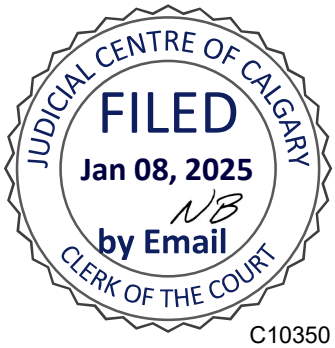

C10350

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

TABLE OF AUTHORITIES

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CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

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

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

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

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

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

Establishing values

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

Établissement des valeurs

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

Meaning of *person who is privy*

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

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

Définition de *personne intéressée*

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

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

Protected transactions

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

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

(b) a payment or delivery to the bankrupt;

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

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

Transactions protégées

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

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

b) les paiements ou remises au failli;

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

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

Definition of *adequate valuable consideration*

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

Law of set-off or compensation

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

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

Recovering proceeds if transferred

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

Trustee may recover

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

Operation of section

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

Trustee subrogated

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

Définition de *contrepartie valable et suffisante*

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

Compensation

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

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

Recouvrement du produit s'il a été transféré

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

Le syndic peut recouvrer

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

Application du présent article

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

Subrogation du syndic

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

Certificate where proposal performed

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

1992, c. 27, s. 30.

Certificat d'exécution

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

1992, ch. 27, art. 30.

Act to apply

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

Application de la présente loi

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

Assignments

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

Cession

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

Final statement of receipts and disbursements

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

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

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

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

État définitif des recettes et des débours

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

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

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

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

Examination by official receiver

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

Interrogatoire par le séquestre officiel

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

Division to be applied conjointly with other Acts

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

Application concurrente

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

Property included for enforcement purposes

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

When obligation to pay ceases

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

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

Assignment of wages

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

Assignment of book debts

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

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

Stay of Proceedings

Stay of proceedings — notice of intention

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

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

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

(i) the insolvent person's insolvency,

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

Biens pouvant faire l'objet d'une exécution

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

Cessation des versements

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

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

Cession de salaire

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

Cession de créances comptables

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

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

Suspension des procédures

Suspension des procédures en cas d'avis d'intention

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

(i) auprès du séquestre officiel dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse de la personne insolvable ou au chapitre de la situation financière de celle-ci,

(ii) auprès du tribunal au plus tard lors de l'audition de la demande dont celui-ci est saisi aux termes du paragraphe (9) et aux autres moments déterminés par ordonnance du tribunal;

c) envoie aux créanciers un rapport sur le changement visé au sous-alinéa b)(i) dès qu'il le note.

Where assignment deemed to have been made

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

Cas de cession présumée

(8) Lorsque la personne insolvable omet de se conformer au paragraphe (2) ou encore lorsque le syndic omet de déposer, ainsi que le prévoit le paragraphe 62(1), la proposition auprès du séquestre officiel dans les trente jours suivant le dépôt de l'avis d'intention aux termes du paragraphe (1) ou dans le délai supérieur accordé aux termes du paragraphe (9) :

a) la personne insolvable est, à l'expiration du délai applicable, réputée avoir fait une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

Prorogation de délai

(9) La personne insolvable peut, avant l'expiration du délai de trente jours — déjà prorogé, le cas échéant, aux termes du présent paragraphe — prévu au paragraphe (8), demander au tribunal de proroger ou de proroger de nouveau ce délai; après avis aux intéressés qu'il peut désigner, le tribunal peut acquiescer à la demande, pourvu qu'aucune prorogation n'excède quarante-cinq jours et que le total des prorogations successives demandées et accordées n'excède pas cinq mois à compter de l'expiration du délai de trente jours, et pourvu qu'il soit convaincu, dans le cas de chacune des demandes, que les conditions suivantes sont réunies :

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

(a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

2005, c. 47, s. 36; 2007, c. 36, s. 18.

shall not be postponed for more than six months from that date; and

(b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

Exception

(2.1) No order may be made under subsection (2) if the order would have the effect of preventing a secured creditor from realizing or otherwise dealing with financial collateral.

(3) [Repealed, 2012, c. 31, s. 418]

1992, c. 27, s. 36; 2005, c. 3, s. 14, c. 47, s. 62; 2007, c. 29, s. 96, c. 36, s. 36; 2012, c. 31, s. 418.

Stay of proceedings — directors

69.31 (1) Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.

Resignation or removal of directors

(3) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the corporation shall be deemed to be a director for the purposes of this section.

1997, c. 12, s. 65.

du créancier ne peut être reporté à plus de six mois après cette date;

b) dans le cas d'une garantie relative à une dette qui ne devient échue que plus de six mois après la date où le failli est devenu tel, l'exercice des droits du créancier peut être reporté à plus de six mois après cette date — mais en aucun cas au-delà de la date à laquelle la dette devient exigible en vertu de l'acte ou de la règle de droit instituant la garantie — seulement si tous les versements d'intérêts en souffrance depuis plus de six mois sont acquittés et si tous les autres manquements de plus de six mois sont réparés, et seulement tant qu'aucun versement d'intérêts ne demeure en souffrance, ou tant qu'aucun autre manquement ne reste sans réparation, pendant plus de six mois.

Exception

(2.1) L'ordonnance visée au paragraphe (2) ne peut avoir pour effet d'empêcher le créancier garanti de réaliser la garantie financière ou d'effectuer à l'égard de celle-ci toute autre opération.

(3) [Abrogé, 2012, ch. 31, art. 418]

1992, ch. 27, art. 36; 2005, ch. 3, art. 14, ch. 47, art. 62; 2007, ch. 29, art. 96, ch. 36, art. 36; 2012, ch. 31, art. 418.

Suspension des procédures — administrateurs

69.31 (1) Entre la date où une personne morale insolvable a déposé l'avis d'intention prévu au paragraphe 50.4(1) ou une proposition et la date d'approbation de la proposition ou celle de sa faillite, nul ne peut intenter ou continuer d'action contre les administrateurs relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations dont ils peuvent être, ès qualités, responsables en droit.

Exception

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la personne morale ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Démission ou destitution des administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la personne morale est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 65.

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

1992, c. 27, s. 36; 1997, c. 12, s. 65.

Non-application of certain provisions

69.41 (1) Sections 69 to 69.31 do not apply in respect of a claim referred to in subsection 121(4).

No remedy, etc.

(2) Notwithstanding subsection (1), no creditor with a claim referred to in subsection 121(4) has any remedy, or shall commence or continue any action, execution or other proceeding, against

(a) property of a bankrupt that has vested in the trustee; or

(b) amounts that are payable to the estate of the bankrupt under section 68.

1997, c. 12, s. 65.

No stay, etc., in certain cases

69.42 Despite anything in this Act, no provision of this Act shall have the effect of staying or restraining, and no order may be made under this Act staying or restraining,

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2001, c. 9, s. 574.

Déclaration de non-application

69.4 Tout créancier touché par l'application des articles 69 à 69.31 ou toute personne touchée par celle de l'article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu'il estime indiquées, donner suite à la demande s'il est convaincu que la continuation d'application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu'il serait, pour d'autres motifs, équitable de rendre pareille décision.

1992, ch. 27, art. 36; 1997, ch. 12, art. 65.

Précision

69.41 (1) Les articles 69 à 69.31 ne s'appliquent pas aux réclamations visées au paragraphe 121(4).

Recours interdits

(2) Malgré le paragraphe (1), le créancier d'une réclamation mentionnée au paragraphe 121(4) n'a aucun recours et ne peut intenter ou continuer d'actions, exécutions ou autres procédures relativement aux biens du failli dévolus au syndic ou aux montants à verser à l'actif de la faillite au titre de l'article 68.

1997, ch. 12, art. 65.

Restrictions

69.42 Malgré les autres dispositions de la présente loi, aucune disposition de la présente loi ne peut avoir pour effet de suspendre ou restreindre et aucune ordonnance ne peut être rendue, pour suspendre ou restreindre :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

PARTIE VII

Tribunaux et procédure

Compétence des tribunaux

Tribunaux compétents

183 (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

a) dans la province d'Ontario, la Cour supérieure de justice;

b) [Abrogé, 2001, ch. 4, art. 33]

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

e) dans la province de l'Île-du-Prince-Édouard, la Cour suprême;

f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

g) dans la province de Terre-Neuve-et-Labrador, la Division de première instance de la Cour suprême;

h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

Compétence de la Cour supérieure de la province de Québec

(1.1) Dans la province de Québec, la Cour supérieure possède la compétence pour exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant son terme, tel que celui-ci est maintenant ou peut par la suite être tenu, pendant une vacance judiciaire et en chambre.

Tab

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CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to November 26, 2024

Last amended on April 27, 2023

À jour au 26 novembre 2024

Dernière modification le 27 avril 2023

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under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

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

Admission of claims

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

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

Admission des réclamations

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

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

Law of set-off or compensation to apply

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

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

Compensation

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

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

Classes of Creditors

Company may establish classes

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

Factors

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

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

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

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

Catégories de créanciers

Établissement des catégories de créanciers

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

Critères

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

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

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

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

Tab

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2015 BCSC 1382
British Columbia Supreme Court

North American Tungsten Corp., Re

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

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

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

In the Matter of North American Tungsten Corporation Ltd. Petitioner

Butler J.

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

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

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

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

s. 11 — considered

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

s. 21 — considered

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

Butler J. **(orally):**

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

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

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

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

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

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

Ruling

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

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

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

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

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

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

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

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

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

Re Just Energy Corp.

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

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

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

Koehnen J.

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

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

Subject: Civil Practice and Procedure; Insolvency

Headnote

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

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed

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

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

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Applicant was acting in good faith and with diligence — Granting 10-day stay against regulatory conduct was consistent with remedial purpose of CCAA to avoid social and economic losses resulting from liquidation of insolvent company — CCAA automatically stayed enforcement of any payments of money ordered by regulator, but it did not automatically stay other steps that regulator may take against regulated entity — Court may stay such other steps if it was of view that failure to stay those other steps meant that viable compromise or arrangement could not be made, as long as additional stay was not contrary to public interest — It was appropriate to stay exercise of other regulatory powers against applicant for at least interim 10- day period — It would be unjust to take regulatory steps that might shut down entire business when financial concerns that prompted those steps may turn out to be unjustified if Texas regulators adjusted some or all of price increases imposed during storm — Foreign regulator was not "regulatory body" within plain meaning of s. 11.1(1) of CCAA, it did not benefit from same exemption from stay as Canadian regulator, and foreign regulator was presumptively subject to stay with respect to matters that fell within jurisdiction of Canadian CCAA court — Set off rights of banks which may allow them to sweep accounts were stayed, as that would give them preferred position over other creditors and deprive applicant of working capital, which was contrary to remedial purposes of CCAA — On its face CCAA applied to corporations, but where operations of partnerships were integral and closely related to applicant, court had jurisdiction to extend protection of stay to partnerships to ensure purposes of CCAA could be achieved — It would be illusory here to grant stay in favour of applicant's corporate entities but not extend its benefit to its partnership entities, and non-corporate entities were captured by stay .

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

Applicant bought electricity and natural gas from power generators and re-sold it to consumer and commercial customers — Unusually intense winter storms in Texas led to breakdown of equipment used to generate and transmit electricity, which led Texas regulators to impose radical and immediate price increases for power applicant bought — Amounts regulators imposed must be paid within two days, failing which applicant could lose its licence and its customers, and price increases imposed

serious, temporary liquidity crisis upon applicant — It appeared that price increases may have been imposed in error by computer program, and applicant was appealing price increases and was seeking rebates from Texas regulators, but that process had not been completed — Applicant applied for initial order under the Companies' Creditors Arrangement Act (CCAA) for period of 10 days with debtor in possession (DIP) financing of $125 million and stay of regulatory action — Application granted — Applicant met test for sealing order — Materials contained commercially sensitive information and/or personal information — Order was necessary to prevent serious risk to important personal or commercial interest, and benefits of sealing order outweighed rights of others to fair determination of issues — No one advanced any need to see information that was proposed to be sealed, and there was no need for anyone to access such information in order to assert their rights fully within proceeding.

APPLICATION by company for initial order under *Companies' Creditors Arrangement Act* and for stay of regulatory action.

***Koehnen J.*:**

Overview

1 The applicant, Just Energy Group Inc. ("Just Energy") seeks protection under *the Companies' Creditors Arrangement Act*, (the "*CCAA*") [1] by way of an initial order. Just Energy is the ultimate parent of the Just Energy group of companies and limited partnerships.

2 Just Energy buys electricity and natural gas from power generators and re-sells it to consumer and commercial customers, usually under long term, fixed price contracts.

3 Unusually intense winter storms in Texas led to a breakdown of equipment used to generate and transmit electricity. This led Texas regulators to impose radical and immediate price increases for the power Just Energy buys. The amounts the regulator imposes must be paid within 2 days, failing which Just Energy could lose its licence and have its customers distributed among other distributors.

4 Those price increases have imposed a serious, temporary liquidity crisis upon Just Energy and others in its position. That liquidity crisis prompts the *CCAA* application. It appears that the price increases may have been imposed by a computer program that misunderstood the data it received as indicating a shortage of power that could be corrected by price increases. Price increase could not lead to more power being generated because the energy shortage was caused by the freezing and consequent breakdown of generating and transmission equipment. Price increases could not remedy that.

5 Just Energy is appealing the price increases and is seeking rebates from the Texas regulator. That process has not been completed.

6 The issue before me today is whether to grant *CCAA* protection for an initial period of 10 days. It is complicated by the fact that Just Energy also seeks a stay of regulatory action in Canada and the United States and seeks what at first blush, is an unusually large amount of debtor in possession financing (the "DIP") of $125 million for the initial 10 day period.

