Clerk's Stamp

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

TABLE OF AUTHORITIES

Tab

1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating

(a) the insolvent person's intention to make a proposal,

(b) the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and

(c) the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

and attaching thereto a copy of the consent referred to in paragraph (b).

50.4(2)Certain things to be filed

Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver

(a) a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50.4(4)Exception

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected

If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors
Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(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.

50.4(8)Where assignment deemed to have been made
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.

50.4(9) Extension of time for filing proposal
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

(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.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11)Court may terminate period for making proposal
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.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Judicial Consideration (2)

Currency
Federal English Statutes reflect amendments current to June 19, 2024
Federal English Regulations Current to Gazette Vol. 158:12 (June 5, 2024)

End of Document

Tab

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2004 NBBR 168, 2004 NBQB 168
New Brunswick Court of Queen's Bench

Plancher Heritage Ltée / Heritage Flooring Ltd., Re

2004 CarswellNB 358, 2004 NBBR 168, 2004 NBQB 168, [2004]
N.B.J. No. 286, 279 N.B.R. (2d) 1, 3 C.B.R. (5th) 60, 732 A.P.R. 1

In the Matter of The Proposal of Plancher Heritage Ltée / Heritage Flooring Ltd.

Glennie J.

Judgment: July 20, 2004
Docket: 10543, Estate No. 51-114608

Counsel: G. Patrick Gorman, Q.C. for Heritage Flooring Ltd.
Stephen J. Hutchinson, Jeffrey R. Parker, Lee C. Bell-Smith for Royal Bank of Canada

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.6 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — General principles

Test for whether insolvent company would be able to make viable proposal, if granted extension of stay, is whether it would likely, as opposed to certainly, be able to present viable proposal — Test is not whether or not specific creditor would be prepared to support proposal — Purpose of stay provisions under Bankruptcy and Insolvency Act is to preserve and protect status quo at moment when insolvent party files Notice of Intention to Make Proposal — Intention of stay provisions is to allow insolvent party to continue its business in accordance with its existing authorized credit agreements — Secured creditor cannot unilaterally amend loan or credit agreement relating to secured revolving line of credit by capping available line of credit.

Table of Authorities

Cases considered by *Glennie J.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to

Com/Mit Hitech Services Inc., Re (1997), 1997 CarswellOnt 2753, 47 C.B.R. (3d) 182 (Ont. Bktcy.) — considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — considered

Gene Moses Construction Ltd., Re (1999), 1999 CarswellBC 149, 9 C.B.R. (4th) 275 (B.C. Master) — considered

National Bank of Canada v. Dutch Industries Ltd. (1996), 149 Sask. R. 317, 45 C.B.R. (3d) 103, 1996 CarswellSask 631 (Sask. Q.B.) — referred to

Scotia Rainbow Inc. v. Bank of Montreal (2000), 2000 CarswellNS 216, 18 C.B.R. (4th) 114, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 186 N.S.R. (2d) 153, (sub nom. *Scotia Rainbow Inc. (Bankrupt) v. Bank of Montreal)* 581 A.P.R. 153 (N.S. S.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 50(1.5) [en. 1992, c. 27, s. 18(1)] — considered

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

s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4)(b) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

ss. 69-69.3(1) — referred to

ss. 69-69.31 — referred to

s. 69(1) — referred to

s. 69(1)(a) — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 244 — referred to

MOTION by insolvent company for extension of stay under s.69 of *Bankruptcy and Insolvency Act* and for order that bank return to it all funds taken from its operating accounts.

***Glennie J.*:**

1 On February 11, 2004, Plancher Heritage Ltee / Heritage Flooring Ltd. ("Heritage") filed a Notice of Intention To Make A Proposal (the "Notice of Intention") pursuant to Subsection 50.4(1) of the *Bankruptcy and Insolvency Act* (the "BIA"). A.C. Poirier & Associates Inc. (the "Trustee") consented to act as Trustee under the proposal. Section 69 of the BIA grants a stay (the "Stay") of all creditor actions and remedies against the insolvent person, which stay in this case was to expire on March 12, 2004. On March 12, 2004, I extended the Stay in this matter to Thursday, March 25, 2004 and advised that I would file written reasons for the granting of such an extension. These are those reasons.

2 There is also another issue, namely whether Heritage's banker, Royal Bank of Canada (the "Bank") operated contrary to the stay by sweeping Heritage's operating account and capping its available line of credit or whether the Bank is authorized to do so by virtue of Section 65.1(4)(b) of the BIA.

Background

3 Heritage manufactured hardwood flooring at its plant in Kedgwick, New Brunswick. It had annual gross sales in the range of five to six million dollars.

4 On January 30, 2001, Heritage accepted an offer from the Bank's Asset Based Finance Division to establish a revolving credit facility in favour of Heritage with a credit limit of two million dollars subject to the limitation that the aggregate amount

22 On February 25, 2004, Heritage filed a motion seeking an extension of the stay and also an order that the Bank return to it all funds taken from its operating accounts since February 11, 2004 and that the Stay be extended to April 12, 2004.

23 The Bank opposed Heritage's motion and subsequently filed its own motion seeking an order declaring the 30-day period for filing a proposal terminated pursuant to Sections 50.4(11)(b) and (c) of the BIA or, in the alternative a declaration that Sections 69 to 69.3(1) of the BIA no longer operate in respect of the Bank pursuant to Section 69.4 of the BIA and, in the further alternative, an order determining the classes of secured creditors pursuant to Subsection 50(1.5) of the BIA and in so doing determine that the Bank does not fall within the same class of secured creditors as Business Development Bank of Canada and Farm Credit Corporation.

24 Counsel for the Bank argued that Heritage would not likely be able to make a viable proposal before the expiration of the 30-day period that will be accepted by the creditors of Heritage and that the Bank is likely to be materially prejudiced by the continued operations of Sections 69 - 69.31 of the BIA.

25 The Bank argued that its level of security decreased significantly after the filing by Heritage of the Notice of Intention. The Bank says that in the nine days following the filing, its level of security decreased in the approximate amount of $140,000.00. Five days later, on February 25, 2004, the Bank says its position had been eroded by a further amount of approximately $38,000.00.

26 Immediately prior to the filing of the Notice of Intention, Heritage was entitled to draw upon its credit facility at the Bank in the amount of $1,283,444.74. Subsequently, Heritage made significant deposits to its Canadian dollar operating account and its U.S. dollar operating account. On the date of filing of the Notice of Intention, the Bank capped Heritage's credit facility at the then current outstanding balance of $1,283,444.74.

