COURT FILE NUMBER:	2201- 11655
COURT:	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
MATTER:	IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF SUGARBUD CRAFT GROWER CORP., TRICHOME HOLDINGS CORP. and 1800905 ALBERTA LTD.
APPLICANTS:	SUGARBUD CRAFT GROWER CORP., TRICHOME HOLDINGS CORP. and 1800905 ALBERTA LTD.

Clerk's Stamp

Reply Brief of the Applicants, Sugarbud Craft Grower Corp., Trichome Holdings Corp. and 1800905 Alberta Ltd. scheduled for October 18, 2022 at 2:00 p.m. before the Honourable Justice J.J. Gill

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ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

MLT AIKINS LLP
2100 Livingston Place
222 - 3rd Avenue S.W.
Calgary, AB T2P 0B4
Solicitor : Ryan Zahara/Chris Nyberg
Phone Number: 403-693-5420/2636
Email: rzahara@mltaikins.com/cnyberg@mltaikins.com
File No.: 0158011.00003

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I. INTRODUCTION

1. This Reply Brief is filed in support of an application by Sugarbud Craft Growers Corp. ("**SCGC**"), Trichome Holdings Corp. ("**THC**"), and 1800905 Alberta Ltd. ("**Opco**"; together with SCGC and THC, "**Sugarbud**" or the "**Applicants**") for an Initial Order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**"):

   (a) pursuant to 11.6 of the CCAA, continuing the notice of intention to make a proposal proceedings (the "**NOI Proceedings**") of the Applicants under the CCAA;

   (b) approving and continuing under the CCAA a sales and investment and solicitation process ("**SISP**") in order to seek an investment or deal with the assets of the Applicants;

   (c) pursuant to section 11.6 and 11.2 of the CCAA and declaring that the Applicants shall be authorized and empowered to obtain and borrow under a credit facility from Connect First Credit Union Ltd. (the "**Interim Lender**" or "**CFCU**") in order to finance Sugarbud's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $2,000,000.00 unless permitted by further order of this Court (the "**Interim Financing Facility**");

   (d) pursuant to section 11.6 and 11.2 of the CCAA, declaring that the Interim Lender shall be entitled to the benefit of a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations to the Interim Lender ranking subordinate only to the Administration Charge and in priority to all other Encumbrances (as defined in the Initial Order) and approving and continuing under the CCAA the Interim Lender's Charge from the NOI Proceeding;

   (e) pursuant to section 11.6 and 11.51, requiring the Applicants to indemnify their directors and officers (the "**Directors and Officers**") for liabilities incurred after the commencement of the within CCAA proceedings, and establishing a third-raking priority charge in the amount of $200,000.00 in order to secure such indemnity (the "**Directors' Charge**");

(f) pursuant to section 11.6, approving and continuing a key employee retention program ("**KERP**") and approving and continuing a fourth-ranking priority charge in the amount of $140,000.00 to secure all obligations owed to employees pursuant to the KERP (the "**KERP Charge**").

II. FACTS

2. The facts relied upon in support of this application are set out in the Affidavit of Daniel T. Wilson sworn on October 7, 2022 (the "**Wilson CCAA Affidavit**"), the Supplemental Affidavit of Daniel T. Wilson sworn on October 17, 2022 (the "**Wilson Supplemental CCAA Affidavit**"), in the Pre-filing Report of the Monitor dated October 11, 2022 (the "**Pre-Filing Report**") and the Bench Brief dated October 12, 2022 filed by the Applicants.

3. Capitalized terms not otherwise defined herein shall have the meaning given to them in the Wilson CCAA Affidavit and the Pre-Filing Report.

4. The Charges sought are critical to allowing the Applicants to effect a successful restructuring under the CCAA, as they ensure the continued participation of the Directors and Officers, key employees, administrative professionals, including the Monitor, and ensure that the Applicants have financing sufficient to fund their operations during the course of the restructuring proceeding.

5. Prior to commencing the NOI Proceeding, Sugarbud was behind on most of its obligations to its critical service providers, including logistics providers, lab services and utility providers. There were critical payments that were made to these service providers both just before and right after the filing of the NOIs in order to maintain the Cannabis Licences and the going concern business.[1]

6. At this time, CFCU was not prepared to continue to funding Sugarbud's operations on a go forward basis without proceedings being commenced and interim financing being obtained to fund operations while implementing a restructuring[2].

