granted by the statute, either expressly or by necessary implication.

[151] In *BC (WCB)*, the majority rejected the argument that the statutory lien in that case (which had priority over all "liens, charges or mortgages of every person"), could also apply to interests acquired by a *bona fide* purchaser of the asset subject to the lien. This conclusion was based largely upon the court's reluctance to nullify interests acquired by such persons without a clear legislative mandate:

> [T]he longstanding equitable principle that the property could not be followed into the hands of a *bona fide* purchaser for value and without notice of the competing claim. As *Halsbury's* states succinctly, "Trust property may not ...

> be followed into the hands of a purchaser for valuable consideration without notice of the trust; in such a case the claim of the owner of the money is extinguished just as all other equitable interests are extinguished by a purchase for value without notice." [citations omitted.] Contrary to the trial judge's suggestion, the fact that the lien is subject to defeat by such a purchaser does not mean the lien does not exist: it still prevails over any other lien, mortgage or charge, whenever granted, in respect of the affected property.
>
> There is nothing in the language of s. 52 that would mandate our departing from this principle in this case, and indeed the priority given over only "liens, charges or mortgages" seems clearly intended to stop short of the interest acquired by a *bona fide* purchaser. The wording is quite different from the statutory language considered in *Glen Lake*, *supra*, and there are strong policy reasons to resist construing s. 52 more broadly than its plain meaning allows. In particular, there is the fact that the Board's lien is not required to be registered and is not, in the words of the Law Reform Commission of British Columbia, "part of a rational scheme that minimizes the danger of third parties being misled as to the existence and priority" thereof (*The Crown as Creditor, supra*, at 62). Courts have generally been reluctant to nullify the interests of innocent third parties except where the language is crystal clear on the point: [citations omitted].
>
> [Emphasis added.]
>
> (at 40-41).

[152] In the context of tax legislation, as noted by the court in *BC (WCB)*, it has been the consistent approach of the courts to disavow any expropriation of property of third parties unless the statute expressly provides for such a result: *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49 at para. 43.

[153] The only statutory provision upon which Procon relies is the phrase “in the hands of the owner” in s. 2(1)(e) of the *MLA*, which it says supports the interpretation that the *MLA* lien is intended to defeat *bona fide* purchasers who acquire the severed minerals after services or materials are provided and before the registration of the lien occurs.

[154] This phrase is not entirely unique to Yukon in that a similar phrase is used in the Saskatchewan legislation: *The Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1, s. 22(2)(e). Even so, counsel was unable to point to any case authority that has considered the meaning of this phrase.

[155] On its face, and even applying a liberal interpretation in light of the remedial nature of the *MLA*, I do not consider that the phrase conveys any clear meaning that the lien could defeat the rights of such a purchaser even though the owner may still have some manner of physical possession of the minerals.

[156] The case cited by Procon, being *Roynat Inc. v. Glen Lake Village Inn Ltd.*, [1987] 11 B.C.L.R. (2d) 39 (S.C.), is distinguishable as it was dealing with a more expansive lien priority provision under corporation capital tax legislation. See *BC (WCB)* at 40. Nor is the reasoning in *Canada Trust Co. v. Cenex Ltd.*, [1982] 41 C.B.R. (N.S.) 225 at 228-229 (Sask. C.A.) helpful, where the Saskatchewan Court of Appeal held that the lien granted over severed minerals was clear and unambiguous in granting a first priority over such minerals even as against debenture holders holding security when the minerals were recovered. The other cases cited by Procon are also distinguishable: see *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, 2001 SCC 90 at para. 26 (unique maritime lien against ships); *British Columbia v. Foster Forest Products Ltd.*, 2008 BCSC 1514 at paras. 34-35 (lien arising before sale under the *Forest Act*, R.S.B.C. 1996, c. 157).

[157] In *Bradshaw v. Saucerman*, [1913] 9 D.L.R. 439 at 441 (B.C.C.A.), the court discussed the issue as to whether a mortgagee of a mining claim could come within the meaning of "owner" under miner's lien legislation. Macdonald C.J.A. referred to:

> [T]he fundamental principal underlying all mechanic's lien laws which seems to have been borne in mind by legislature which enacted them, that it is only the party who procures the work to be done or the material to be supplied, or someone who concurs with him, whose estate or interest is to be charged.

Despite that comment, the court was quick to add that the specific provisions of the legislation may indicate otherwise, including when priority is given over specifically named parties, such as prior encumbrancers.