7 For the reasons set out below, I grant the stay and the DIP. It strikes me that the circumstances facing Just Energy are precisely the sort for which the *CCAA* is appropriate: a sudden, unexpected liquidity crisis, brought on by the action of others, which actions may still be rescinded. Without a stay, Just Energy faces almost certain bankruptcy with a loss of approximately 1,000 jobs and the possibility that a good part of the debt it owes will not be repaid. Those catastrophic consequences may be avoidable if Just Energy succeeds in its appeals of the Texas price increases and if all players are given adequate time to find solutions in a more orderly fashion than the weather crisis allowed them to.

8 A number of critical parties were given notice of today's hearing. Just Energy had consulted widely with them before the hearing. These parties included secured creditors, banks, unsecured term lenders and essential suppliers. Some, including banks and some of the term lenders wish to "reserve their rights" to the comeback hearing. The DIP lender, and two important suppliers (Shell and BP) expressed concern about the reservation of rights. While those who are "reserving their rights" are of course free to do so, as a practical matter, they will be hard-pressed to undo rights that I am affording today in the initial

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

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

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

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

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

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

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

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

F. Should Set off Rights to Be Stayed?

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

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

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

103 Allowing banks to exercise a self-help remedy of sweeping the accounts by claiming set-off would in effect give them a preferred position over other creditors and deprive Just Energy of working capital. That would be contrary to the remedial purpose of the *CCAA* because it would ultimately shut down Just Energy and allow the banks to advantage themselves to the detriment of others in the process.

104 Just Energy had consulted widely with various stakeholder groups had before today's hearing. Those included the banks with sweep rights, at least some of home were represented at today's hearing and did not object.

105 In the foregoing circumstances it is appropriate to at least temporarily stay the exercise of any rights of set-off by the banks.

G. Should Administrative and D & O Charges be Granted?

106 The Applicants propose that an Administration Charge for the first ten days be set at $2.2 million.

107 The largest expenditures in the administration charge involve the retainer of counsel in Canada and the United States for Just Energy and the retainer of the Monitor and its counsel.

108 In addition, the company seeks a financial advisor charge of $1.8 million to retain BMO Nesbitt Burns as a financial advisor to assist in exploring potential alternative transactions.

109 The directors and officers charge sought is in the amount of $30 million.

110 The Monitor estimates that director liabilities in the United States for sales taxes, wages, source deductions and accrued vacation come to approximately $13.1 million. Director and officer exposure in Canada may be as high as $5.8 million.

111 While insurance with an aggregate limit of $38.5 million is in place, the complexity of the overall enterprise creates the risk that it might not provide sufficient coverage against the potential liability that the directors and officers could incur in relation to this *CCAA* proceeding.

112 In determining whether to approve administration charges, the Court will consider: (a) the size and complexity of the businesses under *CCAA* protection; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge is fair and reasonable; (e) the position of secured creditors likely to be affected by the charge; and (f) the position of the Monitor. [21]

113 The Just Energy business is large and complex. The proposed beneficiaries are essential to the success of the *CCAA*. No *CCAA* proceeding can advance without a Monitor or counsel. The addition of a financial advisor would appear to be a prudent step given the complexity of the business. Monetizing or restructuring all or portions of the Just Energy business is substantially more complicated than a sale of hard assets. It would appear to make good sense to have a financial advisor involved. The Monitor agrees to the appointment of a financial advisor. I infer from the Monitor's agreement that Nesbitt Burns will bring to the table a skill set or attributes that the Monitor either does not have or cannot exercise given its role as Monitor.

H. Should Noncorporate Entities Be Captured by The Stay?

114 Many of the gas and electricity licences pursuant to which the Just Energy group conducts business in Canada are granted to limited partnerships.

115 On its face, the *CCAA* applies to corporations, not partnerships. [22]

116 Where, however, the operations of partnerships are integral and closely related to the operations of the *CCAA* debtor, it is well-established that the Court has jurisdiction to extend the protection of the stay to partnerships in order to ensure that the purposes of the *CCAA* can be achieved. Relief of that sort has been granted on several occasions. [23]

Tab

5

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

2021 SCC 53, 2021 CSC 53
Supreme Court of Canada

Montréal (Ville) c. Restructuration Deloitte Inc.

2021 CarswellQue 18529, 2021 CarswellQue 18528, 2021 SCC 53, 2021 CSC 53, [2021] 3 S.C.R. 736, [2021] 3 R.C.S. 736, 340 A.C.W.S. (3d) 7, 463 D.L.R. (4th) 657, 94 C.B.R. (6th) 1

Ville de Montréal (Appellant) and 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)

Wagner C.J.C., Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin JJ.

Heard: May 20, 2021
Judgment: December 10, 2021
Docket: 39186

Proceedings: affirming *Arrangement relatif à Consultants SM inc.* (2020), EYB 2020-349836, 2020 QCCA 438, 2020 CarswellQue 1987, Healy J.C.A., Rochette J.C.A., Ruel J.C.A. (C.A. Que.); varying *Arrangement relatif à Consultants SM inc., Re* (2019), 2019 CarswellQue 5032, 2019 QCCS 2316, EYB 2019-312681, Corriveau J.C.S. (C.S. Que.)

Counsel: Raphaël Lescop, Eleni Yiannakis, for the appellant
Guy P. Martel, Danny Duy Vu, for the respondent
Alain Tardif, for the interveners the Alaris Royalty Corp. and the Integrated Private Debt Fund V LP
Luc Béliveau, for the intervener Thornhill Investments Inc.
Elizabeth Ferland, for the intervener Ville de Laval
Marc Duchesne, for the intervener Union des municipalités du Québec

Subject: Corporate and Commercial; Insolvency; Public; Municipal
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Proceedings subject to stay
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Set-off
Consulting engineering firm performed variety of contracts for municipality — Link was later uncovered between firm and parties involved in collusion schemes — Firm sought protection under Companies' Creditors Arrangement Act — Following initial order, firm continued to perform work for municipality — However, municipality refused to pay for that work — Municipality invoked its right to effect compensation between its debt to firm for work done after initial order and two claims against firm that, according to municipality, arose before order and resulted from fraud on firm's part — Monitor brought motion for declaratory judgment stating that compensation could not be effected — Supervising judge granted monitor's motion, holding that pre-post compensation was not possible — Municipality appealed — Majority reached same conclusion as supervising judge that pre-post compensation could not be effected in this case — Municipality appealed to Supreme Court of Canada —

Appeal dismissed — Words of stay order were broad enough to prohibit pre-post compensation with respect to both claims — In any event, it would not be appropriate to allow municipality to effect compensation or withhold payments owed to firm — Therefore, supervising judge's decision was confirmed.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Procédures assujetties à la suspension — Compensation

Firme de génie-conseil a exécuté divers contrats pour une municipalité — On a plus tard découvert l'existence d'un lien entre la firme et des parties ayant participé à des stratagèmes de collusion — Firme s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — À la suite de l'ordonnance initiale, la firme a continué à effectuer des travaux pour la municipalité — Toutefois, la municipalité a refusé de payer ces travaux — Municipalité a invoqué son droit d'opérer compensation entre sa dette envers la firme résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances envers la firme qui, soutenait-elle, étaient nées avant l'ordonnance et résulteraient de fraude de cette dernière — Contrôleur a déposé une requête visant à obtenir un jugement déclaratoire portant qu'il n'était pas possible d'opérer compensation — Juge surveillante a accueilli la demande du contrôleur, estimant que la compensation pré-post n'était pas possible — Municipalité a interjeté appel — Juges majoritaires ont conclu, à l'instar de la juge surveillante, que la compensation pré-post ne pouvait s'opérer en l'espèce — Municipalité a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Termes de l'ordonnance initiale étaient suffisamment larges pour interdire la compensation pré-post relativement aux deux créances — En tout cas, il ne serait pas approprié d'autoriser la municipalité à opérer compensation ou à retenir les paiements dus à la firme — Par conséquent, la décision de la juge surveillante a été confirmée.

A consulting engineering firm performed a variety of contracts for a municipality over a period of several years. A link was later uncovered between the firm and parties involved in collusion schemes, and criminal charges were laid. The firm subsequently became insolvent. The firm sought protection under the Companies' Creditors Arrangement Act, and the rights and remedies of its creditors were stayed. Following the initial order, the firm continued to perform work for the municipality. However, the municipality refused to pay for that work. It invoked its right to effect compensation between its debt to the firm for the work done after the initial order and two claims against the firm that, according to the municipality, arose before the order and resulted from fraud on the firm's part. The first claim arose from a settlement agreement entered into by the firm and the Minister of Justice, acting on the municipality's behalf, under the Voluntary Reimbursement Program implemented as a result of an exhaustive inquiry into the existence of schemes involving collusion and corruption in the awarding and management of public contracts ("VRP claim"). The second claim was based on a proceeding brought by the municipality against the firm for allegedly having participated in collusion in relation to a call for tenders for a water meter contract ("water meter contract claim"). The monitor brought a motion for a declaratory judgment stating that compensation could not be effected with respect to the amounts owed by the municipality to the firm for work performed for the municipality.

The supervising judge granted the monitor's motion, holding that, according to the principles laid down in a recent decision rendered by the Court of Appeal, pre-post compensation was not possible. She also concluded that the water meter contract claim was neither liquid nor exigible, which precluded compensation. The municipality appealed.

The majority at the Court of Appeal reached the same conclusion as the supervising judge that pre-post compensation could not be effected in this case. With regard to the water meter contract claim, 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. The dissenting judge was of the view that the VRP claim had to be presumed to fall within the exception set out in s. 19(2)(d) of the Act and that the decision referred to had to be distinguished on the basis that it had been rendered in a different context. Consequently, he allowed pre-post compensation between the two parties' respective debts. The municipality appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Wagner C.J.C., Côté J. (Moldaver, Karakatsanis, Rowe, Martin JJ. concurring): The VRP claim in this case was not a claim that related to a debt resulting from fraud pursuant to s. 19(2)(d) of the Act. The mere fact that a debtor company participated in the VRP was not sufficient to infer that the company defrauded a public body. First, the content of the VRP agreement itself was a complete bar to the municipality's argument that participation in the program in itself justified a finding that the municipality's claim resulted from the firm's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulated that the amount fixed in the agreement could in no way be considered to constitute an admission of liability, it could not be presumed that the VRP claim was a claim that fell within s. 19(2)(d) of the Act. Second, the program itself did

not create 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. In fact, fraud was characterized in the program as a mere possibility rather than a certainty. A right to pre-post compensation invoked under the civil law or the common law can be stayed under ss. 11 and 11.02 of the Act. 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. Here, the words of the initial order were broad enough to prohibit pre-post compensation. What remained to be determined was whether the Superior Court should have exercised its discretion under s. 11 of the Act and allowed such compensation in respect of the VRP claim. In exercising its discretion under the Act, 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. Applied in the present case, these considerations tended to confirm that it would not be appropriate to allow the municipality to effect compensation with respect to the VRP claim.

The words of the stay order made by the Superior Court were broad enough to prohibit pre-post compensation with respect to the water meter contract claim. In any event, it would not be appropriate to authorize the municipality to withhold the payments owed to the firm pending the outcome of the case relating to the water meter contract for the same reasons as those relating to the VRP claim.

Per Brown J. (dissenting): It was agreed with the majority that a supervising judge has a discretion under s. 11 of the Act as to whether to allow a creditor to effect compensation between pre-initial order and post-initial order debts. However, this discretion was not limited solely to the exceptional circumstances the majority described. Following a thorough analysis, it was held that the decision relied on by the supervising judge wrongly stated that pre-post compensation could never be allowed under the Act. Given that the supervising judge in this case did not exercise her discretion, the appeal should be allowed solely for the purpose of remanding the case to the Superior Court so it could decide whether the municipality may effect compensation between the debts incurred by the firm before the initial order and the amounts owed by the municipality to the firm for work performed by the latter after the initial order.

Further, the appeal should be allowed so that it could be determined whether compensation was available in respect of the municipality's water meter claim against the firm, as nothing in s. 21 of the Act prohibited judicial compensation.

Une firme de génie-conseil a exécuté divers contrats pour une municipalité sur une période de plusieurs années. On a plus tard découvert l'existence d'un lien entre la firme et des parties ayant participé à des stratagèmes de collusion, et des accusations criminelles ont été déposées. Par la suite, la firme est devenue insolvable. La firme s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies, et les droits et recours des créanciers ont été suspendus. À la suite de l'ordonnance initiale, la firme a continué à effectuer des travaux pour la municipalité. Toutefois, la municipalité a refusé de payer ces travaux. La municipalité a invoqué son droit d'opérer compensation entre sa dette envers la firme résultant des travaux effectués postérieurement à l'ordonnance initiale, et deux créances envers la firme qui, soutenait-elle, étaient nées avant l'ordonnance et résulteraient de fraude de cette dernière. La première créance découlait d'une entente de règlement intervenue entre la firme et la ministre de la Justice, agissant pour le compte de la municipalité, dans le cadre du Programme de remboursement volontaire mis en place à la suite d'une enquête en profondeur concernant l'existence de stratagèmes de collusion et de corruption dans l'octroi et la gestion de contrats publics (« créance PRV »). La seconde créance était fondée sur un recours intenté par la municipalité contre la firme au motif qu'elle aurait participé à une collusion relativement à l'appel d'offres du contrat des compteurs d'eau (« créance relative au contrat des compteurs d'eau »). Le contrôleur a déposé une requête visant à obtenir un jugement déclaratoire portant que les sommes dues à la firme par la municipalité pour des travaux exécutés pour son bénéfice ne pouvaient faire l'objet de compensation.

La juge surveillante a accueilli la demande en jugement déclaratoire du contrôleur, estimant qu'en vertu des principes établis dans une récente décision de la Cour d'appel, la compensation pré-post n'était pas possible. Elle a statué, par ailleurs, que la créance relative au contrat des compteurs d'eau n'était ni liquide ni exigible, de sorte que la compensation ne pouvait être opérée. La municipalité a interjeté appel.