[1] CCAA Wilson Affidavit, Exhibit "A", NOI Affidavit, paras. 40-42.
[2] CCAA Wilson Affidavit, Exhibit "A", NOI Affidavit, para. 10

7. The Interim Financing Facility sought under the NOI Proceedings was done so on a super-priority basis up to the principal amount of $2,000,000. The Interim Financing Term Sheet is repayable on the occurrence of an Event of Default. In accordance with the Interim Financing Term Sheet that was attached to the NOI Affidavit served on September 26, 2022, CFCU was to receive a super-priority charge ranking ahead of all other claims except the Administration Charge. Failure to obtain that priority would be an Event of Default[3].

8. The KERP Charge sought in the NOI Proceedings was done in order to ensure that key employees critical to the operations stayed engaged as those employees provide critical stability and are required to maintain the viability of the Cannabis Licences. The KERP aligns the interests of the key employees with the goal of maximizing value for the stakeholders by tying payments thereunder to key milestones in the SISP[4].

9. Similarly, the Directors and Officers are critical members of the Sugarbud team that are essential to ensuring that Sugarbud's operations continue uninterrupted. Directors and Officers must obtain security clearance in order to hold these positions with a cannabis company and are integral to maintaining regulatory compliance so that Sugarbud can continue to operate in the normal course[5].

10. The Applicants have now entered into an Amended Interim Financing Term Sheet (the "**Amended IFTS**") dated October 14, 2022 in order to further amend the timeline for continuation of the NOI Proceedings under the CCAA and make clear that the Interim Lender requires that first-ranking priority charge be granted for the Interim Lender (subject only to the priority afforded to the Administration Charge)[6].

11. The Applicants can advise that the financial statements attached to the NOI Affidavit are prepared on a consolidated basis and there are no separate financial statements for THC or OpCo. The assertion by CRA that the Applicants have not provided all of the financial statements is incorrect and inaccurate[7].

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[3] Wilson CCAA Affidavit, Exhibit "A", NOI Affidavit, paras 58-62 and Exhibit "J", "Event of Default" (g)
[4] Wilson CCAA Affidavit, Exhibit "A", NOI Affidavit, para 75
[5] Wilson CCAA Affidavit, Exhibit "A", NOI Affidavit, paras 88-91
[6] Wilson CCAA Supplemental Affidavit, Exhibit "A".
[7] Wilson CCAA Affidavit, Exhibit "A", NOI Affidavit, Exhibit "I", page 6, Note 2(b).

Financial Statements

III. ISSUES

12. The Applicants respectfully submit this reply brief (the "**Reply Brief**") to respond to the position of the Attorney General of Canada filed by the Department of Justice acting for His Majesty the King in right of Canada represented by the Minister of National Revenue,

represented in turn by the Canada Revenue Agency (collectively, the "**CRA**").

IV. ARGUMENT

13. The CRA does not oppose the conversion of the NOI Proceedings into CCAA Proceedings. All of the relief being sought in respect of converting into CCAA Proceedings remains unopposed. The only part of the relief that is opposed by the CRA is the priority to be given to the Charges in the proposed form of Initial Order.

14. The CRA incorrectly states a number of facts in its Brief of Argument (the "**CRA Brief**") and files no evidence in support of its position taken. The Court should not give any weight to any of the arguments advanced by the CRA that are simply assertions of fact or speculation as to why the parties structured their commercial arrangements in a certain way as a result of the CRA's position on the priority of the Charges under the NOI Proceeding.

15. Courts have previously indicated that "it is important to remember that the purpose of CCAA proceeding is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent" and that the purpose of the CCAA is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets[8].

16. The priority sought for the Charges intended to do exactly this. Without the priority for the Charges sought, the Applicants may not be able to successfully restructure their affairs.

[8] *Comstock Canada Ltd., Re*, 2013 ONSC 4756, para 54 [**TAB 1**]

A. Priority of Charges

17. The importance of the priority of Charges for any of the parties seeking them cannot be understated. The Administration Charge for the benefit of the professionals, including the Monitor, working on the file is critical to allowing the restructuring to advance. The Interim Financing Charge, similarly, is critical to the proposed restructuring being successful as the Interim Lender is lending to an insolvent entity and taking on all the risk of the restructuring being successful. The Directors and Officers and the key employees benefitting from the KERP should not have to subordinate their charge to any claims of the CRA, especially when such claims remain unknown (by the CRA's own admission).