[158] The intended scope of the *MLA* is also indicated by the only priority provision:

> 3 Any lien registered under this Act shall take priority over any mortgages or encumbrances to the extent the lien arises from work, services, or materials provided to the mine for a period of up to 60 days.

[159] There is no suggestion here that Transamine's interest is that of a mortgagee. Further, I have rejected Procon's arguments that Transamine is an encumbrancer. Transamine's sole status here is as a purchaser of the concentrate. By the clear terms of Contract 369 and Contract 380, title passed to Transamine and Yukon Zinc had no further rights to it.

[160] The interpretation of the *MLA* advanced by Transamine is also supported by a review of the previous version of the *MLA* in force in 2002. By that provision, the priority of the lien in relation to purchasers of lienable assets was specifically addressed and granted:

> 2(3) On registration, <u>the lien shall attach and take effect as against persons purchasing</u> and mortgagees and other encumbrancers registering their mortgages or encumbrances <u>after the start of performance of work or service or furnishing of material in respect of which the lien is claimed</u>.
>
> [Emphasis added.]

[161] There is considerable merit to the argument that, having deleted this provision from the current version of the *MLA*, the Yukon legislature has signaled that no such priority is now intended.

[162] It is also worth noting that the clear intention under the *MLA* is to limit any potential lien under s. 3 to work, services and materials provided to the mine in a 60-day period prior to registration. Procon made submissions on that point, accepting that such a limitation exists, but advancing the argument that it could choose which 60-day period applied. This argument was contrary to the *obiter dicta* found in Veale J.'s decision in *Ross Mining* that the 60-day period arose immediately prior to the last day of work: paras. 68-75.

[163] What this argument highlights, however, is that this limitation only applies to the priority granted with respect to mortgagees and encumbrancers. If I were to accept Procon's position that its lien had priority over Transamine, even as a *bona fide* purchaser for value, no such 60-day limitation would apply, and such a person would be even more prejudiced by reason of the possibility of *all* outstanding amounts for work and services being granted priority.

[164] In that sense, no one could safely purchase concentrate without risk of a lien being filed in the future, which would only be limited by the requirement that the registration take place no later than 45 days after work ceased: *MLA*, s. 6. Such risk would be commercially untenable in ordinary circumstances.

[165] The "strong policy reasons" cited in *BC (WCB),* and the "commercial certainty" cited in *Peri Formwork* against reading the statute too broadly where it is less than clear that other interests are to be affected accord with the comments of Veale J. in *Ross Mining*:

> 71 In my view, the appropriate interpretation is that the 60 days referred to in s. 3 of the *MLA* should be calculated from the last day of provision of work, service or materials. I say this because there must be some certainty given to s. 3 as it has some very serious limitations for lien claimants and financiers if a mining property is encumbered by a mortgage.
>
> 72 The purpose of the s. 3 amendment can be found in the statements of the Minister of Community Services ((Yukon, Legislative Assembly, *Hansard*), No. 122 (26 November 2008) at 3540 (Hon. Archie Lang)):
>
>> As many of the developing mines will require debt financing, it is important to ensure that lenders and other[s] can quantify their risks through the amendments to this act while at the same time ensuring suppliers of goods and services clearly understand the extent of the protection provided. It is the commitment of this government to keep Yukon competitive and attractive for the mineral investment by amending outdated legislation and providing a more attractive investment climate.
>
> 73 In the debate in the Yukon Legislative Assembly, reference was made to the 45-day period for registration of a lien "after the last day of work". Reference was also made to the investment community knowing "how many months of possible liens might be out there".
>
> 74 In my view, the last day of the work, service or materials provided for the purpose of s. 3 is not one fixed date for all lien claimants, but rather the last day for each particular lien claimant. I find this interpretation provides comfort for the investment community, as it limits a lien to a specific two-month period that cannot be varied at the whim of the lien claimant. It also puts the suppliers of work, service or materials on notice that once its outstanding accounts exceed 60 days, that part of the lien claim in excess of 60 days will not have priority over mortgages and encumbrances on the mine.

[166] Just as the investment community requires certainty in respect of outcomes, so too should purchasers of severed minerals have certainty in terms of the acquisition of such minerals and their right to deal with them. As my recital of the

facts also indicates, the investment community is involved here by reason of BCV Bank's financing of Transamine's purchase of the concentrate and the pledging of the concentrate in its favour. In the words of the Supreme Court of Canada in *First Vancouver Finance*, Procon's position, if accepted, would result in an "unprecedented level of uncertainty" and have a "general chilling effect on commercial transactions": para. 44.