Les juges majoritaires de la Cour d'appel ont conclu, à l'instar de la juge surveillante, que la compensation pré-post ne pouvait s'opérer en l'espèce. En ce qui concerne la créance relative au contrat des compteurs d'eau, les conditions de la compensation judiciaire n'étaient pas réunies, le caractère certain, liquide et exigible de cette créance devant être déterminé postérieurement dans une autre instance que celle du dossier de restructuration. Le juge dissident, quant à lui, était d'avis qu'il fallait présumer que la créance PRV était visée par l'art. 19(2)d) de la Loi et que la décision à laquelle on s'était référé devait être distinguée

puisqu'il avait été rendu dans un contexte différent. Ainsi, il a autorisé la compensation pré-post entre les dettes respectives des deux parties. La municipalité a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Wagner, J.C.C., Côté, J. (Moldaver, Karakatsanis, Rowe, Martin, JJ., souscrivant à leur opinion) : La créance PRV visée en l'espèce n'était pas une réclamation se rapportant à une dette qui découlait de fraude aux termes de l'art. 19(2)d) de la Loi. La seule participation au PRV par une société débitrice n'était pas suffisante pour inférer la commission d'une fraude par cette dernière à l'endroit d'un organisme public. En premier lieu, le contenu même de l'entente PRV constituait un obstacle dirimant à la prétention de la municipalité selon laquelle le seul fait de la participation à ce programme suffisait pour conclure que sa créance résulte des activités frauduleuses de la firme. En effet, comme il était clairement stipulé dans cette entente confidentielle intervenue entre les parties que la somme convenue dans celle-ci ne pouvait en aucun cas être assimilée à une admission de responsabilité, on ne saurait présumer que la créance PRV constituait une réclamation visée à l'art. 19(2)d) de la Loi. En deuxième lieu, le programme lui-même ne créait pas une présomption légale ou factuelle de l'existence de représentations frauduleuses de la part d'un débiteur du seul fait de sa participation au PRV. En fait, la fraude était caractérisée dans le programme comme une éventualité, par opposition à quelque chose de certain.

Le droit à la compensation pré-post invoqué en vertu du droit civil ou de la common law peut être suspendu en application des art. 11 et 11.02 de la Loi. Toutefois, le juge surveillant possède le pouvoir discrétionnaire d'autoriser la compensation pré-post dans des circonstances exceptionnelles seulement, considérant le fort potentiel perturbateur de cette forme de compensation. En l'espèce, les termes de l'ordonnance initiale étaient suffisamment larges pour interdire la compensation pré-post. Il restait à déterminer si la Cour supérieure aurait dû exercer son pouvoir discrétionnaire en vertu de l'art. 11 de la Loi et permettre l'application de cette compensation à l'égard de la créance PRV. Dans l'exercice du pouvoir discrétionnaire que lui confère la Loi, le tribunal doit garder à l'esprit trois considérations de base : (1) l'opportunité de l'ordonnance sollicitée, (2) la diligence et (3) la bonne foi du demandeur. Appliquées dans le cas présent, ces considérations tendaient à confirmer qu'il n'était pas approprié de permettre à la municipalité d'opérer compensation relativement à la créance PRV.

Les termes de l'ordonnance initiale rendue par la Cour supérieure étaient suffisamment larges pour interdire la compensation pré-post relativement à la créance relative au contrat des compteurs d'eau. En tout cas, il ne serait pas approprié d'autoriser la municipalité à retenir les paiements dus à la firme jusqu'au dénouement du litige relatif au contrat des compteurs d'eau pour les mêmes motifs que ceux relatifs à la créance PRV.

Brown, J. (dissident) : On était d'accord avec les juges majoritaires pour dire que le juge surveillant possède, en vertu de l'art. 11 de la Loi, le pouvoir discrétionnaire d'autoriser ou non un créancier à opérer compensation entre des dettes pré-ordonnance initiale et post-ordonnance initiale. Toutefois, ce pouvoir n'était pas limité aux seules circonstances exceptionnelles décrites par la majorité. À la suite d'une analyse en profondeur, on a estimé que la décision sur laquelle la juge surveillante s'est fondée affirmait incorrectement que la compensation pré-post ne pourrait jamais être autorisée en vertu de la Loi. Comme la juge surveillante n'a pas exercé son pouvoir discrétionnaire dans la présente affaire, le pourvoi devrait être accueilli à seule fin de retourner le dossier devant la Cour supérieure pour qu'il soit décidé si la municipalité peut opérer compensation entre les dettes de la firme antérieures à l'ordonnance initiale et les sommes dues par la municipalité à la firme pour des travaux réalisés par cette dernière après l'ordonnance initiale.

De plus, le pourvoi devrait être accueilli afin qu'il soit décidé si la réclamation de la municipalité à l'encontre de la firme à l'égard des compteurs d'eau donnait ouverture à compensation, puisque rien dans l'art. 21 de la Loi n'interdisait la compensation judiciaire.

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North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 426, 2015 CarswellBC 3043, (sub nom. *North American Tungsten Corp., Re)* 650 W.A.C. 116, 81 B.C.L.R. (5th) 102, 82 C.P.C. (7th) 109, (sub nom. *North American Tungsten Corp., Re)* 378 B.C.A.C. 116 (B.C. C.A.) — refered to in a minority or dissenting opinion

North American Tungsten Corp., Re (2015), 2015 BCSC 1382, 2015 CarswellBC 2287, 28 C.B.R. (6th) 147 (B.C. S.C.) — refered to in a minority or dissenting opinion

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 51 B.C.L.R. (2d) 105, 2 C.B.R. (3d) 303, 1990 CarswellBC 384 (B.C. C.A.) — refered to in a minority or dissenting opinion

Re Just Energy Corp. (2021), 2021 ONSC 1793, 2021 CarswellOnt 3724 (Ont. S.C.J. [Commercial List]) — refered to in a minority or dissenting opinion

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — refered to in a minority or dissenting opinion

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

9354-9186 Québec inc. v. Callidus Capital Corp. (2020), 2020 SCC 10, 2020 CSC 10, 2020 CarswellQue 3772, 2020 CarswellQue 3773, 78 C.B.R. (6th) 1, 444 D.L.R. (4th) 373, 1 B.L.R. (6th) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Statutes considered by *Wagner C.J.C., Côté J.*:

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

Generally — referred to

s. 178(1)(e) — considered

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

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

Generally — referred to

Pt. II — referred to

Pt. III — referred to

s. 6(1) — considered

s. 11 — considered

s. 11.01 [en. 2005, c. 47, s. 128] — considered

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

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.08 [en. 2005, c. 47, s. 128] — considered

s. 11.1 [en. 1997, c. 12, s. 124] — considered

s. 18.1 [en. 1997, c. 12, s. 125] — considered

s. 19 — considered

s. 19(1) — considered

s. 19(2) — considered

s. 19(2)(d) — considered

s. 20 — considered

s. 21 — considered

s. 32 — considered

Donnant suite aux recommandations de la Commission Charbonneau en matière de financement politique, Loi, L.Q. 2016, c. 18

en général — referred to

Intégrité en matière de contrats publics, Loi sur l', L.Q. 2012, c. 25

en général — referred to

Visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manoeuvres dolosives dans le cadre de contrats publics, Loi, RLRQ, c. R-2.2.0.0.3

en général — referred to

Chaptire III — referred to

art. 1 — considered

art. 3 — considered

art. 3-9 — considered

art. 4 — considered

art. 7 — considered

art. 10 — considered

art. 10 al. 1 — considered

art. 10 al. 4 — considered

art. 10-17 — considered

art. 11 al. 1 — considered

art. 11 al. 3 — considered

art. 14 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

Statutes considered by *Brown J.* (dissenting):

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

Generally — referred to

s. 69 — considered

s. 71 — considered

s. 97(3) — considered

s. 121 — considered

s. 121(1) — considered

s. 136(3) — considered

s. 141 — considered

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

Generally — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 1651 — considered

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

Generally — referred to

s. 11 — considered

s. 11.02(1) [en. 2005, c. 47, s. 128] — considered

s. 18.1 [en. 1997, c. 12, s. 125] — considered

s. 19(2)(d) — considered

s. 21 — considered

Visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manoeuvres dolosives dans le cadre de contrats publics, Loi, RLRQ, c. R-2.2.0.0.3

en général — referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

s. 73(1) — considered

Regulations considered by *Wagner C.J.C., Côté J.*:

Visant principalement la récupération de sommes payées injustement à la suite de fraudes ou de manoeuvres dolosives dans le cadre de contrats publics, Loi, RLRQ, c. R-2.2.0.0.3

Programme de remboursement volontaire, RLRQ, c. R-2.2.0.0.3, r. 1

en général — referred to

art. 1 — considered

art. 4 — considered

art. 7 — considered

art. 8 — considered

Words and phrases considered:

pre-pre compensation

[C]ompensation between debts that arise before an initial order is made [. . .].

Termes et locutions cités:

compensation pré-pré

[C]ompensation entre des dettes nées avant le prononcé de l'ordonnance initiale [. . .].

APPEAL by municipality from decision reported at *Arrangement relatif à Consultants SM inc.* (2020), 2020 QCCA 438, EYB 2020-349836, 2020 CarswellQue 1987 (C.A. Que.), confirming supervising judge's decision that municipality could not effect compensation or withhold payments owed to engineering firm.

POURVOI formé par une municipalité à l'encontre d'une décision publiée à *Arrangement relatif à Consultants SM inc.* (2020), 2020 QCCA 438, EYB 2020-349836, 2020 CarswellQue 1987 (C.A. Que.), ayant confirmé la décision de la juge surveillante que la municipalité ne pouvait pas opérer compensation ou retenir des montants dus à une firme de génie-conseil.

Wagner C.J.C., Côté J. **(Moldaver, Karakatsanis, Rowe and Martin JJ. concurring):**

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

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 *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) , 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 (S.C.C.) , 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 c. Ouellet*, 2011 QCCA 1858 (C.A. Que.) , at para. 30; *Dupuis c. Cernato Holdings Inc.*, 2019 QCCA 376 (C.A. Que.) , at para. 37; 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 H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225 (Ont. S.C.J.), 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 H§63). This exception to the general scheme established by s. 19(1) of the *CCAA* must be interpreted narrowly (see, e.g., by analogy, *Macara c. 2845-4288 Québec inc.*, [2004] R.J.Q. 2637 (C.A. Que.) , at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710 (Ont. C.A.), at para. 24).

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 (B.C. C.A.) , at pp. 113-14; *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 71 Alta. L.R. (3d) 1 (Alta. C.A.), 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 (Alta. C.A.) , at paras. 23-24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.) , at paras. 13-16, aff'd 2015 BCCA 426, 378 B.C.A.C. 116 (B.C. C.A.), 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 (B.C. S.C.) ("*Tungsten* (S.C.)"), at para. 32, aff'd 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 16, 20 and 25, and 2015 BCCA 426, 378 B.C.A.C. 116 (B.C. C.A.), 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 (S.C.C.) , 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 (S.C.C.) , 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* (1995), [1996] 1 A.C. 243 (U.K. 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 (B.C. S.C.) , at para. 12; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at para. 6); *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11 (B.C. S.C. [In Chambers]), 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. [Commercial List]), 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**
>
> ORDERS that during the Stay Period, and subject to, *inter alia*, subsection 11.1 CCAA, all rights and remedies, 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**") 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.
>
> . . . . .
>
> **No Interference with Rights**
>
> ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, 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 Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), 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. Gen. Div. [Commercial List]), 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 in order to deal with and liquidate a claim in the Civil Division ("**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**") ... for the sole purpose of allowing the Applicant, Ville de Montréal, to establish its claim against the Debtors Concerned ... 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.

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 (C.A. Que.)), like the supervising judge (2019 QCCS 2316 (C.S. Que.)), erred in relying on the Quebec Court of Appeal's decision in *Arrangement relatif à Métaux Kitco inc.*, 2017 QCCA 268 (C.A. Que.), 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 and the Quebec sales tax 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). 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., Re*, 2005 SCC 52, [2005] 2 S.C.R. 564 (S.C.C.) , 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 (S.C.C.) , 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 (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) , 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 (S.C.C.) , 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 (B.C. C.A.) ; *Cam-Net Communications v. Vancouver Telephone Co.* (1999), 1999 BCCA 751, 71 B.C.L.R. (3d) 226 (B.C. C.A.); *North American Tungsten Corp. v.*

Global Tungsten and Powders Corp., 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.) ("*Tungsten No. 1*") (decision on application for leave to appeal), aff'd 2015 BCCA 426, 378 B.C.A.C. 116 (B.C. C.A.) ("*Tungsten No. 2*"); *Re Just Energy Corp.*, 2021 ONSC 1793 (Ont. S.C.J. [Commercial List])); 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 (Ont. S.C.J. [Commercial List])).

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 (Ont. S.C.J. [Commercial List]), 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 *at the commencement of the winding-up of the company*". 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 (B.C. S.C.) ("*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. 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.
>
> . . . . .
>
> It now appears to be clear in Canada that legal and equitable set-off are unaffected by proceedings commenced under the CCAA 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. Discretion Not Exercised by the Supervising Judge in This Case

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, [2021] 3 S.C.R. 704 (S.C.C.) , 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.

Pourvoi rejeté.

Footnotes

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.

Tab

6

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

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

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

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

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

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

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

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

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

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Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.
Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

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

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

Headnote

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

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

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

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

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

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

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

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

Held: The appeal was allowed.

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

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

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

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

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

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

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

Arrêt: Le pourvoi a été accueilli.