18. Conversely, the CRA takes on no additional inherent risk as a result of its deemed trust claim for source deductions being primed by the Charges. The CRA is not integral to the restructuring and provides no services to the insolvent Applicants that would justify elevating it even further above any other creditor than what it obtains under its deemed trust claim. The CRA will be paid post-filing for all amounts of source deductions incurred by the Applicants.

19. The Court in *Canada North* summarized the law in respect of why the super-priority for certain of the Charges is necessary and why the Court must have authority to order such charges over deemed trusts:

> There are also practical considerations that explain why supervising judges must have discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a CCAA proceeding is critical: "The monitor is an independent and impartial expert, acting as the 'eyes and the ears of the court' throughout the proceedings…The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on order sought by parties, including the sale of assets and requests for interim financing" [citations omitted]. In the words of Morawetz J. (as he then was) "[i]t is not reasonable to expect that professional will

take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position[9]. [citations omitted]

20. The SCC went on to state the following, specifically, about the need for priority interim financing in insolvency proceedings:

> This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" [citation omitted]. As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the CCAA process, certainty must accompany the granting of such super-priority charges" [citation omitted] [10]

21. Further, as succinctly stated by the SCC in *Canada North,* CCAA proceedings benefit all stakeholders and should not be held hostage by one individual creditor:

> …It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. **To do so would turn the *CCAA* into a dead letter**.[11][**emphasis added**]

22. The dire financial circumstances of the Applicants leading up to the NOI Proceeding were explicitly set out in the NOI Affidavit. Critical funds were required to ensure that operations continue uninterrupted and that value for all stakeholders could be preserved[12]. If the Applicants did not have the funds made available under the Interim Financing Facility then the risk was that it would no longer be able to comply with its regulatory requirements, maintain its suite of Cannabis Licenses, and its operations would cease, all of which would

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[9] *Canada North*, para. 28.
[10] *Canada North*, para. 29
[11] *Canada North*, para. 31
[12] Wilson CCAA Affidavit, Exhibit "A", NOI Affidavit at paras. 9 and 65-67

result in a liquidation of the Applicants and a significant loss of value for all stakeholders[13].

23. The CRA Brief attempts to imply that because the parties to the NOI Proceedings accepted the subordination of the Charges to the priority of the CRA for source deductions that there is something improper about those parties now seeking the enhanced priority afforded to those same Charges under the CCAA.

24. There is no basis to assert that the Applicants, in being required to convert the NOI Proceedings to CCAA Proceedings, are acting improperly or in bad faith. The CRA relies on no evidence to validate its assertions. To the contrary, the Monitor has set out a number of factors in the Pre-Filing Report as to the benefit to the Applicants of the CCAA Proceeding:

    (a) CCAA Proceedings are internationally recognized and allow for easier cross-border collaboration of various insolvency proceedings, including recognition in a foreign proceeding (if required), should there be transaction that requires cross-border recognition in the United States;

    (b) conversion to CCAA Proceedings would allow for more flexibility and time for the Applicants to restructure their affairs, including carrying out the SISP and the SISP Procedures;

    (c) it is a requirement of the Interim Financing Term Sheet to convert the NOI Proceedings into CCAA Proceedings;

    (d) in contrast to the BIA, there are no deemed assignments in bankruptcy under the CCAA in the event a plan is not accepted by the Applicants creditors. As currently contemplated by the NOI Proceedings, the Applicants must make a proposal to their creditors no later than six months after the filing of the NOI. At present it is not certain that the Applicants will be able to close a transaction with an interest party in that time period and as such the flexibility under a CCAA Proceeding is optimal and in the best interests of the Applicants' stakeholders;

[13] Wilson CCAA Affidavit, Exhibit "A", NOI Affidavit, at para. 42

(e) the flexibility provided for under the CCAA may allow the Applicants to better respond to restrictions under the Cannabis Act and Regulations in the course of their restructuring; and

(f) a Licensed Insolvency Trustee, such as A&M, is not a licenced producer or cultivator under the Cannabis Act or the Regulations. Accordingly, if the CCAA Initial Order, or in the alternative, a further Order is not granted extending the NOI Stay Period, the Applicants will be deemed bankrupt and A&M will automatically