27 Subsequent to the filing of its Notice of Intention, Heritage made deposits to its Canadian account and its U.S. account totalling $209,944.03. Subsequent to the deposits being made by Heritage, the Bank transferred the deposited funds to the blocked account and swept the funds in what the Bank says was in accordance "*with the existing contractual arrangements with Heritage*." The balance outstanding under the credit facilities was thus reduced to $1,080,589.38. The Trustee advised counsel for the Bank that the Bank's action offended the Stay in place as a result of the filing of the Notice of Intention. He went on to state, "*the actions of the bank could have a damaging affect on the debtor's ability to restructure*." The Trustee notified counsel for the Bank that Heritage had confirmed to him that the Bank had seized $205,445.01 from Heritage's account and the Trustee requested the immediate return of the funds.

28 The Bank argued that if it had not reduced the amount of the loan balance through the sweep of the account in the usual process. The Bank says it would, as of March 1, 2004, have been in a margin deficit of $179,984.88 in the 14 days since the filing of the Notice of Intention due to a decrease of the level of the Bank's security from $1,283,529.43, as of the date of filing of the Notice, to $1,103,544.55 as of the February 25, 2004 upload. The Bank argued that a decrease of approximately $180,000.00 in the level of its security over a period of 14 days amounted to material prejudice and that the stay should not be allowed to continued.

29 The Trustee takes the position that the Bank's action in sweeping the account was in contravention of the Stay and that the Bank should be ordered to replace the funds and be restrained from taking any further action in this regard without further order of this Court. The Trustee also asserts that the Bank has not been materially prejudiced.

The Application For An Extension Of Time

30 Subsection 50.4(9) of the BIA provides:

> 69.(1) Subject to subsections (2) and (3) and sections 69.4 and 69.5, 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.

31 I am satisfied, on a balance of probabilities, that as of March 12, 2004 Heritage met the following criteria to grant an extension: a) It had acted, and continued to act, in good faith and with due diligence; b) It would likely be able to make a viable proposal if the extension were to be granted; and, c) no creditor of Heritage would be materially prejudiced if the extension were to be granted.

32 The test for whether Heritage would likely be able to make a viable proposal, if granted the extension, is whether it would likely, as opposed to certainly, be able to present a viable proposal. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]), Justice Farley was of the opinion that "viable" means "reasonable on its face" to a reasonable creditor and that "likely" did not require certainty but meant "might well happen", "probable" or "to be reasonably expected." See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S. S.C.).

33 In support of its motion, the Bank relied on Section 50.4(11)(c) of the BIA and argued that Heritage would not be able to make a proposal before the expiration of the 30-day period that would be accepted by the majority of its creditors. It relied upon *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]) in support of its argument. In *Cumberland Trading Inc.*, Skyview International Finance Corporation represented 95 percent of the value of the claims of secured creditors of Cumberland and 67 percent of all creditors' claims. Skyview therefore had a veto power on any vote on a proposal and it asserted that there was no proposal which Cumberland could make that it would approve. Justice Farley allowed Skyview's motion and declared terminated the 30-day period in which to file a proposal.

34 Similarly, in *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.), Toronto Dominion Bank ("TD Bank") was owed more than 90 percent of the debtor's total indebtedness and brought a motion pursuant to Section 50.4(11) of the BIA requesting a declaration that the 30-day period provided in Section 50.4(8) be terminated. Justice Farley allowed TD Bank's application, recognizing that TD Bank was the overwhelming creditor and thus was in a veto position with respect to any proposal.

35 However, in the present case, the Trustee has advised that the Bank would be outside the terms of any proposal and would in fact be paid out. As well, Gilbert LeBlanc testified that Group Savoie, which has expressed an interest in acquiring all of the outstanding shares of Heritage, understands that the Bank would have to be paid out. Accordingly, the Bank's argument that it is in a position to veto any proposal put forth by Heritage must fail since the Trustee has advised that the Bank will not be in a position to veto any proposal since it will be outside the terms of any proposal and would not be included in any class of creditors of Heritage.

36 In granting an extension of the stay, I relied on the fact that Groupe Savoie Inc. expressed a desire to negotiate with the shareholders of Heritage for the purpose of structuring a transaction whereby it would acquire all of the outstanding shares of Heritage. It was anticipated that negotiations would take place from March 15th to March 17, 2004 "*with a formal letter of intent to be provided no later than Monday, March 22, 2004 and open for acceptance by the shareholders of the Company until 5:00 p.m. on Tuesday, March 23, 2004*." Groupe Savoie is an arms length corporation with substantial assets.

37 At the time of the hearing of Heritage's motion, I was satisfied that Heritage established on a balance of probabilities that an extension was justified. Accordingly, I allowed Heritage's application for an extension of the Stay to March 25, 2004.

The Availability of Credit

38 The next issue to be addressed is whether the Bank acted contrary to the Stay provisions of Section 69 of the BIA by sweeping Heritage's operating account and capping its operating facility subsequent to the date Heritage filed its Notice Of Intention. Heritage argues that by so doing the Bank in effect executed a remedy contrary to Section 69.(1) of the BIA.

Tab

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2020 NSSC 131
Nova Scotia Supreme Court

Scotian Distribution Services Limited (Re)

2020 CarswellNS 256, 2020 NSSC 131, 318 A.C.W.S. (3d) 12, 78 C.B.R. (6th) 258

In the Matter of: The Proposal of Scotian Distribution Services Limited

Reg. Raffi A. Balmanoukian

Heard: March 27, 2020
Judgment: April 6, 2020
Docket: 43999, Estate No. 51-2624515

Counsel: Tim Hill, Q.C., for Applicant

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Headnote
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Provincial court adopted essential services model in response to Covid-19 pandemic — Only matters deemed urgent or essential by presiding jurist would be heard and they would be heard by method of least direct personal interaction — Debtor had brought application for extension of time to file proposal, pursuant to s. 50.4(9) of Bankruptcy and Insolvency Act — Application granted — Time to file proposal was extended — Matter was heard by teleconference — Urgent or essential threshold was met — Limitation period in s. 50.4(8) of Act was nigh — Lack of extension would result in deemed assignment in bankruptcy — Deemed assignment would at least potentially have impacts that ran beyond solely individual interests of corporate debtor — Evidence of current status of process established good faith requirement — Debtor had employees and contracts and its operations included transportation which were important and perhaps essential on both micro and macroeconomic basis — No creditor objected and there was no evidence that extension would cause material prejudice to any creditor — Debtor had to demonstrate that it was likely to be able to make viable proposal with extension in place but in current context benefit of any doubt should be accorded to debtor — In current environment, creditor would be well advised to consider viability and desirability of proposal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50.4(9).
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 50.4(8) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(c) [en. 1992, c. 27, s. 19] — considered

APPLICATION by debtor for extension of time to file proposal.