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

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

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

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

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

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

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

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

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

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

Tab

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

2010 SCC 60, 2010 CSC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

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

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

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

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

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

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

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

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

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

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

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

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

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

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

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

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

Table of Authorities

Cases considered by *Deschamps J.*:

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

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

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

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

1. Facts and Decisions of the Courts Below

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

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

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

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

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

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

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

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

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

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

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

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

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

Tab

8

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775

Date: 20111107
Docket: S117098
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 Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	D.K. Fitzpatrick
Appearing on behalf of the Monitor:	S. Dvorak
Counsel for Fisgard Capital Corporation:	A.A. Frydenlund S. Stephens
Counsel for Unsecured Loan Holders:	D. Toigo
Counsel for Water's Edge Rental Pool Creditors:	K.S. Campbell
Counsel for bcIMC Construction Fund Corp.:	C.D. Brousson
Place and Date of Hearing:	Vancouver, B.C. November 2 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. November 7, 2011

[1] **THE COURT:** This proceeding was commenced on October 21, 2011. On October 24, 2011, I granted an initial order pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended ("*CCAA*") which included an interim stay of proceedings and a nominal administration charge. At that time, two of the secured creditors, bcIMC Construction Fund Corporation and bcIMC Specialty Fund Corporation (collectively "bcIMC") and Fisgard Capital Corporation opposed the granting of the order. There was, however, insufficient time to fully hear the arguments against the granting of the order, notwithstanding that the statutory requirements of the *CCAA* had been met by the petitioners.

[2] This hearing was intended to stand as a comeback hearing under s. 11.02(2) of the *CCAA*, when the arguments of those secured creditors could be fully heard. At this time, the petitioners seek to extend the stay to December 11, 2011, and to increase the administration charge from $100,000 to $300,000.

[3] Further, the petitioners seek an order authorizing debtor in possession, or DIP, financing in the amount of $600,000 and the imposition of a director's charge in the amount of $700,000.

[4] bcIMC and Fisgard oppose the granting of the order sought, contending that it is not appropriate in the circumstances and that the petitioners are not acting in good faith and with due diligence; in other words, that the petitioners have not satisfied the test in respect of the granting of this further order as that test is formulated under s. 11.02(3) of the *CCAA*. Fisgard also applies to appoint a receiver over the security held by it relating to one of the developments.

[5] As at the time of the application for the initial order, the onus remains on the petitioners at this hearing to satisfy the requirements under s. 11.02(3) of the *CCAA*.

Background Facts

[6] The corporate group, or, as it is known, the Aviawest Group, began its operations in 1990 with the development of the Pacific Shores Resort near Parksville, British Columbia. Over the last 21 years, the business has grown

in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] ... I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner.

[42] Further, bcIMC's insistence that it will not cooperate in terms of a refinancing simply does not make sense in light of what has already occurred in relation to bcIMC's debt and the positions and actions they have taken in relation to their debt. Firstly, they have already made the "with prejudice" offer to accept an amount under their first mortgage position only, which would give rise to a loss of approximately $20 million. Secondly, they have investigated the potential sale of their debt, which gave rise to an offer of $20 million.

[43] Both of these circumstances indicate to me that they are open to negotiations with the petitioners and that those negotiations may possibly result in a refinance of their debt that would allow the Group to go forward on some restructured basis.

[44] bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc. (Re)* (2000), 283 A.R. 146 (Q.B.) at para. 25, this is some evidence that bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 12, 244 A.R. 93, where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

[45] The petitioners seek DIP financing in the amount of $600,000, which is just shy of the $620,000 which the cash flow indicates will be required to see them through to December 11.

retirees who have invested their life savings into the enterprise, although it is also apparent that many pensioners have also invested through bcIMC.

[58] There can be no doubt that a receivership will result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. On this point there is no disagreement, save for Fisgard's somewhat inexplicable argument that a receivership of Pacific Shores Resort would prejudice no one. The prejudice to the other stakeholders in relation to that resort is palpable in the event of a receivership.

[59] In conclusion, it is my opinion that the petitioners have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that the making of a further order extending the stay is appropriate. The order will go as sought, including that the administration charge is increased to $300,000 and that a director's charge is imposed to a maximum of $700,000 in respect of potential obligations that might be incurred post-filing.

[60] In addition, I am satisfied that the requested DIP financing order is appropriate in the circumstances and that it can be structured as has already been discussed between the parties.

[61] Fisgard's application to appoint a receiver is dismissed.

"The Honourable Madam Justice S.C. Fitzpatrick"

Tab

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2009 CarswellOnt 4806
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4806, 179 A.C.W.S. (3d) 801, 57 C.B.R. (5th) 232, 76 C.C.P.B. 307

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

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

Morawetz J.

Heard: June 16, 2009
Judgment: August 18, 2009
Docket: 09-CL-7950

Counsel: Alan Merskey for Nortel Networks Corp. et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
Leanne Williams for Flextronics Inc.
J. Pasquariello for Monitor, Ernst & Young Inc.
B. Wadsworth for CAW-Canada
Thomas McRae for Recently Severed Calgary Employees
A. McKinnon for Former Employees
Mary Arzoymanidis for Bell Canada
Alex MacFarlane for Unsecured Creditors' Committee
Gavin Finlayson for Noteholders
Tina Lie for Superintendent of Financial Services of Ontario
Steven Graff, Ian Aversa for Current and Former Employees

Subject: Insolvency

Related Abridgment Classifications

Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.f Removal of stay

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Removal of stay

Action was commenced in United States which involved alleged breach by named defendants of their statutory duties under Employee Retirement Income Security Act, 1974 (ERISA) — ERISA litigation was at discovery stage, which entailed review and production of millions of pages of electronic documents and numerous depositions — Stay was contained in Amended and Restated Initial Order (initial order) — Applicants brought motion for order extending stay — Current and former employees of N Inc. who were participants in long-term investment plan sponsored by N Inc. (moving parties) brought motion for order

lifting stay of proceedings — Motion by applicants granted — Motion by moving parties dismissed — D&O stay under initial order did cover D&O defendants in ERISA litigation and it was not appropriate to lift stay at this time — Effect of stay would be merely to postpone ERISA litigation — Allegations against named defendants were not restricted to defendants acting in their capacity as fiduciaries — In expanding scope of litigation to include broad allegations as against directors, moving parties had brought ERISA litigation within terms of D&O stay — Restructuring was at critical stage and energies and activities of board should be directed towards restructuring — To permit ERISA litigation to continue at that time would result in significant distraction and diversion of resources at time when that could be least afforded — Further postponement of claim for relatively short period of time would not be unduly prejudicial to moving parties.

Table of Authorities

Cases considered by *Morawetz J.*:

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339, 1992 CarswellOnt 185 (Ont. Gen. Div.) — referred to

Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc. (2008), 2008 CarswellOnt 1427, *(*sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.)* 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, *(*sub nom. *Slater Steel Inc. (Re))* 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314 (Ont. C.A.) — distinguished

SNV Group Ltd., Re (2001), 95 B.C.L.R. (3d) 116, 2001 BCSC 1644, 2001 CarswellBC 2662 (B.C. S.C.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.5 [en. 1997, c. 12, s. 124] — considered

s. 11.5(1) [en. 1997, c. 12, s. 124] — considered

s. 11.5(2) [en. 1997, c. 12, s. 124] — referred to

Employee Retirement Income Security Act, 1974, 29 U.S.C.

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 21 — referred to

MOTION by applicants for order extending stay in action; MOTION by moving parties for order lifting stay of proceedings.

***Morawetz J.*:**

1 This endorsement relates to two motions.

2 The first is brought by the Applicants for an order extending the stay contained at paragraphs 14 - 15 and 19 of the Amended and Restated Initial Order (the "Initial Order") to the individual defendants (the "Named Defendants") in the action commenced in the United States District Court, Middle District of Tennessee, Nashville District (the "ERISA Litigation").

3 The second is brought by the current and former employees of Nortel Networks Inc. ("NNI") who are or were participants in the long-term investment plan sponsored by NNI (the "Moving Parties") for an order, if necessary, lifting the stay of proceedings provided for in the Initial Order for the purpose of allowing the Moving Parties to continue with the ERISA Litigation.

4 For the following reasons, the motion of the Applicants is granted and the motion of the Moving Parties is dismissed.

Background

5 The motion of the Applicants is supported by the Board of Directors of Nortel Networks Corp. ("NNC") and Nortel Networks Ltd. ("NNL"), the Monitor, the Unsecured Creditors' Committee and the Bondholders.

6 The ERISA Litigation involves the alleged breach by the Named Defendants of their statutory duties under the *Employee Retirement Income Security Act, 1974* ("ERISA") regarding the management of NNI's defined contribution retirement plan (the "Plan"). It is alleged that, among others, the Named Defendants breached their duty by imprudently offering NNC stock for investment in the Plan.

7 The ERISA Litigation is currently at the discovery stage, which entails a review and production of millions of pages of electronic documents and numerous depositions. The ERISA Litigation plaintiffs are entitled to conduct up to 60 depositions.

8 Counsel to the Moving Parties explained that the defendants in ERISA cases are typically the individuals who managed the plan, being the "fiduciaries" in the language of ERISA. The fiduciaries may include the corporate entity itself, senior management employees, human resources employees and/or other personnel, entities or persons outside the company, or any combination of same. Counsel submits that under ERISA, the status of an individual as a fiduciary depends on the plan documents and the actual management and practice relating to the plan, not an individual's official corporate status as an officer and/or director of the plan's sponsor.

9 Although the intent of the ERISA action may be aimed at the individuals in their capacity as independent ERISA fiduciaries, it seems to me that the Second Amended Complaint ("SAC") as filed in the action has a much broader impact.

10 At paragraph 15 of his factum, Mr. Barnes makes the following submission:

> It is simply untenable to suggest that the D&O Defendants [referred to herein as the "Named Defendants"] are only being sued in their capacity as independent ERISA fiduciaries. This claim is belied by the Plaintiff's own pleadings. The Second Amended Consolidated Class Action Complaint ("SAC") repeatedly asserts claims against the Named Defendants that specifically relate to the obligations of the company, where the defendants are alleged to be liable in their capacities as directors or officers. For example, the Plaintiffs allege that Nortel "necessarily acts through its Board of Directors, officers and employees", and assert that the "directors-fiduciaries act on behalf of [Nortel]". The SAC further claims that the Named Defendants are liable as "co-fiduciaries" alongside the company. It is inescapable that some of the claims for which the plaintiffs seek to recover against the individual Named Defendants relate to obligations of Nortel, because, as is evident from multiple allegations in the SAC, Nortel can only act derivatively through its directors and officers.

11 Mr. Barnes cites references to the SAC at page 5, paragraph 14; page 6, paragraph 19; pages 24, 52, 54 and paragraphs 50 - 109, 114; and pages 26 and 35 and paragraphs 58 and 66.

12 Mr. Barnes goes on to submit that as a result, the allegations in the ERISA Litigation against the Named Defendants and the allegations against the corporate defendants are invariably intertwined, raising several identical questions of fact and law.

13 Mr. Barnes also made reference to paragraph 147 of the SAC which sets out the additional theory of liability against some of the Defendants and alleges in the alternative that the said defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA.

14 Although the ERISA Litigation may be aimed at the Named Defendants in their capacities as "fiduciaries" it seems to me that this distinction is somewhat blurred such that it is arguable that the Named Defendants only have fiduciary status under ERISA as a consequence of their position as directors or officers of the company.

15 The Moving Parties concede that the ERISA Litigation against NNI, NNC and NNL is stayed as a result of the Chapter 11 proceeding, the Initial Order, and the Chapter 15 proceedings. The Moving Parties seek to continue the action as against the Named Defendants and carry on with the discovery process.

16 The Moving Parties stated intention in continuing with the ERISA Litigation is to pursue insurance proceeds. The Moving Parties have filed evidence of an offer to settle made within the limits of the applicable policies but the offer has not been accepted.

17 The Moving Parties take the position that the ERISA Litigation is not stayed as against the Named Defendants pursuant to the stay because the Named Defendants are "not being sued in their capacity as officers and directors of the two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan". The Applicants take the position that it is, however, as a result of their employment by the Applicants that the Named Defendants had any capacity as fiduciaries for an American 401(k) Plan.

18 The Moving Parties take the position that a continuation of the ERISA Litigation will have a minimal effect on the Applicants because, among other things:

(a) the documentary discovery can be managed by the lawyers without the extensive involvement of any Nortel personnel;

(b) the bulk of documentary discovery issues have been worked out;

(c) they will accommodate individual defendants involved in the restructuring efforts by scheduling the remaining steps in the ERISA Litigation so that they are not distracted from the restructuring efforts; and

(d) they will agree that any determination or adjudication shall be without prejudice to the Canadian applicants in the claims process.

19 The Applicants take the position that they do not wish to be drawn into the conflict over the insurance proceeds as this would result in prejudice to their restructuring efforts. At this time, the Applicants are at a critical stage of their restructuring and submit that their efforts should be directed towards the restructuring.

20 Mr. Barnes submits that, if the ERISA Litigation is allowed to continue, it will detract significant attention and resources from Nortel's restructuring. The Moving Parties are seeking continued discovery of millions of pages of electronic documents in the company's possession and are expected to conduct dozens depositions. Mr. Barnes further submits it is simply not the case that continued litigation has a minimal effect on the company as negotiating a discovery agreement and collecting and providing the documents in question requires considerable time and resources in preparing past and current directors and officers for the depositions which will necessitate significant attention and focus for management and the board. In addition, he submits that addressing the strategic issues raised by the litigation, including the prospect of settlement, requires the attention of management and the board. Further, as the questions of fact and law at issue in the ERISA Litigation are practically identical as between the corporate defendants and the D&O Defendants, he submits there is a serious risk of the record being tainted if the action proceeds without the Applicants' participation, which could have corresponding effects on any claims process.