(g) be appointed as the trustee in bankruptcy. In this scenario, A&M is not authorized to and will not take possession or take any steps to secure the cannabis or cannabis-related assets of the Applicants. In addition, all employees would automatically be terminated in a bankruptcy leaving no employees to manage the Applicants' operations, including feeding and taking care of the cannabis plants. This could adversely impact the value of the business and stakeholders' interests in the Applicants' property.[14]

25. CRA have provided no basis as to why the Charges should not be granted the priority sought by the Applicants (as is standard and typical in all CCAA cases). The CRA has also not provided any evidence to dispute the need for the CCAA Proceedings as outlined in the Wilson CCAA Affidavit[15] and the Pre-Filing Report.

26. It is clear from the *Canada North* decision that there is a different priority that can be afforded to the Charges under the BIA than can be provided under the CCAA. In fact, the CRA, in other proceedings has specifically acknowledged and argued this exact point[16].

27. Debtors cannot be prevented from seeking relief provided for under the CCAA simply by the CRA questioning the basis for why parties are taking steps to protect their valid commercial positions by utilizing a proper statutory procedure and the clear provisions of the CCAA.

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[14] Pre-Filing Report, para. 23

[15] Wilson CCAA Affidavit, paras. 14 and 15 and Pre-Filing Report, para 23

[16] *Chronometriq Inc. and Health Myself Innovations Inc., Re*. Nos. 500-09-029763-216 C.A.M. – 500-11-060355-217 S.C.M., ("***Chronometriq***") Appellants' Brief dated April 8, 2022 filed by the Attorney General of Canada, paras. 92 to 96 [**TAB 2**]

B. Considerations from *Canada North*

28. The CRA attempts to argue that there are a list of factors outlined in *Canada North* that must be satisfied before super-priority Charges are granted by this Honourable Court in priority to the claim of the CRA. This is not the case. The SCC stated that the Court has the discretion to order these priority Charges and that it should not allow one creditor to oppose a successful restructuring rendering the CCAA to be "dead letter".

29. The Court will always be required to assess the totality of the circumstances and approve the priority Charges sought based on the need of the debtors, the evidence before the Court on the potential benefit to the stakeholders from a successful restructuring and the result if such priority is not granted and a restructuring fails – liquidation and bankruptcy in many scenarios with the corresponding loss of value for stakeholders and jobs for employees.

30. In reviewing the arguments of the CRA, it is clear that the CRA misunderstands the necessity of the interim financing and the other priority Charges in order for a successful restructuring of the Applicants to occur. The CRA also incorrectly sets out the relevant timeline, ignores the provisions of the September 29, 2022 Order (the "**NOI Order**") of Justice Nixon, and how the NOI Proceedings unfolded.

31. The timeline for the commencement of the NOI Proceedings and the application for the relief sought from Justice Nixon is as follows:

    (a) NOI Proceedings were commenced on September 26, 2022[17] by filing the NOIs;

    (b) the Applicants then served unfiled copies of the materials for the application in the NOI Proceedings on the Service List (including CRA) on September 26, 2022[18];

    (c) the Applicants were first contacted by the CRA on September 28, 2022 at which time CRA indicated it had received the materials on September 26, 2022[19];

[17] Wilson CCAA Affidavit, Exhibit "A", NOI Affidavit at paras. 4 and 5.
[18] Affidavit of Service of Joy Mutuku sworn on September 29, 2022, filed, at para. 3.
[19] Wilson Supplemental CCAA Affidavit, at para. 7.

(d) the Applicants received CRA's position on the priming charges sought in the NOI Proceedings on September 28, 2022 at 1;28 p.m.[20] At this time, the relief and the interim financing being required were critically necessary to stabilize ongoing operations of the Applicant in the face of the commencement of the NOI Proceeding.