***Reg. Raffi A. Balmanoukian*:**

1 The word "Bankrupt" is derived from the Italian "*banca rotta*." In times of yore, an insolvent merchant's place of business would be trashed by irate creditors; the result was a "broken bench."

2 In Nova Scotia, the Bench will not break.

3 During the Great Plague of 1665-6, the Court in London moved from Westminster to Oxford (as did Parliament). But yet, they persisted.

4 In 2020, we are blessed with far greater modalities of communication and administration. As circumstances direct they are being, and will be brought, to bear in the interests of delivering both justice and access to justice.

5 As I write, and with a hat tip to Mr. Yeats, mere anarchy is loosed upon the world.

6 It is not business as usual. Virtually nothing is.

7 On March 19, 2020, the Supreme Court of Nova Scotia adopted an "essential services" model in response to the Covid-19 pandemic. This has meant that only matters deemed urgent or essential by the presiding jurist will be heard until further notice; and those, by the method of least direct personal interaction that is consistent with the delivery and administration of justice. This can, in appropriate instances, include written, virtual, electronic, telephone, video, or other modalities, and adaptations of procedures surrounding filing of affidavit and other material.

8 On March 20, 2020, I issued a memorandum to all Trustees in Nova Scotia reflecting this as it applies to this Court, and underscoring the "urgent or essential" standard. It can be obtained from the Deputy Registrar whose contact coordinates, in turn, are posted on the Court website (courts.ns.ca).

9 "Essential" means such matters that must be filed, with or without a scheduled hearing, to preserve the rights of the parties - such as those which face a legislative limitation period. "Urgent" means matters that simply cannot wait, in the opinion of the presiding jurist.

10 Both the Chief Justice of Nova Scotia, the Honourable Chief Justice Michael J. Wood, and the Chief Justice of the Supreme Court of Nova Scotia, the Honourable Chief Justice Deborah K. Smith, have been clear that this does not mean that Courts, being an essential branch of government and the guardian of the rule of law, cease to function. It means that they operate during this global emergency - and its local manifestation - on an essential services basis.

11 Accordingly, scheduled matters are deemed to be adjourned *sine die* unless brought to my attention in accordance with the memorandum noted above and I (or a presiding Justice) deem the standard to be met.

12 Against that backdrop, evolving in real time, I faced the present application. It is a motion for an extension of time to file a proposal, pursuant to Section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). That section reads:

> **(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
>
> (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. [emphasis added]

13 The present motion had been scheduled for March 27, 2020. The applicant's Notice of Intention had been filed on February 28, 2020, meaning that its expiration, 30 days thereafter, was at the end of March, 2020 (BIA s. 50.4(8)). The scheduled motion was therefore at the very end of this timeline, and the lack of an extension would result in a deemed assignment in bankruptcy (BIA s. 50.4(8)).

14 The applicant sought to have the matter heard by teleconference. After a review of the file material, I agreed. The Deputy Registrar, with my gratitude, arranged for recording facilities; this is still an open Court of record. Affected entities are still entitled to notice, and they are still entitled to be heard. As well, our open court principle remains and is at least as important as ever.

15 To that end, the applicant was directed to provide affected entities, including creditors, with particulars of the conference call, including time and call-in particulars. That was done, and a creditor (who did not object to the application) did indeed avail itself of this facility.

16 I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

17 I have granted the order based on the following factors:

18 First, I am satisfied that the 'urgent or essential' threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

19 Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; *and* that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

20 The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

21 It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

22 No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the *extension* would be prejudicial, not whether the proposal *itself* would be.

23 This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

24 To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

25 I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish, and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

26 This Court will, no doubt, face a considerable additional case load as the economic fallout of the current human disaster works its way through what is and remains a robust legal process. An applicant should have every reasonable opportunity to avail itself of a restructuring rather than a bankruptcy, assuming it otherwise meets the requirements of BIA 50.4(9).

Conclusion

27 The application is granted, and I have issued the order allowing the time to file a proposal to be extended to and including May 11, 2020.

Application granted.

Tab

4

2022 SKKB 236, 2022 CarswellSask 534

2022 SKKB 236
Saskatchewan Court of King's Bench

T & C Steel Ltd., Re

2022 CarswellSask 534, 2022 SKKB 236

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3, AS AMENDED, OF T & C STEEL LTD. AND T & C REINFORCING LTD.

T & C STEEL LTD. and T & C REINFORCING LTD. (Applicants)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3, ASAMENDED, OF UNDER THE SUN GROWERIES INC.

UNDER THE SUN GROWERIES INC. (Applicant)

Scherman J.

Judgment: October 28, 2022
Docket: BKY-RG-00228-2022

Counsel: Travis K. Kusch, David J. Smith, for Applicants
Kelsey J. Meyer, Andrew Basi, for Proposal Trustee

Subject: Insolvency
Headnote
Bankruptcy and insolvency
Table of Authorities
Cases considered by *Scherman J.*:
Cantrail Coach Lines Ltd., Re (2005), 2005 BCSC 351, 2005 CarswellBC 581, 10 C.B.R. (5th) 164 (B.C. S.C.) — considered
Enirgi Group Corp. v. Andover Mining Corp. (2013), 2013 BCSC 1833, 2013 CarswellBC 3026, 6 C.B.R. (6th) 32 (B.C. S.C.) — considered
Scotian Distribution Services Limited (Re) (2020), 2020 NSSC 131, 2020 CarswellNS 256, 78 C.B.R. (6th) 258 (N.S. S.C.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — pursuant to

***Scherman J.*:**

1 Each of T & C Steel Ltd. [TCS], T & C Reinforcing Ltd. [TCR] and Under the Sun Groweries Inc. [UTSG] had given Notices of Intention to Make a Proposal [NOI] to their unsecured creditors. On the filing thereof, Grant Thornton was named as the Proposal Trustee for each. The applications did not include proposals to their secured creditors.

2 On September 13, 2022, Gabrielson J. made an order consolidating the proceedings in BKY-RG-00228-2022 and BKY-RG-00229-2022 respecting TCS and TCR into the court file BKY-RG-00228-2022 and granted, pursuant to s. 50.4(9) of the

Bankruptcy and Insolvency Act, RSC 1985, c B-3 [*BIA*], a first extension of the time for those applicants to file their proposal to 11:59 p.m. on October 28, 2022, along with ordering other interim measures. He also made a similar extension order in respect of UTSG.

3 Each of the applicants now asks the court to order an extension of the time to file their respective proposals to creditors to December 9, 2022.