21 It is also necessary to take into account the effect of a stay of the ERISA Litigation on the Moving Parties.

22 As counsel to the Applicants points out, the Moving Parties have also stated that their primary interest in continuing the ERISA Litigation is to pursue an insurance policy issued by Chubb. The Moving Parties have noted that the insurance proceeds are a "wasting policy", starting at U.S. $30 million and declining for defence costs.

23 Counsel to the Applicants submits that in the event that the stay continues, few defence costs will be incurred against the insurance proceeds and the Moving Parties will maintain the value of their within limits offer.

24 Further, as Mr. Barnes points out, staying the entire ERISA Litigation would not significantly harm the Moving Parties as it does not preclude their action, but merely postpones it.

Analysis

25 Section 11.5 of the CCAA authorizes the court to make an order under the CCAA to provide for a stay of proceedings against directors. Section 11.5(1) states:

> 11.5(1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable within their capacity as directors for the payment of such obligations, unless a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

26 Section 19 of the Initial Order provides as follows:

> THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, unless a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the applicant or this Court (the "D&O" stay).

27 It is also argued by both counsel to the Applicants and the Board that this statutory power is augmented by the court's inherent jurisdiction to grant a stay in appropriate circumstances. (See: *SNV Group Ltd., Re*, [2001] B.C.J. No. 2497 (B.C. S.C.).) Counsel to the Applicants and the Board also submit that the CCAA is remedial legislation to be construed liberally and in these circumstances, it should be recognized that the purpose of the stay is to provide a debtor with its opportunity to negotiate with its creditors without having to devote time and scarce resources to defending legal actions against it. It is further submitted that given that a company can only act through its management and board, by extension, the purpose of the stay provision is to provide management and the board with the opportunity to negotiate with creditors and other stakeholders without having to devote precious time, resources and energy to defending against legal actions.

28 Mr. Barnes submits that the ERISA Litigation falls squarely within the terms of the D&O Stay as it is a claim against former and current directors and officers under a U.S. statute that arose prior to the date of filing. Further, the Named Defendants are only exposed to this liability as a consequence of their position with the company.

29 It is on this last point that Mr. Graff, on behalf of the Moving Parties, takes issue. He submits that the litigation is not stayed against the individual defendants because they are not being sued in their capacities as officers and directors of two Canadian corporations, but in their capacities as fiduciaries of an American 401(k) Plan. As such, he submits that the stay ought not to extend to the ERISA Litigation. He submits that the named defendants' liability is not a derivative of the Applicants' liability, if any, as a fiduciary. He further submits that the corporate defendants have claimed in the ERISA Litigation that the corporate entities are not fiduciaries at all and need not even have been named in the ERISA Litigation.

30 Mr. Graff further submits that the Applicants' submission and the Board's submission is flawed and that following the reasoning of the Court of Appeal in *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.* (2008), 40 C.B.R. (5th) 172 (Ont. C.A.), the fact that the management of the Plan has always been performed by the Applicants' employees, officers and directors is moot. Mr. Graff submits that the *Morneau* case is on "all fours" with this case.

31 With respect, I do not find that the *Morneau* case is on "all fours" with this case. Mr. Graff submits that in *Morneau*, the Court of Appeal opined on the applicable legal questions: When are directors and officers not directors and officers?

32 In my view, while the Court of Appeal may have commented on the issue referenced by Mr. Graff, it was not in a context which is similar to that being faced on this motion. In *Morneau*, the Court of Appeal was faced with an interpretation issue arising out of the scope and terms of a release. The consequences of an interpretation against Morneau would have resulted in a bar of the claim. This distinction between *Morneau* and the case at bar is, in my view, significant.

33 The *Morneau* case can also be distinguished on the basis that Gillese J.A. was examining a release and, in particular, how far that release went. That is not an issue that is before me. There is no determination that is being made on this motion that will affect the ultimate outcome of the ERISA Litigation. There is no issue that a denial of the stay will result in the action being barred. Rather, the effect of the stay would be merely to postpone the ERISA Litigation.

34 This is not a Rule 21 motion and accordingly, the pleadings do not have to be reviewed on the basis as to whether it is "plain, obvious and beyond doubt" that the claim could not succeed. In this case, there is no "bright line" in the pleadings. As I have noted above, the allegations against the Named Defendants are not restricted to the defendants acting in their capacity as fiduciaries. In expanding the scope of the litigation to include broad allegations as against the directors, the Moving Parties have brought the ERISA Litigation, in my view, within the terms of the D&O Stay.

35 Having determined that the ERISA Litigation falls within the terms of the D&O Stay, the second issue to consider is whether the stay should be lifted so as to permit the ERISA Litigation to continue at this time.

36 In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA Litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).)

37 I also note the comments of Blair J. (as he then was) in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at paragraph 24 where he stated:

> In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with - at least for the purposes of that proceeding in the CCAA proceeding itself.

38 The prejudice to be suffered by the Moving Parties in the ERISA Litigation is a postponement of the claim. In view of the fact that the ERISA Litigation was commenced in 2001, I have not been persuaded that a further postponement for a relatively short period of time will be unduly prejudicial to the Moving Parties.

Disposition

39 Under the circumstances, I have concluded that the D&O Stay under the Initial Order does cover the D&O Defendants in the ERISA Litigation and that it is not appropriate to lift the stay at this time.

40 It is recognized that the ERISA Litigation will proceed at some point. The plaintiffs in the ERISA Litigation are at liberty to have this matter reviewed in 120 days.

41 To the extend that I have erred in determining that the ERISA Litigation is not the type of action directly contemplated by the D&O Stay, I would exercise this Court's inherent power to stay the proceedings against non-parties to achieve the same result.

Motion by applicants granted; motion by moving parties dismissed.

Tab

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COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE CHICOUTIMI

N° : 150-05-003257-039

DATE : 27 avril 2004

SOUS LA PRÉSIDENCE DE : L'HONORABLE J. CLAUDE LAROUCHE, J.C.S.

Siégeant comme tribunal désigné en vertu de la *Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers* (L.R.C.), 1985, chapitre C-36 et ses amendements

DANS L'AFFAIRE DE L'ARRANGEMENT PROPOSÉ PAR :

COOPÉRATIVE FORESTIÈRE LATERRIÈRE
personne morale de droit privé ayant son siège social et principale place d'affaires au 4910, boulevard Talbot, Laterrière, province de Québec, G0V 1K0
Débitrice-requérante
et
ERNST & YOUNG INC.
150, boulevard René-Lévesque Est, bureau 120, Québec, province de Québec, G1R 6C6
et
LUC POULIN
150, boulevard René-Lévesque Est, bureau 120, Québec, province de Québec, G1R 6C6
Mis en cause
et
PLACEMENTS RAOUL GRENIER INC.
Personne morale légalement constituée ayant son siège au 625, 8e rue, Saint-Prime (Québec) district de Roberval, G8J 1P7
et
RAOUL GRENIER
625, 8e rue, Saint-Prime G8J 1P7
et
GILLES LAVOIE
725 rue des Saguenéens, Chicoutimi G7H 6E2
Intervenants

JL 2332

JUGEMENT

[1] La requérante, la Coopérative forestière Laterrière, ci-après désignée comme étant CFL, présente une requête en homologation du Plan d'arrangement et ce, en vertu des dispositions de l'article 6 de la Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers (LACC).[1]

[2] Le mis en cause, Luc Poulin de Ernst & Young inc., le contrôleur du Plan proposé par CFL, a fait envoyer aux créanciers par courrier les documents suivants : avis de l'assemblée aux créanciers, lettre de CFL, Plan de compromis et d'arrangement proposé, rapport du contrôleur, formulaire de preuve de réclamation et de procuration et formulaire de votation.

[3] L'assemblée a été tenue le 23 avril 2004 à 11 h à l'hôtel Le Montagnais de Chicoutimi.

[4] Le contrôleur, dans son rapport, exprime l'avis que le plan proposé par CFL constitue un arrangement juste et équitable et en recommande l'acceptation pour les raisons suivantes :

> Le plan proposé est une condition essentielle à la mise en place de la transaction que la direction de CFL a négociée pour assurer son avenir. Il repose sur des bases solides. Les créanciers, les fournisseurs et les employés pourront bénéficier de la continuité de l'entreprise.
>
> CFL fait l'objet de la protection de la LFI et de la LACC depuis environ 1 an. Les coûts directs et indirects reliés à un tel processus sont énormes. La situation est rendue au point limite et le rejet du plan par les créanciers entraînerait la liquidations des actifs de CFL. Dans ce contexte, la valeur de réalisation nette des actifs serait inférieure aux charges garanties, si bien qu'aucun montant ne serait recouvré par les créanciers non garantis.

[5] Le résultat du vote compilé par le contrôleur lors de l'assemblée du 23 avril 2004 est le suivant :

a) Le vote exprimé en pourcentage:

. 466 créanciers ont voté en faveur du Plan d'arrangement, et

. 6 créanciers ont voté contre le Plan d'arrangement,

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[1] L.R.C. 1985, C-36 et amendements.

de sorte que le Plan a été accepté à un pourcentage de 98,7 % en nombre;

b) Le vote exprimé en valeur a révélé que:

. des créanciers représentant une valeur totale de 15 319 855,26 $ ont voté en faveur du Plan, et

. des créanciers ayant des créances d'une valeur de 1 925 206,37 $ ont voté contre l'approbation du Plan.

Ainsi un pourcentage de 88,8% en valeur de créances prouvées ont approuvé le Plan présenté, le tout tel qu'il appert du procès-verbal de l'assemblée des créanciers, de la liste des présences ainsi que de la compilation des votes, le tout produit en liasse au soutien des présentes sous la cote R-3;

[6] CFL a présenté le 26 avril 2004 la requête en homologation dont nous sommes saisi.

[7] Il y a eu dans le cadre de la présentation de cette requête deux interventions : une de Placements Raoul Grenier inc. et Raoul Grenier et l'autre de Gilles Lavoie.

[8] Une entente est cependant intervenue entre CFL et Placements Raoul Grenier et Raoul Grenier relativement à une modification à l'une des conclusions recherchées dans la requête en homologation.

[9] Le paragraphe 41 du présent jugement reflète cette entente qui en définitive préserve le droit à l'hypothèque légale de Placements Raoul Grenier et Raoul Grenier, nonobstant l'homologation du Plan jusqu'à ce que ce droit soit tranché aux termes d'une autre requête intitulée «Requête pour directives».

[10] Pour sa part, Gilles Lavoie, dans son intervention, demande au Tribunal de modifier l'article 2.04 b) du Plan d'arrangement proposé.

[11] Cet article intitulé «Libération et quittance pour les administrateurs de CFL» prévoit ce qui suit à son premier alinéa :

> Les membres de CFL et/ou détenteurs de parts, officiers, administrateurs et employés de CFL présents ou passés, seront libres et quittes de toutes Réclamations et instances judiciaires en cours, auxquelles ils pourraient être tenus responsables en qualité de membres de CFL et/ou détenteurs de parts, officiers, administrateurs et employés en poste ou non à la date de l'Ordonnance initiale, en droit ou en équité, en ce qui concerne toutes Réclamations qui seraient antérieures à la date de l'Ordonnance initiale ou découlant du Plan.

[12] La demande de modification de Gilles Lavoie est formulée comme suit :

> Ajouter à la fin du premier alinéa, après les mots «découlant du plan», les mots «sauf la requête introductive d'instance pour dommages et intérêts portant le numéro de la Cour supérieure du district de Chicoutimi 150-17-000591-039».

[13] Gilles Lavoie réitère à l'audience sa demande de modification qui a été refusée par les représentants de CFL.

[14] Il importe de préciser pour la bonne compréhension du dossier sur ce volet que CFL a déposé le 2 mai 2003, auprès de ses créanciers, un avis d'intention de déposer une proposition concordataire en vertu de la Loi sur la faillite et l'insolvabilité (LFI)[2].

[15] CFL, en raison de son incapacité à déposer une proposition concordataire au sens de la Loi sur la faillite et l'insolvabilité (LFI) dans les délais prévus, s'est prévalue, le 29 octobre 2003, des dispositions de la LACC. L'ordonnance rendue par monsieur le juge Babin, à cette même date, est reconduite avec certaines modifications les 28 novembre, 29 décembre 2003, 28 janvier 2004, 6 février 2004 et le 22 mars 2004, comporte la conclusion suivante au paragraphe[26] :

> **INTERDIT**, jusqu'à nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action contre les administrateurs de la requérante relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente Loi et visant les obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le Tribunal ou rejeté par celui-ci ou les créanciers (article 11.5, LACC).

[16] Gilles Lavoie qui a été à l'emploi de CFL du 19 mai 1981 au 18 février 2002 s'est prévalu, en mars 2002, d'une clause d'arbitrage contenue à son contrat de travail.

[17] Le dossier d'arbitrage a débuté devant Me Jacques Philippon, l'arbitre choisi par les parties, le 27 février 2003 et s'est poursuivi les 28 février, 6, 7,26, 27 et 28 mars 2003 ainsi que les 8 et 10 avril 2003.

[18] Toutefois, à la suite de l'avis d'intention de CFL, le syndic a transmis aux parties le 22 mai 2003 un avis de surseoir à l'arbitrage.

[19] Par la suite, en l'occurrence au milieu du mois de juillet 2003, Gilles Lavoie a fait signifier aux administrateurs de CFL ainsi qu'à Samson, Bélair et Paul Grimard qui ont été impliqués dans le dossier, une requête introductive d'instance pour dommages et intérêts. Gilles Lavoie réclame des défendeurs la somme de 590 000 $ comprenant un montant de 175 000,00 $ à titre de reliquat des sommes dues sur son contrat.

[20] Le contrôleur, Luc Poulin a le 19 novembre 2003, à la suite du jugement de monsieur le juge Babin, transmis un avis de surseoir dans le dossier de la Cour supérieure.