[167] In any event, with title to all the concentrate having passed to Transamine, and with such concentrate being expressly held by Yukon Zinc or SBT only for the account of Transamine and BCV Bank under the various holding certificates, or placed on trucks for delivery to SBT, I have difficulty seeing how the concentrate could be seen as "in the hands of" Yukon Zinc, in accordance with the *MLA*, s. 2(1)(e). As I have stated above, the terms of the contracts and the holding certificates make plain that, upon ascertainment of the concentrate, it was then at the "irrevocable and unconditional disposal" of Transamine and BCV Bank, not Yukon Zinc. Yukon Zinc had very limited physical control of the concentrates, given its responsibility only to warehouse the concentrate and deliver it to trucks, as instructed by BCV Bank.

[168] In my view, there is no basis upon which it can be said that the concentrate remained "in the hands of" Yukon Zinc after the zinc concentrate was produced and then title transferred to Transamine under the contractual arrangements.

[169] Nor does it assist to equate the phrase "in the hands of" with responsibility since it is clear that, after title passed, Transamine had an interest sufficient to allow it to pledge the concentrate to BCV Bank, and also require insurance in relation to risks arising from that interest. Yukon Zinc's only responsibility, with respect to the concentrate, was, again, limited and related only to holding the concentrate at BCV Bank's direction.

[170] Procon argues that allowing a transfer of title to defeat the lien would invite abuse, in that owners could avoid liens by transferring title to trustees or third parties. I do not see this possibility posing significant risk of abuse. Improper

transfers can always be challenged, for example, under fraudulent conveyance legislation. In addition, in context of a proper commercial transaction, the passage of title will usually mean the transfer of purchase funds, which can be used by the owner for its cash-flow needs, including paying the very workers or suppliers who have potential liens if they are not paid.

[171] Taking all of the above into consideration, in my view, the proper interpretation of the *MLA* is that a lien is not intended to defeat the interests of a *bona fide* purchaser for value who takes title prior to the registration of any lien, such as Transamine.

[172] Nor do I see any merit in Procon's argument that Transamine, while a purchaser, was not a *bona fide* purchaser. This is evident from the actions of Transamine in addressing the liens of Procon in late 2014 in anticipation of later shipments, as I will describe below.

(e) Effect of the September 2014 Agreement

[173] Other issues arise relating to the transactions between Yukon Zinc, Transamine and Procon in late September and early October 2014 in anticipation of entering into Contract 380.

[174] Transamine takes the position that, by reason of the agreements reached with Procon, Procon specifically released its December 2013 and September 2014, Liens and any future lien in respect of the concentrate to be purchased by Transamine under either Contract 369 or Contract 380.

[175] I will recount in more detail the course of the negotiations and the agreements reached.

[176] There can be no doubt that, by September 2014, Transamine was aware that Procon had filed liens against Yukon Zinc's assets. Procon argues that this is an indication that Transamine was not a *bona fide* purchaser, having been put on notice about the previous defaults of Yukon Zinc. However, Transamine did not ignore the

liens; rather, it took concrete steps to address the liens prior to proceeding with the significant purchase of concentrate under Contract 380.

[177] On September 23, 2014, Procon's counsel wrote to Transamine's counsel:

> I understand that your client [Transamine] is prepared to purchase certain concentrate from the Wolverine Mine. As you know, Procon has registered against all concentrate, wheresoever situate. We have instructions to prepare a no interest letter with respect to the concentrate that your client is purchasing. Could you please provide us with the details of your client and proposed language describing the concentrate, etc.

[178] Transamine's counsel replied in his September 23, 2014, email to Procon's counsel:

> Transamine Trading, S.A. will be purchasing concentrate and providing an advance payment facility through 2017 pursuant to an offtake agreement. The scope of the collateral subject to the security interest in favour of Transamine is not yet settled, but will include all concentrates and inventory of Yukon Zinc during the term of the offtake. Presumably if your client intends on executing a no interest letter it will be discharging as against the concentrates and inventory (and other collateral?)? Please confirm.

[179] On September 25, 2014, the parties were negotiating the amount that Procon could claim under its lien. On that date, Procon was specifically told by Yukon Zinc's counsel that, without a full resolution of its lien, the sale of the concentrate would not go forward and no funds would be received by either Yukon Zinc or Procon. Yukon Zinc threatened legal action against Procon in the event that Procon acted unreasonably in releasing its liens.