Applicable Legislation and Authorities

4 Section 50.4(9) of the *BIA* states as follows:

> **Extension of time for filing proposal**
>
> **50.4 (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
>
> (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.

5 In light of this provision, before granting the requested extension, I have to be satisfied that:

a. The respective applicants are acting in good faith and with due diligence;

b. They are likely able to make a viable proposal to their respective creditors if the extensions are granted; and

c. No creditor would be materially prejudiced if the respective extensions are granted.

6 In *Cantrail Coach Lines Ltd. (Re)* 2005 BCSC 351, 10 CBR (5th) 164 [*Cantrail*], the British Columbia Supreme Court said the following in respect of this section:

> [11] I am satisfied on reading the case law provided by counsel that in considering this type of application an objective standard must be applied. In other words, what would a reasonable person or creditor do in the circumstances. The case of *Re: N.T.W. Management Group Ltd.* [1993] O.J. No. 621, a decision of the Ontario Court of Justice, is authority for the proposition that the intent of the Act and these specific sections is rehabilitation, and that matters considered under these sections are to be judged on a rehabilitation basis rather than on a liquidation basis.
>
> [12] I am also satisfied that it would be important in considering the various applications before me to take a broad approach and look at a number of interested and potentially affected parties, including employees, unsecured creditors, as well as the secured creditor that is present before the Court.

7 In *Enirgi Group Corp. v Andover Mining Corp.* 2013 BCSC 1833, 6 CBR (6th) 32 [*Enirgi Group*], the Court said:

> [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": *Cumberland* [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not be a certainty and "likely" means "such as might well happen." (*Baldwin* [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

8 Then more recently the Nova Scotia Supreme Court said the following in *Scotian Distribution Services Limited (Re)* 2020 NSSC 131 [*Scotian Distribution*]:

> [24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.
>
> [25] I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish, and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

The Position of Interested Parties

9 Counsel for the applicants says that the affidavits of Chad Joinson, the sole director and shareholder of each of the applicants, provides evidence that they are acting in good faith, with due diligence and that no creditor would be materially prejudiced. He adds that given there is no evidence presented by any interested party disputing this evidence, these requirements are satisfied. Thus, counsel says the remaining issue is whether I am satisfied the applicants are likely able to make a viable proposal to their respective creditors if the extensions are granted.

10 The only interested parties appearing were the Royal Bank of Canada [Royal Bank] through their legal counsel Mr. Olfert and David Smith for Canada Revenue Agency [CRA]. The Court was advised that the Royal Bank takes no position in respect of the applications. This is understandable since no compromise of the debts to it are proposed.

11 David Smith advised the Court that the CRA does not take issues with the good faith or diligence of the applicants, nor was he able to say that the ongoing obligations of the applicants to the CRA (there being no current indebtedness) are prejudiced. However, he takes the position that the extensions sought should not be granted, because he argues that on the basis of the information available to the Court, I should not be satisfied the applicants are likely able to make a viable proposal to their respective creditors.

My Analysis and Conclusions

12 The affidavits of Chad Joinson make no express statement that the applicants are likely able to make a viable proposal to their respective creditors. The furthest he goes is to state: "It is my honest belief that a viable proposal will be made in this matter". He provides no factual basis for his stated honest belief, nor does he speak to whether the financial information and projections the applicants were providing to the Proposal Trustee were accurate and truthful. This is significant because the Proposal Trustee relied on the financial information and projections provided for its reports to the Court.

13 The best information that I have in respect of the prospects for a viable proposal are contained in the Proposal Trustee's Second Report in respect of the applications. Their reports are not evidence, but proposal trustees have a status akin to officers of the court in *BIA* proceedings. The Second Report respecting TCS and TCR contains the following statements:

> 7. To date, nothing has come to the Proposal Trustee's attention that would cause it to question the reasonableness of the information and explanations provided to it by the Companies and their management. The Proposal Trustee has requested that management bring to its attention any significant matters which were not addressed in the course of the Proposal Trustee's specific inquiries. Accordingly, this Report is based on the information (financial or otherwise) made available to the Proposal Trustee by the Companies.
>
> . . . . .
>
> 25. The Proposal Trustee's review of the Second Cash Flow Statement consisted of inquiries, analytical procedures and discussions related to information supplied to the Proposal Trustee by management of T&C. Since hypothetical

assumptions need not be supported, the Proposal Trustee's procedures with respect to such assumptions were limited to evaluating whether they were consistent with the purpose of the Second Cash Flow Statement. The Proposal Trustee has also reviewed the support provided by management for the probable assumptions and the preparation and presentation of the Second Cash Flow Statement. Based on the Proposal Trustee's review, nothing has come to its attention that causes it to believe that, in all material respects:

(a) the Probable and Hypothetical Assumptions are not consistent with the purpose of the Second Cash Flow Statement;

(b) as at the date of the Second Cash Flow Statement, the Probable and Hypothetical Assumptions developed by management were not suitably supported and consistent with the Companies' plans or do not provide a reasonable basis for the Second Cash Flow Statement, given the Probable and Hypothetical Assumptions; or

(c) the Second Cash Flow Statement does not reflect the Probable and Hypothetical Assumptions.

. . . . .

28. The Proposal Trustee believes that granting an extension of time to file a proposal and the continuation of these Proceedings is in the best interest of stakeholders, and preferable to a liquidation in a bankruptcy and/or receivership.

14 The Second Report in respect of UTSG contains the same statements but paragraphs 25 and 28 quoted above are found at paragraphs 27 and 30 of this Report.

15 Each Second Report has attached, as Appendix 2, a Report on the Actual Cash Flow over the Period September 3 to October 14, 2022, and, as Appendix 3, a Cash Flow Forecast for the period October 15 to January 13, 2022 [*sic*] (presumably 2023 was intended).

16 By way of summary, these appendices provide the following information:

a. Re the consolidated operations of TCS and TCR:

i. Its cash flow over the period September 3 to October 14 was a negative $125,699 and was some $273,000 less than the projected cash flows the applicants had previously provided; and

ii. Its projected cash flow from operations October 15 to January 13 is stated to be $251,684 before professional costs and $138,684 after the professional costs associated with the proposal.

b. Re UTSG:

i. Its cash flow from operations over the period September 3 to October 14 was $207,064, some $195,000 less than the projected cash flow the applicants had previously provided; and

ii. Its projected cash flow from operations October 15 to January 13 is $22,094 before professional costs and a negative $90,406 after the professional costs associated with the proposal.

17 Thus, the applicants had failed by some significant measure to achieve their projected cash flows for the period to October 14 with somewhat mixed projections going forward. This information leaves me with serious reservations as to whether the applicants are viable businesses.