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

[21] Gilles Lavoie demande que le Plan de compromis et d'arrangement proposé ne couvre pas le montant qu'il réclame aux administrateurs, ce qui lui a été refusé par les représentants de CFL.

[22] D'entrée de jeu, le Tribunal est d'avis que Gilles Lavoie ne pouvait pas, après le dépôt de l'avis d'intention prévu au paragraphe 50.4 (1) de la LFI, intenter une action contre les administrateurs. Les dispositions de l'article 69.31 de la LFI, ci-après reproduites, sont claires sur ce point :

> **69.31** (1) **[Suspension des procédures – administrateurs]** Entre la date où une personne morale insolvable a déposé l'avis d'intention prévu au paragraphe 50.4(1) ou une proposition et la date d'approbation de la proposition ou celle de sa faillite, nul ne peut intenter ou continuer d'action contre les administrateurs relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations dont ils peuvent être, ès qualités, responsables en droit.
>
> (2) **[Exception]** La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la personne morale ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

[23] Par la suite, lorsque CFL s'est prévalue des dispositions de la LACC, Gilles Lavoie ne pouvait non plus intenter ou continuer une action contre les administrateurs. C'est ce que prévoit l'article 11.5 de cette loi auquel s'ajoute le paragraphe [26] du jugement de monsieur le juge Babin.

[24] L'article 5.1 (1) de la LACC qui est susceptible de s'appliquer pour décider de l'intervention de Gilles Lavoie énonce ce qui suit :

> **5.1 (1) [Transaction – réclamations contre les administrateurs]** La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.
>
> **(2) [Restriction]** La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.
>
> **(3) [Pouvoir du tribunal]** Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

[25] Il y a lieu de traiter du sens à donner à l'article 5.1 (1) dont la formulation ne pêche pas par excès de clarté.

[26] Notre collègue, monsieur le juge Gascon, dans un jugement particulièrement intéressant rendu dans l'affaire de la proposition de Le Royal Penfiedl inc.[3], le 16 juillet 2003, fait une analyse de l'article 5.1 (1) de la LACC et de l'article 50 (13) de la LFI.

[27] Il en arrive à la conclusion que la transaction sur les réclamations contre les administrateurs dont il est question aux articles précités n'exige pas qu'il y ait une première transaction conclue avec les créanciers d'une débitrice ayant des réclamations contre les administrateurs de cette dernière.

[28] Monsieur le juge Gascon s'exprime comme suit :

> "40. Or, les dictionnaires usuels français donnent au mot « transaction » entre autres le sens de « concordat », « arrangement », ou « compromis »
>
> 41. Pour leur part, les dictionnaires anglais traduisent aussi le mot « compromise » en référant notamment à la notion d'« accepter un compromis », de « compromis » et d'« arrangement »
>
> 42. Un trait commun découle de cela. Tant en français qu'en anglais, le terme « transaction » ou « compromise » traduit l'idée d'un compromis, concordat ou arrangement. Bref, de ce qui est visé par les articles 50 et suivants de la LFI dans le contexte des propositions concordataires ou de ce qui est visé par la LACC dans le contexte des arrangements avec les créanciers des compagnies.
>
> 43. Associer, comme le suggère la débitrice, la référence à une « transaction » à la proposition elle-même respecte alors beaucoup mieux le sens des versions française et anglaise de l'article 50(13) et le contexte de la partie où il s'inscrit, contrairement au processus en deux étapes que le Ministère avance.
>
> **v) l'intention du législateur:**
>
> 44. Enfin, il faut souligner que le législateur a ajouté l'article 50(13) à la LFI en 1997. Au même moment, il a aussi amendé la LACC pour y prévoir la disposition similaire de l'article 5.1 (1).
>
> 45. Par ces amendements, le législateur a permis aux propositions de la LFI et aux arrangements de la LACC d'inclure des dispositions relatives à une transaction sur les réclamations contre les administrateurs de la compagnie débitrice. Auparavant, certains jugements, dont l'arrêt rendu en 1993 par la Cour d'appel dans *Michaud* c. *Steinberg inc.*, avaient conclu que la LACC ne permettait pas d'étendre l'application d'un arrangement à des personnes autres que la compagnie débitrice et ses créanciers.
>
> 46. Comme la doctrine l'a correctement souligné, l'objectif premier des amendements était d'encourager les administrateurs à demeurer en poste durant le processus de réorganisation d'une compagnie insolvable :

[3] Le Royal Penfield inc. et autres, C.S. 200-11-010954-025, jugement du 16 juillet 2003 par le juge Clément Gascon;

To encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized, amendments were made to the Act in 1997. Prior to the amendments, it had not been possible in a proposal by a corporation to require creditors to compromise their claims against directors: see Re Kern Agencies Ltd. (No. 2), 13 C.B.R. 11, [1931] 2 W.W.R. 633 (Sask. C.A.)

The BIA and the CCAA were amended to permit claims against directors to be compromised based on the perception that directors resign in an insolvency to limit their personal liability exposure and that such measures were necessary to encourage directors to stay in office during a reorganization of the company.

47. D'ailleurs, de façon concomitante aux articles 50(13) à 50(17), l'article 69.31(1) fut ajouté à la LFI pour prévoir la suspension des procédures contre les administrateurs suite au dépôt d'un avis d'intention comme en l'espèce :

69.31 (1) **[Stay of proceedings - directors]** Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation , no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.	**69.31** (1) **[Suspension des procédures -administrateurs]** Entre la date où une personne morale insolvable a déposé l'avis d'intention prévu au paragraphe 50.4(1) ou une proposition et la date d'approbation de la proposition ou celle de sa faillite, nul ne peut intenter ou continuer d'action contre les administrateurs relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations dont ils peuvent être, ès qualités, responsables en droit.

(Le Tribunal souligne)

48. En somme, par ces amendements, le législateur a voulu simplement permettre que les propositions ou arrangements s'appliquent à d'autres que la seule débitrice ou ses créanciers. Ce faisant, le législateur a voulu favoriser la transaction des réclamations contre les administrateurs d'une débitrice dans le but d'en faire bénéficier la débitrice en facilitant sa réorganisation.

49. Par contre, ces amendements n'ont pas changé la nature même de la proposition de la LFI ou de l'arrangement de la LACC. Dans un cas comme dans l'autre, ils se veulent toujours une proposition ou un arrangement que la débitrice soumet à un vote requérant une majorité suffisante de ses créanciers en nombre et en valeur et qui recherche un compromis acceptable de toutes les réclamations contre elle.

50. Le compromis que vise la proposition continue donc d'être global entre, d'une part, la débitrice et, d'autre part, l'ensemble de ses créanciers, en tenant compte des catégories le cas échéant. S'il est vrai que chaque créancier vote sur une proposition selon son intérêt propre, c'est la règle de la majorité qui gouverne. Si

> la proposition est acceptée par une majorité suffisante en nombre et en valeur des catégories prévues, elle lie tous les créanciers, peu importe la façon dont ils ont voté.
>
> 51. Vu de cet angle, la position qu'adopte ici le Ministère irait à l'encontre des fondements mêmes d'une proposition en exigeant que la « transaction » à laquelle réfère l'article 50(13) soit préalablement conclue séparément avec certains créanciers seulement.
>
> 52. Ainsi, aller dans le sens proposé par le Ministère ne ferait pas seulement dire aux articles de la LFI ce qu'ils ne disent pas. Cela ferait des créanciers des administrateurs de la débitrice les premiers bénéficiaires de ces récents amendements à la LFI, au détriment de la débitrice elle-même, ce qui serait contraire à l'intention du législateur.
>
> **vi) conclusion:**
>
> **53.** En terminant, que la transaction (ou « compromise ») proposée soit généreuse ou non importe peu. Une transaction peut valablement faire partie de la proposition, même si la conséquence possible de son acceptation est, comme ici, la quittance totale des recours contre les administrateurs. Il n'y a pas là motif à devoir procéder en deux étapes comme la prétention du Ministère le commande. Ce sont tous les créanciers de la débitrice qui doivent en décider en une seule étape, au moment du vote sur la proposition.
>
> 54. Le Tribunal estime donc que la transaction (ou « compromise ») de l'article 50(13) est celle que la proposition contient, au profit des créanciers de la débitrice et soumise à leur vote.
>
> 55. Par conséquent, la clause 7 de la proposition respecte les dispositions de l'article 50(13) LFI."
>
> (références omises) (soulignements ajoutés)

[29] Nous partageons entièrement la façon de voir les choses de monsieur le juge Gascon.

[30] Le Tribunal, en définitive s'il acceptait la modification recherchée par Gilles Lavoie, ferait en sorte de le placer dans une situation exceptionnelle lui permettant de bénéficier d'avantages au détriment de CFL et de ses autres créanciers ordinaires. Cela pourrait même jusqu'à aller à compromettre la réalisation du plan d'arrangement, ce qui serait désastreux pour l'ensemble des créanciers et des membres de CFL qui pourront retourner au travail sous peu.

[31] Ceci étant dit, il ne faut pas perdre de vue les dispositions du paragraphe 2 de l'article 5.1 (1) qui prévoit que la transaction ne peut viser la conduite injustifiée ou abusive des administrateurs. Le Tribunal n'a pas, dans le cadre de la présente requête, à décider si tel est le cas pas plus qu'il est nécessaire de faire une réserve à ce sujet.

[32] En outre, le Tribunal, après l'analyse du dossier, considère qu'il n'a pas à appliquer les dispositions du paragraphe 3 de l'article 5.1 (1).

[33] Dans les circonstances et pour les motifs susmentionnées, le Tribunal n'accorde pas la modification recherchée par Gilles Lavoie.

[34] Enfin, le Tribunal, après analyse du dossier et avoir pris connaissance des pièces produites, notamment le plan d'arrangement de CFL daté du 14 avril 2004 et avoir entendu les représentations des procureurs des parties, en vient à la conclusion que le plan d'arrangement est juste et raisonnable de sorte qu'il y a lieu d'accueillir la requête de CFL.

[35] Le Tribunal considère qu'il n'a cependant pas à déclarer tel que CFL a agi de bonne foi avec toute la diligence voulue conformément aux dispositions de la loi, cette conclusion nous paraissant inutile.

[36] **POUR CES MOTIFS LE TRIBUNAL :**

[37] **ACCUEILLE** la requête de la Coopérative forestière Laterrière;

[38] **DÉCLARE** que le plan d’arrangement est juste et raisonnable;

[39] **DÉCLARE** que le plan d’arrangement daté du 14 avril 2004 a été approuvé par la majorité requise de chaque catégorie de créanciers prévue par la Loi;

[40] **DÉCLARE** que le plan d’arrangement lie, suivant ses termes et conditions, tous les créanciers de la requérante visés par le plan d’arrangement sous réserve cependant de ce qui est prévu au paragraphe suivant;

[41] **HOMOLOGUE** et **APPROUVE** le plan d’arrangement de la Requérante sous réserve du droit à l’hypothèque légale de Placements Raoul Grenier inc. et Raoul Grenier nonobstant l’homologation du plan, lequel droit sera tranché aux termes de la requête pour directives, la requérante s'engageant à ne pas faire radier cette hypothèque légale et ce, jusqu’à jugement final;

[42] **DÉCLARE** que la remise au contrôleur par l’acheteur de la Somme Globale au bénéfice des créanciers, l’accomplissement des conditions de mise en œuvre prévues au Plan et la vente des Biens à l’acheteur seront réputées constituer l’exécution intégrale du plan d’arrangement par la Requérante;

[43] **LE TOUT** frais à suivre.

_____
J. CLAUDE LAROUCHE, J.C.S.

Me Maurice Dussault
Mes Brochet, Dussault et ass.
Procureurs de la débitrice

Me Claude Marchand
Mes Pouliot, L'Écuyer
Procureurs du contrôleur Luc Poulin de Ernst & Young inc.

Me Rodrigue Larouche
Mes LAROUCHE & ASSOCIÉS
Procureur de Placements Raoul Grenier inc. et Raoul Grenier

Me Claude Desbiens
Mes AUBIN & ASSOCIÉS
Procureur correspondant pour Me Gilles Grenier (Mes JOLI-CŒUR LACASSE)
Procureurs de Gilles Lavoie

Date d'audience : 26 avril 2004

69.31 (1) **[Suspension des procédures – administrateurs]** Entre la date où une personne morale insolvable a déposé l'avis d'intention prévu au paragraphe 50.4(1) ou une proposition et la date d'approbation de la proposition ou celle de sa faillite, nul ne peut intenter ou continuer d'action contre les administrateurs relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations dont ils peuvent être, ès qualités, responsables en droit.

(2) **[Exception]** La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la personne morale ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

(3) **[Démission ou destitution des administrateurs]** Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la personne morale est réputé un administrateur pour l'application du présent article.