[180] In her emails on September 26, 2014, Procon's counsel indicated that Procon would release its lien "in its entirety (that is, against both the concentrate and the quartz claims)", in exchange for payment of a certain agreed-upon amount. Procon's counsel confirmed in her later email that same day that, in accordance with these arrangements, Procon would confirm that "it has no interest in the concentrate which is to be purchased."

[181] Presumably, arising from discussions between Yukon Zinc, Transamine and Procon, the confusion on Procon's part concerning the collateral description under

the registration of its security interest at the PPR was also corrected. On September 25, 2014, the registration was deleted with respect to “concentrates” and clarified, consistent with the security agreement that it related only to equipment.

[182] Similar to her earlier email of September 26, 2014, Procon's counsel also confirmed in her letter of September 29, 2014, to Transamine's counsel that:

> [T]he arrangements for the delivery of Procon's full discharge of miners lien no. RL09215 ... and “no interest” letter … <u>in the concentrate to be purchased by Transamine Trading SA</u> …, in exchange for payment to Procon, as part of the intended transaction between Transamine and [Yukon Zinc].
>
> [Emphasis added.]

[183] On October 1, 2014, Procon executed a discharge of lien relating to both the December 2013 Lien and the September 2014 Lien in consideration of the payment of the sum of $2,958,341, which was sourced from Transamine's advance payment for the concentrate under Contract 380. By the terms of the discharge, Procon acknowledged that Yukon Zinc had satisfied any and all liabilities and obligations related to the two liens. Also by this document, Procon released, discharged, quit claimed, transferred and surrendered all of its right, title and interest in and to the “severed minerals”, being all of Yukon Zinc's “present and after-acquired concentrates”.

[184] Also in accordance with these agreements, Procon provided Yukon Zinc and Transamine with a “no interest letter” executed October 3, 2014. This no interest letter referred to Procon's security interest registered at the PPR (defined as the “Security”). It also referred to Contract 380 (defined as the “Agreement”). If there had been any doubt about what “concentrates” were referred to in the previous exchanges between counsel, by the no interest letter, Procon confirmed and agreed as follows:

> 1. it is aware that [Yukon Zinc] intends to transfer certain concentrates as described in Schedule “B” (“Concentrates”) to [Transamine] on the terms and conditions set forth in the Agreement (the “Transaction”);
>
> 2. it hereby consents to the Transaction;

> 3. it hereby releases and discharges the Concentrates from the Security and confirms that the Concentrates may be transferred by the Seller free and clear of the Security.
>
> [Emphasis added.]

[185] Schedule “B” to the no interest letter specifically states that Yukon Zinc was to deliver to Transamine 70,000 DMT of concentrate, on a schedule that conformed to the shipping schedule under Contract 380 (10,000 DMT to be shipped in the first quarter of 2015), and also included a further 20,000 DMT in the second quarter of 2015 in lots of 5,000 DMT each. Transamine argues that this would include the further 5,000 DMT, which was to be delivered under Contract 369, although no such statement is found in any of the communications or documents exchanged.

[186] The no interest letter also provided:

> 5. [Procon] will execute and deliver, at [Yukon Zinc’s] sole expenses, all such further releases and discharges as the Parties or their respective counsel may reasonably request to give effect to the provisions of this No Interest Letter[.]

[187] Procon’s position relies on a strict and narrow reading of the discharge of lien and the no interest letter. Specifically, it says that the neither of those documents provide that Procon may not register liens in the future as against the concentrates. It also points to the no interest letter which refers to a potential transfer to Transamine, but says that this agreement only related to its “Security”, which was expressly defined as its PPR registration (which was not effective against concentrates in any event).

[188] I consider that Procon’s arguments are highly technical and do not accord with the commercial realities, intentions, expectations and agreements as evidenced in the various communications between Procon and Transamine’s counsel and the exchanged documents themselves. It was manifestly clear to Procon that the whole purpose of addressing its liens was to clear the way so that Yukon Zinc could conclude its contractual arrangements with Transamine and transfer the concentrate to Transamine as contemplated by Contract 380.

[189] There are numerous references to the proposed transaction. The discharge of lien refers to “after-acquired concentrates”, which infers that there was agreement regarding any assertion of lien rights by Procon in the future. Further, Schedule “B” to the no interest letter also certainly referred to future shipments throughout 2015 and into 2017. While it is possible to read these two documents very narrowly and strictly, such an approach would defeat the clear intentions of the parties, as evidenced by the overarching agreement reached in the earlier emails between counsel for Transamine and Procon.