18 In their Second Reports, Grant Thornton, in carefully limiting and curiously phrased statements, say that having reviewed the support provided by management for the probable assumptions and the preparation and presentation of the Second Cash Statements:

25. ... Based on the Proposal Trustee's review, nothing has come to its attention that causes it to believe that, in all material respects:

(a) the Probable and Hypothetical Assumptions are not consistent with the purpose of the Second Cash Flow Statement;

(b) as at the date of the Second Cash Flow Statement, the Probable and Hypothetical Assumptions developed by management were not suitably supported and consistent with the Companies' plans or do not provide a reasonable basis for the Second Cash Flow Statement, given the Probable and Hypothetical Assumptions; or

(c) the Second Cash Flow Statement does not reflect the Probable and Hypothetical Assumptions.

19 The Proposal Trustee then end their Second Reports with the following conclusion:

28. The Proposal Trustee believes that granting an extension of time to file a proposal and the continuation of these proceedings is in the best interests of the stakeholders, and preferable to a liquidation in a bankruptcy and/or receivership.

and recommend the Court approve the stay extensions sought.

20 I find the evidentiary and informational basis provided to the Court in support of the extension application to barely meet the test of a likelihood of being able to make a viable proposal. As stated in *Scotian Distribution*, on a first extension, the test "will likely not be a difficult standard to meet". But this is not a first extension.

21 It is only by giving regard to:

a. the statement in *Enirgi Group* to the effect that "'likely' means 'such as might well happen'";

b. the direction in *Cantrail* quoted above to the effect that is important for the Court to take a broad approach and look at a number of interested and potentially affected parties, including employees and unsecured creditor;

c. recognizing that Grant Thornton is, in providing to the Court their reports, effectively an officer of the court in respect of the conclusions and recommendations they provide, notwithstanding my concerns about the limitations inherent in their reports; and

d. my opinion that the creditors should, where a reasonable possibility of acceptance of a proposal exists, be given the opportunity to decide, since they are the ones who will be primarily affected;

that I am able to conclude that I am satisfied that the applicants "would likely be able to make a viable proposal" if given additional time. I recognize that creditors might view what I might perceive as unviable as to them being viable and acceptable.

22 Accordingly, I am granting the extensions sought and direct that orders shall issue in the form of the draft orders filed on October 21, 2022, on each of the files.

23 In granting the requested second extensions, I wish to make it clear that should the applicants fail to complete their proposals within the time limits set forth in the orders I have made and come to the Court seeking a further extension, they should expect the Court will be requiring better and focused evidence and information on the likelihood of a viable proposal, given the problematic cash flow projections in turn based on unknown "probable and hypothetical assumptions".

24 Because of the attention I have given to these matters and the concerns expressed herein, and in the interests of judicial efficiency, I will remain seized of any future application for a further extension of time.

End of Document

Tab

5

2020 PESC 15
Prince Edward Island Supreme Court

Nautican v. Dumont

2020 CarswellPEI 30, 2020 PESC 15, 319 A.C.W.S. (3d) 18, 79 C.B.R. (6th) 243

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by NAUTICAN RESEARCH AND DEVELOPMENT LTD. Pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by CARELI MARINE CORPORATION LIMITED pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Motion by NAUTICAN RESEARCH AND DEVELOPMENT LTD. and by CARELI MARINE CORPORATION LIMITED for Orders pursuant to Sections 50.4(9), 64.2(1), 64.2(2), 50.6(1) and 50.6(3) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

James W. Gormley J.

Heard: October 31, 2019
Judgment: May 8, 2020
Docket: S1-GS-28836

Counsel: Michael G. Drake, Sean Corcoran, for Nautican Research and Development Ltd. and Careli Marine Corporation Ltd.
David W. Hooley, Q.C., Melanie McKenna, for David Dumont and Outboard Engineering Group LLC

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.5 Practice and procedure
Bankruptcy and insolvency
VII Consolidation orders and orderly payment of debts
Headnote
Bankruptcy and insolvency --- Consolidation orders and orderly payment of debts
Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Consolidation would avoid multiplicity of proceedings thereby providing most just, expeditious and least expensive determination of issues — Debtors were closely aligned, as one was holding company that held all issued shares in other and had no employees, no bank account, and no active business activities — Managing director for both debtors was same and both companies shared same major secured creditor — No prejudice in granting consolidation — Creditor agreed to consolidation.
Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Extension of time to file proposal granted — Not shown that debtors were acting in bad faith and it was not shown that funds were being diverted to other entity — There was evidence that viable proposal could be filed — No prejudice to creditor from extension — Tangible assets were subject to seizure order, and intangible assets would be diminished if bankruptcy declared — Administrative charge

iii) since the stay commenced, they are addressing current lease requirements, assessing current employee levels and reviewing client contracts. They have also reduced operating costs and worked with PWC to assess options and formulate viable proposals to creditors.

14 I also note that the proposal trustee states that the debtors have been acting in good faith and have prepared projected statements of cash flow, which have been provided to their creditors.

15 Outbound and Mr. Dumont have raised their concerns of the "possibility" that Nautican may have or is attempting to divert contracts to its US subsidiary to avoid its creditors. Mr. Dumont also has a "feeling" that he was not receiving the same good faith bargaining from Nautican and Careli that he was offering. Although the creditors have concerns, which may or may not be based in fact, they have not produced sufficient evidence to overcome the evidence provided by Nautican and Careli that their activities have been demonstrative of acting in a good faith manner and with due diligence with respect to the preparation of a viable proposal. I find Nautican and Careli have met the first prong of the three part test.

Sub-issue B - Will Nautican and Careli likely be able to make a viable proposal if the extension is granted?

16 I refer again to *Convergix Inc., Re* wherein Glennie J. states as follows:

> [40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

17 Clearly, this creates an objective standard for the court to consider, which is not tied to a specific creditor and particularly in this case, the creditor opposing the request for an extension.

18 The test requires me to consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur. This test requires a dispassionate evaluation, not the position of an advocate of a specific creditor. Nautican and Careli are seeking 45 days to allow the process a chance at success. They have retained consultants, one of which has expressed his opinion that the debtors will likely be able to make a viable proposal if the extension is granted. Nautican and Careli have made efforts in the first 30 days of the stay. This is not a situation of inactivity by the debtors. Although the evidence is not overwhelming on this aspect of the test, it is sufficient to meet the legislative requirement on a balance of probabilities.