11.5 (1) **[Suspension des procédures - administrateurs]** L'ordonnance rendue au titre de l'article 11 peut prévoir que nul ne peut intenter ou continuer d'action contre les administrateurs de la compagnie débitrice relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

(2) **[Exclusion]** La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

(3) **[Démission ou destitution des administrateurs]** Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
CHICOUTIMI DISTRICT

No.: 150-05-003257-039

DATE: April 27, 2004

UNDER THE PRESIDENCY OF: THE HONORABLE J. CLAUDE LAROUCHE, JCS

Sitting as a designated tribunal under the *Companies and Their Creditors Act* (CCRA), 1985, chapter C-36 and its amendments

IN THE MATTER OF THE ARRANGEMENT PROPOSED BY:

LATERRIÈRE FOREST COOPERATIVE

legal entity under private law with its registered office and principal place of business at 4910, boulevard Talbot, Laterrière, province of Quebec, G0V 1K0
Debtor-applicant

and **ERNST & YOUNG INC.**
150, boulevard René-Lévesque Est, bureau 120, Québec, province of Québec, G1R 6C6 and **LUC**

POULIN 150,
boulevard René-Lévesque Est, bureau 120, Québec, province of Québec, G1R 6C6
Implicated

and **PLACEMENTS RAOUL GRENIER INC.**
Legally constituted legal entity having its head office at 625, 8th Street, Saint-Prime (Quebec) district of Roberval, G8J 1P7 and **RAOUL**

GRENIER 625, 8th
Street, Saint-Prime G8J 1P7 and

GILLES LAVOIE 725
rue des Saguenéens, Chicoutimi G7H 6E2 Interveners

JL 2332

JUDGEMENT

[1] The applicant, the Laterrière Forestry Cooperative, hereinafter referred to as CFL, is submitting a request for approval of the Plan of Arrangement, pursuant to the provisions of section 6 of the Act to facilitate transactions and arrangements between companies and their creditors (CCAA).[1]

The respondent, Luc Poulin of Ernst & Young Inc., the controller of the Plan [2] proposed by CFL, had the following documents sent to the creditors by mail: notice of the meeting to creditors, letter from CFL, proposed Plan of Compromise and Arrangement, controller's report, proof of claim and proxy form and voting form.

[3] The meeting was held on April 23, 2004 at 11 a.m. at the Le Montagnais Hotel in Chicoutimi.

[4] The Controller, in his report, expresses the opinion that the plan proposed by CFL constitutes a fair and equitable arrangement and recommends its acceptance for the following reasons:

> The proposed plan is an essential condition for the implementation of the transaction that CFL management has negotiated to secure its future. It is based on solid foundations. Creditors, suppliers and employees will be able to benefit from the continuity of the company.
>
> CFL has been under BIA and CCAA protection for approximately 1 year. The direct and indirect costs associated with such a process are enormous. The situation has reached the limit and the rejection of the plan by the creditors would result in the liquidation of CFL's assets. In this context, the net realizable value of the assets would be less than the secured charges, so that no amount would be recovered by the unsecured creditors.

[5] The result of the vote compiled by the controller at the meeting of April 23, 2004 is as follows:

has) The vote expressed as a percentage:

. 466 creditors voted in favour of the Arrangement Plan, and

. 6 creditors voted against the Arrangement Plan,

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1 LRC 1985, C-36 and amendments.

so that the Plan was accepted at a percentage of 98.7% in number;

b) The vote expressed in value revealed that:

. creditors representing a total value of $15,319,855.26 have voted in favor of the Plan, and

. creditors with claims worth $1,925,206.37 voted against approval of the Plan.

Thus a percentage of 88.8% in value of proven claims approved the Plan presented, all as it appears from the minutes of the meeting of creditors, the attendance list as well as the compilation of votes, all produced in a bundle in support of these presents under reference R-3;

[6] On 26 April 2004, CFL submitted the application for approval before us.

[7] There were two interventions in the context of the presentation of this request: one from Placements Raoul Grenier inc. and Raoul Grenier and the other from Gilles Lavoie.

[8] However, an agreement was reached between CFL and Placements Raoul Grenier and Raoul Grenier regarding a modification to one of the conclusions sought in the homologation application.

[9] Paragraph 41 of this judgment reflects this agreement which ultimately preserves the right to the legal mortgage of Placements Raoul Grenier and Raoul Grenier, notwithstanding the approval of the Plan until this right is decided under the terms of another motion entitled “Motion for Directions”.

[10] For his part, Gilles Lavoie, in his intervention, asks the Court to modify article 2.04 b) of the proposed Plan of Arrangement.

[11] This article entitled “Release and discharge for CFL directors” provides the following in its first paragraph:

CFL members and/or unitholders, officers, directors and employees, present or former, shall be free and discharged from all pending Claims and legal proceedings to which they may be liable as CFL members and/or unitholders, officers, directors and employees, whether current or former, as of the date of the Initial Order, at law or in equity, with respect to any Claims that arose prior to the date of the Initial Order or arising out of the Plan.

[12] Gilles Lavoie’s request for modification is formulated as follows:

> Add at the end of the first paragraph, after the words “arising from the plan”, the words “except the application to institute proceedings for damages bearing the number of the Superior Court of the district of Chicoutimi 150-17-000591-039”.

[13] Gilles Lavoie reiterated at the hearing his request for modification which was refused by the CFL representatives.

[14] It is important to clarify for a good understanding of the file on this aspect that CFL filed with its creditors on May 2, 2003, a notice of intention to file a composition proposal under the Bankruptcy and Insolvency Act (BIA)2 .

[15] CFL, due to its inability to file a proposal within the meaning of the Bankruptcy and Insolvency Act (BIA) within the prescribed time limits, took advantage of the provisions of the CCAA on October 29, 2003. The order issued by Mr. Justice Babin on that same date, renewed with certain modifications on November 28, December 29, 2003, January 28, 2004, February 6, 2004 and March 22, 2004, includes the following conclusion in paragraph[26]:

> **PROHIBITED,** until further order to the contrary, from bringing or continuing any action against the directors of the applicant in respect of claims against them that predate the proceedings brought under this Act and relating to obligations under this Act for which they may be, in their capacity, legally liable, until the transaction or arrangement, as the case may be, has been approved by the Court or rejected by it or the creditors (section 11.5, CCAA).

[16] Gilles Lavoie, who was employed by CFL from May 19, 1981 to February 18, 2002, invoked an arbitration clause contained in his employment contract in March 2002.

[17] The arbitration case began before Mr. Jacques Philippon, the arbitrator chosen by the parties, on February 27, 2003 and continued on February 28, March 6, 7, 26, 27 and 28, 2003 and April 8 and 10, 2003.

[18] However, following CFL's notice of intention, the trustee sent the parties a notice to stay the arbitration on May 22, 2003.

[19] Subsequently, in mid-July 2003, Gilles Lavoie served a motion to institute proceedings for damages on the directors of CFL and on Samson, Bélair and Paul Grimard, who were involved in the case. Gilles Lavoie is claiming from the defendants the sum of $590,000, including an amount of $175,000.00 as the balance of the amounts owed on his contract.

[20] On November 19, 2003, following the judgment of Mr. Justice Babin, the controller, Luc Poulin, sent a notice of stay in the Superior Court file.

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2 LRC (1985), c. B-3.

[21] Gilles Lavoie requests that the proposed Compromise and Arrangement Plan not cover the amount he is claiming from the administrators, which was refused by the CFL representatives.

[22] At the outset, the Court is of the opinion that Gilles Lavoie could not, after filing the notice of intention provided for in subsection 50.4 (1) of the BIA, bring an action against the directors. The provisions of section 69.31 of the BIA, reproduced below, are clear on this point:

> **69.31** (1) **[Stay of proceedings – directors]** Between the date on which an insolvent body corporate filed the notice of intention under subsection 50.4(1) or a proposal and the date of approval of the proposal or the date of its bankruptcy, no person may commence or continue an action against the directors in respect of claims against them that predate proceedings commenced under this Act and relate to obligations for which they may, in their capacity as such, be liable at law.
>
> (2) **[Exception]** The suspension does not, however, apply to actions against directors for guarantees they have given in relation to the obligations of the legal person or to measures in the nature of an injunction directed against them in relation to the latter.

[23] Subsequently, when CFL availed itself of the provisions of the CCAA, Gilles Lavoie could not bring or continue an action against the directors.
This is what is provided for in article 11.5 of this law, to which is added paragraph [26] of the judgment of Mr. Justice Babin.

[24] Section 5.1(1) of the CCAA which may apply to decide
Gilles Lavoie's intervention states the following:

> **5.1 (1) [Compromise – claims against directors]** A compromise or arrangement involving a debtor company may include, for the benefit of its creditors, provisions for a compromise of claims against its directors that predate proceedings under this Act and relate to obligations under this Act for which they may, in their capacity as such, be legally liable.
>
> **(2) [Restriction]** The transaction may not, however, target claims relating to contractual rights of one or more creditors or based on the false representation or unjustified or abusive conduct of the administrators.
>
> **(3) [Power of court]** The court may declare that a claim against the directors cannot be settled if it is satisfied that settlement would not be just or equitable in the circumstances.

[25] It is appropriate to address the meaning to be given to Article 5.1 (1), the wording of which does not lack clarity.

[26] Our colleague, Mr. Justice Gascon, in a particularly interesting judgment rendered in the case of the proposal of Le Royal Penfiedl inc.3 , on July 16, 2003, made an analysis of section 5.1 (1) of the CCAA and section 50 (13) of the BIA.

[27] He concludes that the transaction on claims against directors referred to in the aforementioned articles does not require that there be a first transaction concluded with the creditors of a debtor having claims against the latter's directors.

[28] Mr. Justice Gascon expressed himself as follows:

> "40. However, the usual French dictionaries give the word "transaction" among others the meaning of "concordat", "arrangement", or "compromise"
>
> 41. For their part, English dictionaries also translate the word "compromise" by referring in particular to the notion of "accepting a compromise ", of "compromise" and "arrangement"
>
> 42. A common thread arises from this. In both French and English, the term "transaction" or "compromised" translates the idea of a compromise, concordat or arrangement. In short, what is covered by sections 50 et seq. of the BIA in the context of composition proposals or what is covered by the CCAA in the context of arrangements with companies' creditors.
>
> 43. Associating, as the debtor suggests, the reference to a “transaction” with the proposal itself then much better respects the meaning of the French and English versions of section 50(13) and the context of the part in which it appears, unlike the two-step process that the Ministry puts forward.
>
> **(v) the intention of the legislator:**
>
> 44. Finally, it should be noted that the legislature added section 50(13) to the BIA in 1997. At the same time, it also amended the CCAA to provide for the similar provision of section 5.1(1).
>
> 45. By these amendments, the legislature allowed the BIA proposals and the CCAA arrangements to include provisions relating to a compromise on claims against the directors of the debtor company. Previously, certain judgments, including the 1993 decision of the Court of Appeal in *Michaud* v. *Steinberg Inc.,* had concluded that the CCAA did not allow the application of an arrangement to be extended to persons other than the debtor company and its creditors.
>
> 46. As the doctrine has correctly pointed out, the primary objective of the amendments was to encourage directors to remain in office during the process of reorganizing an insolvent company:

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3 Royal Penfield Inc. et al., CS 200-11-010954-025, judgment of July 16, 2003 by Judge Clément Gascon;

To encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized, amendments were made to the Act in 1997. Prior to the amendments, it had not been possible in a proposal by a corporation to require creditors to compromise their claims against directors: see Re Kern Agencies Ltd. (No. 2), 13 CBR 11, [1931] 2 WWR 633 (Sask. CA)

The BIA and the CCAA were amended to permit claims against directors to be compromised based on the perception that directors resign in an insolvency to limit their personal liability exposure and that such measures were necessary to encourage directors to stay in office during a reorganization of the company .

47. Moreover, concurrently with sections 50(13) to 50(17), section 69.31(1) was added to the BIA to provide for the suspension of proceedings against directors following the filing of a notice of intention as in this case:

69.31 (1) **[Stay of proceedings - directors]** Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.	**69.31** (1) **[Stay of proceedings - administrators]** Between the date on which an insolvent body corporate filed the notice of intention under subsection 50.4(1) or a proposal and the date of approval of the proposal or the date of its bankruptcy, no person may bring or continue an action against the directors in respect of claims against them that predate the proceedings brought under this Act and relate to obligations for which they may, in their capacity, be liable in law.

(The Court emphasizes)

48. In short, by these amendments, the legislature simply wanted to allow the proposals or arrangements to apply to others than just the debtor or its creditors. In doing so, the legislature wanted to encourage the transaction of claims against the administrators of a debtor with the aim of benefiting the debtor by facilitating its reorganization.

49. However, these amendments have not changed the very nature of the BIA proposal or the CCAA arrangement. In either case, they are still intended to be a proposal or arrangement that the debtor submits to a vote requiring a sufficient majority of its creditors in number and value and which seeks an acceptable compromise of all claims against it.

50. The compromise sought by the proposal therefore continues to be global between, on the one hand, the debtor and, on the other hand, all of its creditors, taking into account the categories where appropriate. While it is true that each creditor votes on a proposal according to his own interest, it is the majority rule that governs. If

the proposal is accepted by a sufficient majority in number and value of the categories provided for, it binds all creditors, regardless of how they voted.

51. Seen from this angle, the position adopted here by the Ministry would go against the very foundations of a proposal by requiring that the "transaction" to which section 50(13) refers be previously concluded separately with certain creditors only.

52. Thus, moving in the direction proposed by the Ministry would not only make the articles of the BIA say what they do not say. It would make the creditors of the debtor's administrators the primary beneficiaries of these recent amendments to the BIA, to the detriment of the debtor itself, which would be contrary to the intention of the legislature.

vi) conclusion:

53. In conclusion, whether the proposed transaction (or "compromise") is generous or not matters little. A transaction may validly form part of the proposal, even if the possible consequence of its acceptance is, as here, the total discharge of claims against the administrators. There is no reason here to have to proceed in two stages as the Ministry's claim requires. It is all the debtor's creditors who must decide in a single stage, at the time of the vote on the proposal.

54. The Court therefore considers that the transaction (or "compromise") of article 50(13) is that which the proposal contains, for the benefit of the debtor's creditors and submitted to their vote.

55. Therefore, clause 7 of the proposal complies with the provisions of section 50(13) LFI."

(references omitted) (emphasis added)

[29] We fully share Judge Gascon's way of seeing things.

[30] The Court, ultimately, if it accepted the modification sought by Gilles Lavoie, would ensure that he was placed in an exceptional situation allowing him to benefit from advantages to the detriment of CFL and its other ordinary creditors.
This could even go so far as to compromise the implementation of the arrangement plan, which would be disastrous for all creditors and CFL members who will be able to return to work shortly.