[190] The absurdity of Procon’s position is made plain by its position that, even after the conclusion of this transaction and the payment of the significant funds to it on October 8, 2014, Procon could have almost immediately filed a lien against the severed minerals which Transamine was purchasing. By that date, certain nominal amounts were already owed by Yukon Zinc and were unpaid. Further, an invoice had been issued on September 30, 2014, which was payable within 15 days, and which was not paid by Yukon Zinc. Accordingly, Procon takes the fairly incredible position that, by no later than October 15, 2014, some one week after this transaction, it could have liened the severed minerals which Procon knew Transamine had purchased, and which all could have expected to still be present at the Mine.

[191] If such a scenario had been suggested to either Transamine or Procon’s counsel at the time, I expect that both would have resoundingly proclaimed that such could not be the case. Certainly, from Transamine and BCV Bank’s point of view, given the course of the negotiations and the agreement, I expect that they would have been astounded to have considered that, after this transaction, the concentrate was still at risk in relation to Procon filing a lien.

[192] This is so, notwithstanding that clause 10.1 of Contract 380 provided that title was to pass from Yukon Zinc to Transamine “free and clear of all liens, claims, mortgages, charges, security interests or other encumbrances”, which would presumably arise whenever title passed, either at the time of the advance payment,

or later. Contrary to the arguments of Procon, Transamine was clearly not relying on the general contractual obligations of Yukon Zinc to ensure that no liens would be filed. The express terms of this agreement *required* payment to Procon (which Transamine did directly to Procon), to ensure that the liens were satisfied prior to the simultaneous payment to Yukon Zinc and the implementation of Contract 380.

[193] In that sense, the scenario that Procon now asserts is available to it (that Procon could still assert a lien to stop Transamine's purchase of the concentrate), was the very scenario that Transamine specifically sought to avoid by this agreement: *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*, [1997] 36 B.C.L.R. (3d) 155 at 159.

[194] Procon suggests that there were various ways that Transamine could have acted so as to take steps to "protect itself" from any future lien. This would have included obtaining proof of payment of contractors, such as in the form a statutory declaration. This argument is without merit. If nothing else, it would require a contracting party to engage in an investigation of the other party's internal affairs, a matter that goes beyond normal commercial practice. The best response to this argument is that, having been alerted to the fact that Procon held liens, Transamine did take significant steps to satisfy those liens on the basis, as agreed, that this would allow the purchase of the concentrate to proceed without issue. In that vein, Transamine did take steps to protect itself, although Procon has now cast an interpretation of those arrangements which defies commercial logic.

[195] In conclusion, Procon specifically agreed that it would not assert any lien or claim against the first 10,000 DMT of concentrates to be delivered to Transamine under Contract 380, whether in accordance with its earlier liens or any future lien that it might file. The matter is less clear in relation to concentrate to be shipped under Contract 369. In that regard, Transamine points to the fact that Schedule "B" to the no interest letter refers to quantities of concentrate above 60,000 DMT, as required under Contract 380. There is, however, no indication that Procon ever

received a copy of Contract 380 or Contract 369, which might have highlighted the difference in the quantities in the Schedule and Contract 380.

[196] This issue relating to Contract 369 is, in any event, moot given my conclusions on the other issues as above. Certainly, by the time the concentrate was appropriated to Contract 369, Transamine had no notice of any lien having been registered by Procon. After the discharge of Procon's liens in the fall of 2014, no issue of notice of Procon's rights, whether constructive or actual, arises. While Transamine would certainly have understood that liens could arise in the future, no such potential right to enforce a lien did arise until January 15, 2015, by which time the passage of title under Contract 369 had occurred.

Conclusion

[197] Accordingly, the relief sought by Transamine is granted on the terms sought. This will include an order that the concentrate held either in Stewart, British Columbia or at the Mine, is for the benefit of Transamine and is free and clear of all court ordered charges granted in this proceeding. Further, the order granted will confirm that the concentrate is not attached by the 2015 Procon Lien.

[198] In light of my decision on the above issues, it is not necessary to address the marshalling arguments advanced by Transamine. Nor is it necessary to address Transamine's allegation that Procon was acting less than honestly in respect of its performance of the agreement with Transamine from the fall of 2014.

[199] If any party wishes to address the matter of costs, and failing agreement, they may contact Supreme Court Scheduling to arrange for a further hearing before me.

"Fitzpatrick J."