19 Although it is clear that Nautican, Careli and Outbound have been involved in lengthy, contentious negotiations and that Outbound believes no viable proposal will be made during the term of the extension, the test is not a subjective one and I find that the evidentiary record provided by Nautican and Careli is sufficient to meet this aspect of the test.

Sub-issue C - If the extension is granted, will any creditors be materially prejudiced?

20 It is clear from the affidavit of Dumont that the major creditors of Nautican and the major creditor of Careli vehemently oppose the motion and argue their position will be materially prejudiced if I order an extension.

21 I note the decision of *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.) wherein Goodfellow J. stated as follows:

> [37] This section of the *Act* contemplates some prejudice to creditors and I am of the view that the prejudice must be of a degree that raises significant concern to a level that it would be unreasonable for a creditor or creditors to accept. Overall, I am satisfied that HHFL has met the requirement of establishing on the balance of probabilities that the granting of an extension will not materially prejudice any of the creditors and in particular BNS.

Tab

6

1994 CarswellOnt 254
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 254, 23 C.B.R. (3d) 219 at 223

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Registrar Ferron

Judgment: February 3, 1994

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

***Registrar Ferron*:**

1 Baldwin and Varion are described as corporate components of "an entity known as Georgian Equity Corporation which is part of the Georgian group".

2 Baldwin is indebted to the Royal Bank of Canada for about $5,000,000 which constitutes 92% of the Baldwin's total indebtedness while Varion is indebted to the bank for about $1,000,000 which constitutes about 99% of its total indebtedness. Aside from indebtedness to related companies the unsecured debts of both companies are negligible.

3 Royal Bank's indebtedness is secured by Demand Debentures and General Security Agreements which blanket the assets of both companies.

4 Baldwin's only asset is a multi-tenanted building which is now about 50% leased; Varion's only asset is vacant land.

5 In or about November 1993, both Baldwin and Varion defaulted in their obligations to the bank and on November 12, 1993, the Royal Bank demanded payment of its debt from both companies and concurrently served notices of intention to enforce its security. Both companies responded by filing, on November 19, a notice of intention to file proposals.

6 There has been one extension to file a proposal granted to each company on unopposed applications which were made on December 16, 1993. No proposal has yet been filed and the secured creditor opposes this second application for a further extension.

7 The statutory burden on an applicant under s. 50.4(9) of the *Bankruptcy and Insolvency Act* is fourfold. It must be shown that the applicant has, and is acting in good faith, and with diligence adequate in the circumstances. An applicant must also satisfy the court that if an extension or further extension is ordered it would as a consequence likely be able to make a viable proposal and that such an extension will not materially prejudice the creditors of the applicant.

8 The bottom line of these applications is that the secured creditor has made it quite clear that it, as counsel expressed it, has lost all confidence in the debtors and now only wants to enforce its security.

9 Since the bank's debt is about 92% of the total indebtedness of Baldwin and almost 100% of that of Varion, as a practical matter, a viable proposal, that is, a proposal which is capable of implementation is not possible.

10 Both applicants were undoubtedly formed to hold one asset, the commercial building in the case of Baldwin and vacant land in the case of Varion. These applicants carry on no business in the ordinary sense and have no employees. Baldwin is managed by "a related company". Their major, and for all practical purposes only creditor, is a secured creditor and as a matter of fact the applicants have no business to reorganize or to restructure.

11 The cash flow of Baldwin is negative and Varion has no cash flow at all so that the company, in order to make a viable proposal must, pay out the bank either by prospective financing or by equity financing. It has no revenue otherwise on which to found a proposal.

12 In practical terms these options are not available and one must conclude that the applications are merely an attempt to fend off the secured creditor and to protect their only asset rather than to put forth a viable proposal.

13 The applicants accordingly have not met the standard of good faith.

14 There is no equity in the Baldwin asset and to extend the period in which to file a proposal is to permit the insolvent person to speculate. A debtor may not in good faith speculate on an investment asset at the expense of the secured creditor and thereby throw the entire risk of loss on that creditor.

15 I do not accept the argument that the representatives of the Royal Bank entered into an agreement concerning the preparation of the appraisal of the Baldwin property and that the secured creditor having obtained an independent appraisal is acting in bad faith and I find it disingenuous to base the application on the argument that a proposal cannot be formulated until an appraisal is obtained. The applicant was in no way precluded from obtaining an independent appraisal and it does not require the concurrence of the secured creditor to do so. It is the court which must be satisfied and not the secured creditor.

16 In addition, the letter of December 8th sent by W.B. Clunie to the Royal Bank of Canada is not indicative of an agreement. The letter merely suggests that Baldwin Valley Investors Incorporated, "is prepared to allow the bank to conduct an independent assessment including an inspection of the premises to determine its viability, provided the work is completed by a mutually acceptable party at a mutually acceptable fee".

17 Presumably the bank did not accept that offer and has in fact obtained an independent appraisal which is before the court. A perusal of that appraisal, allowing for the fluctuation and value which depends upon the purpose of the appraisal and, in addition, allowing for a generous margin of error the gulf between the value of the Baldwin property and the bank's indebtedness serious and clearly indicates that there is no equity in that property.

18 In the circumstances the applicants have not met the statutory burden and the applications for extension must be refused.

Applications dismissed.

Tab

7

KeyCite treatment
Most Negative Treatment: Check subsequent history and related treatments.

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XX Miscellaneous
Headnote
Bankruptcy and insolvency --- Miscellaneous
Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — referred to

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

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

Generally — referred to

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

End of Document

Tab

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 823, 2002 CarswellNat 822, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

Tab

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2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8340, 2021 CarswellOnt 8339, 2021 SCC 25, 2021 CSC 25, [2021] 2 S.C.R. 75, [2021] 2 R.C.S. 75, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants
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Peter Scrutton, for Intervener, Attorney General of Ontario
Jacqueline Hughes, for Intervener, Attorney General of British Columbia
Ryder Gilliland, for Intervener, Canadian Civil Liberties Association
Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in

Tab

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KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: Abbey Resources Corp. v. Saskatchewan Assessment Management Agency | 2021 SKQB 100, 2021 CarswellSask 230, 332 A.C.W.S. (3d) 623 | (Sask. Q.B., Apr 7, 2021)

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 CSC 5, 2019 SCC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency

Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)).