(e) The Applicants and the Interim Lender only had hours to decide if they would contest the CRA's position before the September 29, 2022 hearing. A decision was made to not contest that priority based upon the decision in *Canada North*;

(f) Justice Nixon granted the NOI Order with the following relevant language at paragraph 26:

> Each of the Administration Charge, the Interim Lender's Charge, the Directors' Charge and the KERP Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. **On a without prejudice basis, for the purposes of this NOI Proceeding only**, and solely in respect of SCGC's Property, SCGC hereby agrees that the Charges shall rank subsequent to any amounts outstanding and owed by SCGC to His Majesty the King in the right of Canada, as represented by the Minister of National Revenue and the Canada Revenue Agency (collectively, the "CRA") pursuant to subsection 227(4.1) of the Income Tax Act, subsection 23(4) of the Canada Pension Plan, and subsection 86(2.1) of the Employment Insurance Act by SCGC (collectively, the "Source Deductions"). **The agreement regarding the ranking of the Charges between SCGC and the CRA in respect of the Source Deductions is not determinative of the ranking of any charges granted by the Court in any other proceedings and shall not be used as a precedent for future matters**. [**emphasis added**]; and

[20] Wilson Supplemental CCAA Affidavit, at para. 7.

(g) Subsequent to the issuance of the NOI Order, the Interim Financing Term Sheet had to be amended or the Applicants would have been immediately in default as a result of the priority granted under the NOI Order to the CRA's claim for source deductions. This was made clear to Justice Nixon at that time of the hearing on September 29, 2022.

32. It is clear from the terms of the NOI Order at paragraph 26 that the subordination of the Charges to the CRA claim was on "without prejudice" basis and "is not determinative of the ranking of any charges granted by the Court in any other proceedings and shall not be used as a precedent for future matters".

33. It is also clear from this language that the parties considered that there may be other proceedings commenced and the Charges may be ordered to have a different priority than that granted in the NOI Proceeding. The CRA agreed to this language in the NOI Order and did not object to it being granted. CRA's argument now that "some factor – not apparent in the materials – has changed which casts doubt on the quality of the security of Justice Nixon's order" is incorrect. It ignores the clear language of the NOI Order and that the subordination of the Charges in the NOI Proceeding cannot now be used by the CRA as a basis to affect the same outcome in the present Application before the Court.

34. The Interim Lender, after the NOI Order was issued, included a requirement in the Interim Financing Term Sheet that the NOI Proceeding be continued into a CCAA proceeding. This was a commercial term of the Interim Financing Term Sheet and did not alter the substantive provisions of the Interim Financing Term Sheet approved by Justice Nixon, namely, quantum, amount and pricing.

35. There can be no negative inference drawn from the fact that the Interim Lender wanted the Applicants to convert the NOI Proceedings to a CCAA Proceeding and seek the priority provided for the Charges under the CCAA. This was always intended to be the priority given to these Charges in the NOI Proceeding until CRA objected on September 28, 2022 to that priority being granted. It was this last minute change to the priority of the Charges requested by the CRA that necessitated the changes and amendments to the Interim Financing Term Sheet that was executed on September 30, 2022.

36. The Interim Lender has also made clear in the Amended IFTS that it requires a super-priority ahead of all other Encumbrances (as defined in the Initial Order) for the Interim Financing Charge, including the CRA's claim for source deductions.

37. As stated by the court in *Canada North*:

> Super priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. **The fact that they require super priority is just a part of "[t]he harsh reality…that lending is governed by the commercial imperatives of the lenders". It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense"** [citation omitted] [**emphasis added**].

38. Accordingly, in every other CCAA proceeding, professionals, such as the Monitor are afforded a priority charge to protect the work being done for an insolvent entity. Asking those professionals to subordinate to the CRA's claim is not supported in the present case. The Interim Lender, who is also taking the most significant risk in the restructuring process, should also not be forced to choose between allowing the Applicants restructuring to fail or accede to the CRA's request for a priority for its source deductions. No interim lender will lend if those are its options and interim lenders should be allowed to rely on the certainty of a first priority charge if lending to an insolvent entity in a restructuring proceeding.

39. The CRA claim in the present case is estimated by the Applicants to be $262,000. The CRA also states that it does not know the full extent of His Majesty's claim. This uncertainty cannot result in any factor being found in favor of the CRA to give it a priority position over and above the Charges. It should be noted that the quantum of the potential CRA priority is greater than 10% of the total amount of the proposed Interim Financing, which is significant in the context of the overall proceedings. The Applicants also note that the correct quantum of all the Charges is not the $3,102,000 as certain of the costs, including

KERP and Administration Charge amounts are proposed to be paid out of the Interim Financing during the stay of proceedings.