[31] That said, one must not lose sight of the provisions of paragraph 2 of article 5.1 (1) which provides that the transaction cannot target the unjustified or abusive conduct of the directors. The Court does not have, in the context of the present application, to decide whether this is the case any more than it is necessary to make a reservation on this subject.

[32] Furthermore, the Court, after analyzing the case, considers that it does not have to apply the provisions of paragraph 3 of article 5.1 (1).

[33] In the circumstances and for the reasons set out above, the Court does not grant the modification sought by Gilles Lavoie.

[34] Finally, the Court, after analyzing the file and having taken note of the documents produced, in particular the CFL arrangement plan dated April 14, 2004, and having heard the representations of the parties' attorneys, comes to the conclusion that the arrangement plan is fair and reasonable, so that CFL's application should be granted.

[35] The Court considers that it does not have to declare that CFL acted in good faith with all due diligence in accordance with the provisions of the law, this conclusion appearing to us to be unnecessary.

[36] **FOR THESE REASONS THE COURT:**

[37] **WELCOMES** the request of the Laterrière Forestry Cooperative;

[38] **DECLARES** that the plan of arrangement is fair and reasonable;

[39] **DECLARES** that the plan of arrangement dated April 14, 2004 was approved by the required majority of each class of creditors provided for by the Act;

[40] **DECLARES** that the plan of arrangement binds, according to its terms and conditions, all creditors of the applicant covered by the plan of arrangement, subject however to what is provided for in the following paragraph;

[41] **HOMOLOGATES** and **APPROVES** the Applicant's plan of arrangement subject to the right to the legal mortgage of Placements Raoul Grenier inc. and Raoul Grenier notwithstanding the homologation of the plan, which right will be decided under the terms of the motion for directions, the applicant undertaking not to have this legal mortgage cancelled until final judgment;

[42] **DECLARES** that the delivery to the Controller by the Purchaser of the Global Sum for the benefit of the creditors, the fulfillment of the conditions of implementation provided for in the Plan and the sale of the Assets to the Purchaser will be deemed to constitute the full execution of the plan of arrangement by the Applicant;

[43] **ALL** costs to follow.

_____
J. CLAUDE LAROUCHE, JCS

Mr. Maurice Dussault Mr.
Brochet, Mr. Dussault and ass.
Debtor's attorneys

Mr. Claude Marchand
Mes Pouliot, L'Écuyer
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Mr. Rodrigue Larouche Mr.
LAROUCHE & ASSOCIATES Attorney
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Mr. Claude Desbiens
My AUBIN & ASSOCIATES
Corresponding attorney for Mr. Gilles Grenier (Mr. JOLI-CŒUR LACASSE)
Attorneys for Gilles Lavoie

Hearing date: April 26, 2004

69.31 (1) **[Stay of proceedings – directors]** Between the date on which an insolvent body corporate filed the notice of intention under subsection 50.4(1) or a proposal and the date of approval of the proposal or the date of its bankruptcy, no person may commence or continue an action against the directors in respect of claims against them that predate proceedings commenced under this Act and relate to obligations for which they may, in their capacity as such, be liable at law.

(2) **[Exception]** The suspension does not, however, apply to actions against directors for guarantees they have given in relation to the obligations of the legal person or to measures in the nature of an injunction directed against them in relation to the latter.

(3) **[Resignation or removal of directors]** If all the directors resign or are removed by the shareholders without being replaced, any person who directs or supervises the business and affairs of the body corporate is deemed to be a director for the purposes of this section.

11.5 (1) **[Stay of proceedings - directors]** An order made under section 11 may provide that no person may bring or continue any action against the directors of the debtor company in respect of claims against them that arose before proceedings were brought under this Act and relate to liabilities of the company for which they may, in their capacity as directors, be liable at law until the compromise or arrangement, as the case may be, has been approved by the court or rejected by the court or the creditors.

(2) **[Exclusion]** The stay does not, however, apply to actions against directors for guarantees given by them in relation to the company's obligations or to measures in the nature of an injunction directed against them in relation to the company.

(3) **[Resignation or removal of directors]** If all the directors resign or are removed by the shareholders without being replaced, any person who directs or supervises the business and affairs of the company shall be deemed to be a director for the purposes of this section.

Tab

11

Court of King's Bench of Alberta

Citation: Cleo Energy Corp (Re), 2024 ABKB 773

Date:
Docket: B301 163430
Registry: 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.

Endorsement
of the
Honourable Justice M.H. Hollins

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[1] Cleo Energy Corp. is an oil and gas company operating in Alberta. It sells some of its products to Trafigura Canada Limited and Trafigura pays on the 24th day of each month for the gas products purchased in the month prior.

[2] In addition to this arrangement, which is governed by a Commercial Agreement, Trafigura also loaned $1M USD to Cleo in August of 2024 (the Loan), as Cleo has been in financial and operational difficulties for most of this year.

[3] The Loan, governed by a Prepayment Agreement, provided that Cleo would make a installment repayment of principle every month (approximately $91,000). It also gave Trafigura the right to set-off further amounts against its obligations to Cleo under the Commercial Agreement, which set-off amount is calculated based on the monthly production,

[4] The Loan matures on July 1, 2025. However, on December 8, 2024, Cleo filed and served a Notice of Intention to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3 as amended (BIA). As a result, there is a stay of proceedings of any actions against Cleo for 30 days therefrom. The court application for an order extending that time is scheduled for January 6, 2025.

[5] In the meantime, however, Trafigura has advised Cleo that it intends to set-off the entire balance of the Loan ($750,000) against its payment due to Cleo on December 24, 2024. Absent this set-off, that payment would be $757,644.77 but with the set-off, Trafigura is proposing to pay $35,965.78.

[6] Cleo takes the position that the statutory stay applies to Trafigura's right to set-off the balance of the outstanding Loan amount and therefore Trafigura's attempt to do so contravenes the BIA. Trafigura says that this is a pre-filing debt under the Prepayment Agreement and therefore its contractual rights to set-off are not affected by the stay.

[7] Both parties allege significant prejudice if their respective position is not upheld – Cleo because without this $757,644.77 payment, it will cease operations before the January 6, 2025 court date and Trafigura because, if it pays the full December amount now, it is unlikely to recoup this money as an unsecured creditor in the ongoing proceedings.

[8] For the reasons that follow, I agree with Cleo that Trafigura is not at liberty to set-off the entire Loan balance against its December payment and that the $757,644.77 payment is due immediately.

Analysis

[9] Trafigura relies primarily on s.97(3) BIA:

> **Law of set-off or compensation**
> 97(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

[10] This is equally applicable to a proposal proceeding such as this; s.66(1) BIA.

[11] Thus, there is no question that Trafigura has a right of set-off but for how much? Trafigura argues that the whole amount of the outstanding balance can be set off either (1) because it is an existing debt, whether due now or later; or (2) because Cleo's pre-filing breaches of the Prepayment Agreement entitle Trafigura to accelerate the outstanding amount.

[12] Trafigura points to various sections of the Prepayment Agreement to make the point that the right of set-off was central to the entire repayment arrangement, which is clearly accurate (Recital B, ss.2.1 and 5.3 of the Prepayment Agreement). It says that a debt is a debt, whether owing now or in the future; *North American Tungsten Corp. Ltd*, 2015 BCSC 1382 at para.10. However, acknowledging the existence of a debt is different than saying that debt is owing.

[13] There is a 1998 Ontario case, *Re 728835 Ontario Ltd*, in which the Court reasoned that any existing debt, regardless of when it was payable, was eligible for set-off. The decision was upheld by the Ontario Court of Appeal; 1998 CarswellOnt 2576. To the extent that my decision is contrary to that jurisprudence, I rely on subsequent cases which have delved more deeply into the distinction of debts owing pre-filing versus post-filing.

[14] In fact, *728835 Ontario Ltd* was cited by two of my colleagues, once in *Schendel Mechanical Contracting Ltd. (Re)*, 2021 ABQB 893 and once in *FAST Industries Ltd v Sparta Engineering Inc*, 2017 ABQB 240 (affirming Master Smart at 2016 ABQB 215. Both of those

decisions centred on what was owing at the date of the bankruptcy or filing. Justice Topolniski put it thus:

> Section 97(3) *BIA* preserves legal set-off and equitable set-off where two persons are both debtors and creditors of the other: *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69, [1995] 3 S.C.R. 453 (S.C.C.). Indeed, as noted in that case at para 60:
>
> > ...in the bankruptcy context, the law of set-off allows a debtor of a bankrupt who is also a creditor of the bankrupt to refrain from paying the full debt owing to the estate, since it may be that the estate will only fulfil a portion, if that, of the bankrupt's debt. Consequently, in this limited sense the party claiming set-off has Parliament's blessing for the "reordering" of his priority in bankruptcy by virtue of the operation of the law of set-off.
>
> Because the effect of the set-off is to prefer one creditor over the general body of creditors, it is confined within narrow limits and the requirement of mutuality is rigorously enforced, *Bank of Credit & Commerce International S.A. (No. 8), Re* (1995), [1996] 2 W.L.R. 631 (Eng. C.A.). Accordingly, s 69 of the *BIA* stays all proceedings against a bankrupt or a person who has filed a NOI including set-off of *pre-bankruptcy and pre-NOI debts against post-bankruptcy and NOI debts*: *Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417 (S.C.C.); *Sabey, Re*, [1996] B.C.J. No. 2820 (B.C. S.C.) at para 16; *Jones, Re* (2003), 66 O.R. (3d) 674 (Ont. C.A.) at para 14; *Cobourg Felt Hat Co., Re*, [1925] 2 D.L.R. 997 (Ont. S.C.); *728835 Ontario Ltd., Re* (1998), 3 C.B.R. (4th) 211 (Ont. Gen. Div. [Commercial List]), aff'd 728835 Ontario Ltd., Re (1998) [1998 CarswellOnt 2576 (Ont. C.A.)].
>
> The longstanding policy reason for this limitation is that, notwithstanding s 97(3), the equitable rights of creditors cannot be undermined. As noted in *Cobourg Felt* at paras 9 -10, allowing set-off from a post NOI debt against a debtor's pre-NOI obligations is inconsistent with, and in effect, a fraud on the proposals contrary to equity and good conscience. In my view, the competing policy objective of fostering continued relationships between restructuring entities or persons and their trading partners is trumped by the need to protect the integrity of the bankruptcy system.
>
> *FAST Industries Ltd v Sparta Engineering Inc*, 2017 ABQB 240 at paras.20-22

[15] Although Trafigura intimates that the maturity debt of the Loan is irrelevant for our purposes, it is not. While Cleo is meeting its obligations under the Prepayment Agreement, there is no contractual ability to accelerate the obligation in order to set off the balance against Trafigura's current obligations to Cleo. Without the ability to accelerate the amount owing, there can be no right to set-off an amount not yet due.

[16] Houlden & Morawetz, cited by Master Smart in FAST Industries, defines a debt existing at the time of filing as one capable of being enforced:

.

> In order for legal set-off to apply, the debts must exist between the same parties and be capable of being ascertained with certainty at the relevant date:
>
> Mutual debts are debts due from either party to the other for liquidated sums or money demands that can be ascertained with certainty at the date of bankruptcy. Each party must have the right to enforce its claim at the date of bankruptcy, and if one party cannot do so, there is no right of legal set off ...[emphasis added]
>
> L.W. Houlden and Geoffrey B. Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, WestlawNext Canada (Consulted on March 21, 2016) [Houlden] F§237 – Set-Off (1) – Generally Houlden, supra at F§237 – Set-Off (2) – Legal Set-Off

[17] In the alternative, Trafigura argues that Cleo was in breach of the Prepayment Agreement prior to filing its NOI on December 8, 2024 because it did not disclose the pending proceedings nor the material and adverse changes to its financial position that precipitated the BIA proceedings. Trafigura says that these pre-filing breaches entitle it to accelerate and set-off the remaining Loan balance.

[18] With respect, this argument cannot be accepted. To do so would undermine the entire mechanism and the objectives of the protections created under the BIA. Unless working with their secured creditors, debtors do not generally announce their intentions to file a NOI as that would obviate the statutory protections sought. Nor can I accept that there was an undisclosed material adverse change. Trafigura knew about Cleo's financial troubles – that is why it loaned the money in the first place. Like many creditors in insolvency proceedings, it did not call its loan prior to the NOI filing and cannot do so now.

Conclusion

[19] I appreciate the perception of unfairness to Trafigura in having extended a loan to Cleo, substituting a right of set-off in place of actual security (likely not an option at that point) and now being foreclosed from that contractual right. However, that is akin to the perceived unfairness visited on all unsecured creditors whose rights are suspended for the statutory objectives of BIA-sponsored reorganization.

[20] Those objectives, as concerns Cleo, must in my view take precedence over the rights of one unsecured creditor, particularly where granting the relief sought by Trafigura would not only mean the end of the company but would prejudice the other creditors of Cleo, both in extinguishing the possibility of a proposal to all but also in paying one creditor in preference to the others.

[21] Cleo's application is granted and Trafigura's cross-application is dismissed. A filed copy, corrected for any typographical errors, will be provided to the parties as soon as possible. Costs

will be reserved and may be spoken to later if counsel cannot agree. The issue of ongoing monthly set-off, which was raised by both parties, is adjourned to the scheduled court appearance on January 6, 2025. The presiding Justice will be made aware of this Endorsement.

Heard on the 23rd day of December, 2024.

Dated at the City of Calgary, Alberta this 26th day of December, 2024.

M.H. Hollins
J.C.K.B.A.

Appearances:

Tom Cuming and Sam Gabor
for Cleo Energy Corp.

Karen Fellowes, KC and Archer Bell
for Trafigura Canada Ltd.