Termes et locutions cités:

exploitant

[Un] « exploitant » [est] la personne qui a droit à une substance minérale ou le droit de la travailler (*Surface Rights Act*, R.S.A. 2000, c. S-24, al. 1(h) et art. 15).

installation

L'« installation » est définie au sens large et englobe tous les bâtiments, structures, installations et matériaux qui sont liés ou associés à la récupération, à la mise en valeur, à la production, à la manutention, au traitement ou à l'élimination de ressources pétrolières et gazières ([*Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6], art. 1(1)(w)).

orphelins

[L]es « orphelins » [sont] les biens pétroliers et gaziers ainsi que leurs sites délaissés sans que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité.

profit à prendre

Les tribunaux canadiens qualifient le bail d'exploitation minière permettant à une société d'exploiter des ressources pétrolières et gazières de profit à prendre. Il n'est pas contesté qu'un profit à prendre constitue une forme d'intérêt détenue par la société sur un bien réel (*Berkheiser c. Berkheiser*, [1957] R.C.S. 387).

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), s. 1(ddd), and ***Oil and Gas Conservation Act***, R.S.A. 2000, c. O-6 ("OGCA"), s. 1(1)(a)).

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*,

R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

3 The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

4 Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the *BIA* empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

5 The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88 (Alta. Q.B.)) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171 (Alta. C.A.)) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

6 Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the *BIA* did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

7 For the reasons that follow, I would allow the appeal. Although my analysis differs from hers in some respects, I agree with Martin J.A. that the Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. The Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's regulatory regime can coexist with and apply alongside the *BIA*.

II. Background

A. Alberta's Regulatory Regime

8 The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

III. Analysis

A. The Doctrine of Paramountcy

63 As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

64 The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 3).

65 Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3(S.C.C.) , at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) , at para. 66).

66 Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

67 The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, *Lemare*, at para. 45.

68 GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

69 The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

70 The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

71 I will consider each alleged conflict in turn.

B. Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?

72 As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

73 At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the *BIA*, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline Act*, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the *BIA* based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose

Tab

11

KeyCite treatment
Most Negative Treatment: Check subsequent history and related treatments.

2015 SCC 51, 2015 CSC 51
Supreme Court of Canada

Alberta (Attorney General) v. Moloney

2015 CarswellAlta 2092, 2015 CarswellAlta 2091, 2015 SCC 51, 2015 CSC 51, 2015 J.E. 1777, [2015] 12 W.W.R. 1, [2015] 3 S.C.R. 327, [2015] A.W.L.D. 4293, [2015] A.W.L.D. 4294, [2015] A.W.L.D. 4341, 22 Alta. L.R. (6th) 287, 259 A.C.W.S. (3d) 20, 29 C.B.R. (6th) 173, 391 D.L.R. (4th) 189, 476 N.R. 318, 606 A.R. 123, 652 W.A.C. 123, 85 M.V.R. (6th) 37, J.E. 2015-1777

Attorney General of Alberta, Appellant and Joseph William Moloney, Respondent and Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan and Superintendent of Bankruptcy, Interveners

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté JJ.

Heard: January 15, 2015
Judgment: November 13, 2015
Docket: 35820

Proceedings: affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 64 M.V.R. (6th) 82, 569 A.R. 177, 370 D.L.R. (4th) 267, 9 C.B.R. (6th) 278, 91 Alta. L.R. (5th) 221, [2014] 4 W.W.R. 272, 2014 CarswellAlta 225, 2014 ABCA 68, Frans Slatter J.A., Jack Watson J.A., Ronald Berger J.A. (Alta. C.A.); affirming *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2012), 550 A.R. 257, 39 M.V.R. (6th) 21, 2012 ABQB 644, 2012 CarswellAlta 1757, [2012] A.J. No. 1094, 73 Alta. L.R. (5th) 44, A.B. Moen J. (Alta. Q.B.)

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Subject: Constitutional; Insolvency; Public
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of federal government and provinces
Bankruptcy and insolvency
XV Discharge of bankrupt
XV.6 Effect of discharge
XV.6.b Miscellaneous
Motor vehicles
II Constitutional issues
II.1 Conflict with federal legislation
II.1.g Licence suspension

n many aspects, the BIA [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are distribute to creditors, and how. It then sets out which claims are released on discharge and which claims survive bankruptcy.

driving

Driving is unlike other activities. For many, it is necessary to function meaningfully in society

paramountcy

In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws.

Termes et locutions cités:

conduite d'un véhicule

La conduite d'un véhicule se distingue d'autres activités. Pour bon nombre de personnes, elle est nécessaire pour fonctionner normalement dans la société

loi sur la faillite et l'insolvabilité

La LFI [*Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3] constitue à maints égards un code complet en matière de faillite. Elle précise les réclamations qui sont considérées comme des réclamations prouvables et les biens qui sont distribués aux créanciers, et la façon dont ils le sont. Elle énonce ensuite les réclamations dont le failli est libéré par une ordonnance de libération et les réclamations qui subsistent après la faillite

prépondérance

Conformément à la théorie du fédéralisme coopératif, la doctrine de la prépondérance est appliquée avec retenue. On présume que le Parlement a voulu que ses lois coexistent avec les lois provinciales.

APPEAL by Attorney General from judgment reported at *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), dismissing appeal from judgment granting application for judicial review of suspension of driver's licence.

POURVOI formé par le procureur général à l'encontre d'un jugement publié à *Moloney v. Alberta (Administrator, Motor Vehicle Accident Claims Act)* (2014), 2014 ABCA 68, 2014 CarswellAlta 225, 9 C.B.R. (6th) 278, [2014] 4 W.W.R. 272, 91 Alta. L.R. (5th) 221, 370 D.L.R. (4th) 267, 64 M.V.R. (6th) 82, 569 A.R. 177 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant accordé une demande de contrôle judiciaire d'une décision ayant suspendu un permis de conduire.

Gascon J. **(Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Overview

1 In Canada, the federal and provincial levels of government must enact laws within the limits of their respective spheres of jurisdiction. The *Constitution Act, 1867* defines which matters fall within the exclusive legislative authority of each level. Still, even when acting within its own sphere, one level of government will sometimes affect matters within the other's sphere of jurisdiction. The resulting legislative overlap may, on occasion, lead to a conflict between otherwise valid federal and provincial laws. In this appeal, the Court must decide whether such a conflict exists, and if so, resolve it.

2 The alleged conflict in this case concerns, on the one hand, the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and on the other hand, Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6 ("*TSA*"). It stems from a car accident caused

by the respondent while he was uninsured, contrary to s. 54 of the *TSA*. The province of Alberta compensated the individual injured in the accident and sought to recover the amount of the compensation from the respondent. The latter, however, made an assignment in bankruptcy and was eventually discharged. The *BIA* governs bankruptcy and provides that, upon discharge, the respondent is released from all debts that are claims provable in bankruptcy. The *TSA* governs the activity of driving, including vehicle permits and driver's licences, and allows the province to suspend the respondent's licence and permits until he pays the amount of the compensation.