40. Any such priority afforded to the CRA could also potentially expose the professionals, including the Monitor, the Directors and Officers and the key employees to significant uncertainty as to payment under the respective Charges and provides the Interim Lender with no certainty as to what amount CRA is actually owed. As stated above this defies fairness and common sense to ask an interim lender to advance funds in these circumstances.

41. The SISP has been commenced by the Applicants and is presently ongoing in the NOI Proceedings. The SISP is a full-blown sales and investment solicitation process that is seeking any and all types of transactions, including investment in or a corporate combination with another entity that may result in a successful restructuring. Without priority charges for Interim Financing, an Administration Charge, Directors' Charge or KERP Charge it is highly unlikely that the Applicants will be able to complete any restructuring. This is the very purpose for which these Charges have been granted historically in other CCAA proceedings, which is to give debtors every chance to avoid the costs of a liquidation, save jobs and effect a restructuring.

42. There is no argument or evidence that has been advanced by the CRA that should result in any different result in these CCAA Proceedings. As was noted by the CRA in other materials its filed on other matters, the difference between the CCAA and BIA are critical and allow restructuring options to be explored with flexibility and creativity for the benefit of all stakeholders with the certainty provided by the priority charges being granted over deemed trusts[21].

43. Finally, the CRA relies upon other factors from the concurring decision of Justices Karakatsanis J. and Martin J. With respect, those Justices concurring decision did not form part of the majority decision in *Canada North* and the Applicants submit that any of those statements should **not** be considered as any part of a notional test prior to granting priority

[21] *Chronomatiq*, Appellants Brief, paras. 95-97 [**TAB 3**]

Charges in CCAA proceedings.

44. This Honourable Court should take no different approach to the request for the priority of the Charges then it would in any other CCAA Proceeding. As outlined above, there is a real and tangible need for the priority of the Charges, there is evidence that such priority is required by those seeking it, and there is no basis (evidentiary or otherwise) to grant the CRA a super-priority under the CCAA Proceedings over the Charges.

45. Even if this Court treats the considerations noted by Justice Cote in *Canada North* as factors to be considered, the Applicants submit that those factors all weigh in favor of the Court granting the requested priority for the Charges and that any balance of prejudice would clearly be in favor of the Applicants, for the reasons outlined above, as opposed to the CRA's claim for unpaid source deductions.

46. The Court has the ability to exercise its discretion to order these Charges, the Applicants have met the basis for relief for all of the Charges (which is not being contested by CRA) and taking into account the totality of the evidence and the critical need there is a clear basis for the priority of the Charges sought by the Applicants.

V. CONCLUSION AND REQUESTED RELIEF

47. For all of the foregoing reasons, the Applicants respectfully request that an Initial Order and an Amended and Restated Initial Order be granted in the forms of the Draft Orders provided to the Court and the priority of the Charges be granted over all Encumbrances, including the claims of the CRA for source deductions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2022.

MLT AIKINS LLP

Ryan Zahara / Chris Nyberg
Counsel for the Applicants

Appendix of Authorities

TAB 1

CITATION: Comstock Canada Ltd. (Re), 2013 ONSC 4756
COURT FILE NO.: CV-13-10181-00CL
32-1763935
32-1763929
32-1764011
DATE: 20130716

SUPERIOR COURT OF JUSTICE – ONTARIO
(IN BANKRUPTCY AND INSOLVENCY)

RE: **IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF COMSTOCK CANADA LTD.**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CCL REALTY INC.

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CCL EQUITIES INC.

BEFORE: **MORAWETZ J.**

COUNSEL: **A. MacFarlane, F. Lamie and A. McFarlane (Corporate Counsel), for Comstock Canada Ltd., CCL Realty Inc., and CCL Equities Inc., Applicants**

H. Chaiton, for the Bank of Montreal

R. B. Schwill, for PricewaterhouseCoopers Inc.

B. Harrison, for the Board of Directors

K. Plunkett, for TESC Inc.

J. Milton, for Rio Tinto Alcan Inc.

HEARD &
ENDORSED: **JULY 9, 2013**

REASONS: **JULY 16, 2013**

ENDORSEMENT

[1] This motion was brought by Comstock Canada Ltd. ("Comstock"), CCL Realty Inc. ("CCL Realty") and CCL Equities Inc. ("CCL Equities", and together with Comstock and CCL Realty, the "Comstock Group") for an order, *inter alia*:

(a) continuing Comstock Group's restructuring proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), effective as of July 9, 2013;

(b) granting an initial order (the "Initial Order") under the CCAA in respect of the Comstock Group;

(c) declaring that, upon the continuance under the CCAA, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") proposal provisions shall have no further application;

(d) approving the cost reimbursement agreement entered into by Comstock and Rio Tinto Alcan Inc. ("Rio Tinto");

(e) approving the Commitment Letter (defined below) and the granting of the DIP Lender's Charge (defined below) and corresponding priority in favour of Bank of Montreal ("BMO"); and

(f) discharging PricewaterhouseCoopers Inc. ("PwC") in its capacity as interim receiver (in such capacity, the "Interim Receiver") of Comstock.

[2] At the conclusion of argument, the motion was granted, with reasons to follow. These are those reasons.

Background

[3] Established in 1904, Comstock is one of Canada's largest multi-disciplined contractors, currently employing over 1,000 unionized and non-unionized tradespeople and 80 salaried employees across Canada. For over 100 years, Comstock has provided a broad capability in the completion of large-scale electrical and mechanical contracts to the planning, directing and execution of multi-trade, multi-million dollar commercial, industrial, institutional, automotive, nuclear, oil and gas, overhead and underground, and structural steel assignments. Recent projects include work for Enbridge Pipelines Incorporated, Shell Canada Limited, Petro Canada, Imperial Oil, Ontario Power Generation, Bruce Nuclear Power, Ford Motor Company, Chrysler Canada Inc., Winnipeg Airport Authority Inc. and Cadillac Fairview Corporation. In 2012, Comstock provided services to 130 customers and had several recurring customers.

[4] Comstock experienced financial challenges necessitating a restructuring of the company. While Comstock continues to enjoy a strong market reputation, Comstock's business has experienced liquidity challenges, cost overruns and litigation costs that have imperilled the Comstock Group's business.

[5] Comstock's counsel submits that any serious disruption to Comstock's ability to provide core services would imperil the viability of various projects and have negative effects cascading throughout the trades, subtrades and local economies of these projects. As a result, Comstock's senior management believes that it is imperative to restructure the Comstock Group as soon as reasonably possible with a focus on avoiding disruption to Comstock's operations.

[6] The Comstock Group seeks the Initial Order, at this time, to protect its business and preserve its value while it seeks to complete its restructuring.

[7] Comstock is a privately-held corporation incorporated pursuant to the *Business Corporations Act (Ontario)*, R.S.O. 1990, c. B.16 ("OBCA"), with headquarters located in Burlington, Ontario and a western office located in Edmonton, Alberta. Comstock maintains additional regional facilities in Ontario, Manitoba, Alberta and British Columbia.

[8] Comstock and CCL Realty, a real estate holding company which holds all of the Comstock Group's real property, are the direct and wholly-owned subsidiaries of CCL Equities – a holding company incorporated pursuant to the OBCA with headquarters located in Burlington, Ontario.

[9] In 2011, a management buyout was executed in respect of Comstock. Prior to this time, Comstock was a wholly-owned subsidiary of a U.S. publicly-traded company.

Comstock Debt and Lender Security

[10] Pursuant to a credit agreement dated July 29, 2011 (the "Credit Agreement") among Comstock, as borrower, CCL Equities Inc., CCL Realty Inc., 3072454 Nova Scotia Company, as guarantors (collectively, the "Guarantors") and BMO, as lender, BMO made available to Comstock a credit facility up to a maximum aggregate amount of $29,200,000 (the "Credit Facility" or the "Loan").

[11] Comstock's indebtedness under the Credit Agreement is secured by a general security agreement in favour of BMO; an assignment of insurance policies of Comstock and the Guarantors; an assignment, postponement, and subordination of shareholder loans; guarantees from each of the Guarantors; and mortgages over all of the real property owned by Comstock and CCL Realty (collectively, the "Lender's Security").

[12] A number of entities, including CBSC Capital Inc., Transportation Lease Systems Inc., ATCO Structures and Logistics Ltd., Leavitt Machinery General Partnership, Altruck International Truck Centres, Integrated Distribution Systems LP o/a Wajax Equipment, RCAP Leasing Inc., Horizon North Camp & Catering Inc., also have registered a security interest in respect of certain of Comstock's equipment and vehicles.