3 As a result of his bankruptcy and subsequent discharge, the respondent did not pay the amount of the compensation in full; because of this failure to pay, Alberta suspended his vehicle permits and driver's licence. The respondent contested this suspension, arguing that the *TSA* conflicted with the *BIA*, in that it frustrated the purposes of bankruptcy. The province replied that there was no conflict since the *TSA* was regulatory in nature and did not purport to enforce a discharged debt. The Court of Queen's Bench and the Court of Appeal found that there was a conflict between the federal and provincial laws. Relying on the doctrine of federal paramountcy, they declared the impugned provision of the *TSA* to be inoperative to the extent of the conflict. I agree with the outcome reached by the lower courts, and I would dismiss the appeal.

II. Facts

4 The car accident caused by the respondent occurred in 1989. In 1996, the individual injured in the accident obtained judgment against the respondent in the amount of $194,875. The Administrator appointed under the *Motor Vehicle Accident Claims Act*, R.S.A. 2000, c. M-22 ("*MVACA*"), indemnified the injured party for the amount of the judgment debt and was assigned the debt in accordance with the *MVACA*. Initially, the respondent made arrangements with the Administrator to pay the debt in instalments. Some years later, however, in January 2008, he made an assignment in bankruptcy. He listed the Administrator's claim in his Statement of Affairs. It is not disputed that the judgment debt assigned to the Administrator was a claim provable in bankruptcy. It was, by far, the respondent's most substantial debt and, in fact, the reason for his financial difficulties. At the time of the assignment, the outstanding amount due to the Administrator stood at $195,823.

5 In June 2011, the respondent obtained an absolute discharge, which no one opposed. In October of the same year, he received a letter from the Director, Driver Fitness and Monitoring, notifying him that, by application of s. 102(1) of the *TSA*, his operator's licence and vehicle registration privileges would be suspended until payment of the outstanding amount of the judgment debt. Later, in November, his lawyer received another letter, this time from Motor Vehicle Accident Recoveries, advising the respondent that he "remains indebted for the judgment debt obtained against him ... 'until the judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy'" (A.R., at p. 49). The letter proposed that new payment arrangements be made, failing which the suspension of his driving privileges would continue.

6 Given this situation, in March 2012, the respondent sought an order from the Court of Queen's Bench to stay the suspension of his driving privileges. He claimed that he had been discharged in bankruptcy and that s. 178 of the *BIA* precluded the Administrator from enforcing the judgment debt.

III. Judicial History

A. Alberta Court of Queen's Bench, 2012 ABQB 64473 Alta. L.R. (5th) 44 (Alta. Q.B.)

7 Moen J. first found that, as a result of the discharge, there was no longer a liability on the basis of which the judgment could be enforced (para. 21). In her view, the question at issue was whether the discharge precluded the province from suspending the respondent's driving privileges because of the unpaid judgment debt. This entailed looking at the operation of the *TSA* and the *BIA* and determining whether the relevant provisions were in conflict, making the doctrine of paramountcy applicable. According to Moen J., an "operational conflict" could arise in two situations, namely where (1) "compliance with both acts is rendered inconsistent or impossible by directly conflicting with an express provision of the *BIA*" or (2) "the *TSA* has the intent and/or effect of interfering with the provisions of the *BIA* or its fundamental objectives" (para. 30).

8 Moen J. emphasized the rehabilitative purpose of the *BIA* (para. 31). She described the purpose of the *TSA* as being the "protection of public safety via the regulation of traffic and motor vehicles" (para. 33), and the purpose of s. 102 of the *TSA*

[Emphasis added.]

(*Husky Oil*, at para. 39)

Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly: *Husky Oil*, at para. 39.

29 In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law: *Western Bank*, at para. 69; *Rothmans*, at para. 11; *Mangat*, at para. 74. In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists: *Husky Oil*, at para. 81; E. Colvin, "Constitutional Law — Paramountcy — Duplication and Express Contradiction — Multiple Access Ltd. v. McCutcheon" (1983), 17 *U.B.C.L. Rev.* 347, at p. 348.

30 I now turn to the application of the doctrine to the facts of this appeal.

B. Application

(1) The Legislative Schemes at Issue

31 The first step of the analysis is to ensure that the impugned federal and provincial provisions are independently valid. Early in the proceedings, the parties recognized the validity of the relevant provisions of the *BIA* and the *TSA*. Before this Court, they again conceded the validity of both laws. The only question is whether their concurrent operation results in a conflict. This requires analyzing the legislative schemes at issue at the outset so as to reach a proper understanding of the provisions that are allegedly in conflict.

(a) The Bankruptcy and Insolvency Act

32 Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867*. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).

33 The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the *BIA*; *Husky Oil*, at para. 9. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379(S.C.C.), at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

> 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.

Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

34 For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the *BIA* thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

> **69.3** (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

(See *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005(S.C.C.), at pp. 1015-16.)

35 Yet there are exceptions to the principle of equitable distribution. Section 136 of the *BIA* provides that some creditors will be paid in priority. These creditors are referred to as "preferred creditors". There are also creditors that are paid only after all ordinary creditors have been satisfied: ss. 137(1), 139 and 140.1 of the *BIA*. Furthermore, the automatic stay of proceedings does not prevent secured creditors from realizing their security interest: s. 69.3(2) of the *BIA*; *Husky Oil*, at para. 9. A court may also grant leave permitting a creditor to begin separate proceedings and enforce a claim: s. 69.4 of the *BIA*. These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.

36 The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:

> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605(S.C.C.), at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109(S.C.C.), at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. In those cases, rehabilitation becomes the primary objective of bankruptcy: Wood, at p. 37.

37 Although it is an important purpose of the *BIA*, financial rehabilitation also has its limits. Section 178(1) of the *BIA* lists debts that are not released by discharge and that survive bankruptcy. Furthermore, s. 172 provides that an order of discharge may be denied, suspended, or granted subject to conditions. These provisions demonstrate Parliament's attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy: Wood, at pp. 273 and 289.

38 Discharge is the main rehabilitative tool contained in the *BIA*, but it is not the only one. As Professor Wood, at p. 273, observes:

> The bankruptcy discharge is one of the primary mechanisms through which bankruptcy law attempts to provide for the economic rehabilitation of the debtor. However, it is not the only means by which bankruptcy law seeks to meet this objective. The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal.

39 Another means of rehabilitation is the automatic stay of proceedings contained in s. 69.3 of the *BIA*. The stay not only ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are precluded from seizing property that is exempt from distribution to creditors. This is an important part of the bankrupt's financial rehabilitation:

> The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence.
>
> (*Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417(S.C.C.), at p. 430.)