[13] According to Comstock's trade accounts payable records, Comstock owed approximately $47 million of unsecured trade debt to approximately 830 vendors as of June 27, 2013.

[14] As of July 9, 2013, Comstock is not in arrears in respect of payroll. Payroll obligations of the previous week had been funded through an Interim Receiver's Borrowing Charge, which was subject of an endorsement reported at *Comstock Canada Ltd. (Re)*, 2013 ONSC 4700.

[15] Comstock had payroll of $1.5 million due on Thursday, July 11, 2013, pertaining to the contracted project in Kitimat, British Columbia. The mechanics enabling this payroll to be met were authorized by the Initial Order.

Comstock's Financial Position

[16] Copies of the consolidated and unaudited balance sheet and income statement of the Comstock Group as at December 31, 2012, and all other audited and unaudited financial statements prepared in the year prior to 2013 (collectively, the "Financial Statements"), are attached to the confidential supplement (the "Confidential Supplement") to the Report of PwC in its capacity as proposal trustee and prospective CCAA monitor of the Comstock Group.

[17] As at December 31, 2012, the Comstock Group had assets with book value of approximately $112 million, with corresponding liabilities of $103.4 million.

[18] Comstock has initiated several ongoing litigation claims against various entities, with a total claim face amount in excess of $120 million. Comstock has been named as defendant in litigation claims, with a face amount in excess of $110 million.

[19] The Comstock Group previously enjoyed financial prosperity due to sustained contracts throughout Canada in respect of various significant engagements. However, counsel advises that Comstock's recent declining economic fortunes have resulted in increasingly severe financial losses, liquidity challenges, cost overruns and litigation costs imperilling the Comstock Group's business.

[20] On June 27, 2013, counsel advises that Chrysler Canada locked out Comstock from the performance of its contract at facilities in Ontario and, on July 2, 2013, threatened to terminate all existing contracts and purchase orders with Comstock. On July 3, 2013, Chrysler Canada issued a formal notice of contract termination to Comstock.

[21] On July 5, 2013, Travellers Insurance Company of Canada provided Comstock with notices of termination, to be effective in 30 days, in respect of certain contracts.

[22] During the week of July 1, 2013, TLS Fleet Management notified Comstock that no further purchases would be authorized in respect of vehicle leases, service and maintenance, and management fees, unless Comstock paid outstanding amounts and provided a security deposit.

[23] Certain entities have registered lien claims against Comstock in respect of labour and material allegedly supplied in relation to Enbridge Pipelines (Athabasca) Inc. in Calgary.

Restructuring and Refinancing Efforts

[24] In February 2013, the Comstock Group engaged Deloitte & Touche Corporate Finance Canada Inc. ("Deloitte") to conduct a market solicitation process with a view to attracting equity investors and/or purchasers of Comstock. Under this market solicitation process, the Comstock Group did not receive any letters of intention.

[25] Comstock's Counsel advised that the Comstock Group's management believes that, in view of cost overruns and the Comstock Group's liabilities, a number of potential purchasers would not submit letters of intention absent the protections afforded by a restructuring vehicle such as the CCAA or BIA.

Filing of Notices of Intention to Make a Proposal

[26] Comstock's counsel advised that in response to Chrysler Canada's lockout and, as a result of unsuccessful negotiations with a potential bridge financer, Comstock's Board of Directors determined that the Comstock Group had no other readily available options but to file Notices of Intention to Make a Proposal (the "NOI") pursuant to section 50.4(1) of the BIA on June 28, 2013 (the "NOI Proceedings") in order to preserve the *status quo* and prepare for a CCAA restructuring.

[27] On July 3, 2013, I issued an order appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

Anticipated Restructuring

[28] Comstock anticipates conducting a sales and investor solicitation process (the "SISP") to be administered by the monitor. Comstock and the monitor have advised that they will report back to court once the SISP has been fully developed.

[29] In order to avoid disruption to the ongoing operations of one of Comstock's major customers, Rio Tinto, and to minimize enhanced safety risks that would be incurred in the event of such a disruption, Rio Tinto agreed to a cost reimbursement agreement with Comstock in order to ensure that the project continues in an uninterrupted manner. In addition, Rio Tinto and BMO agreed to a cost sharing mechanic which would see Rio Tinto cover portions of the costs for overhead, infrastructure and administrative costs from which they believe they will benefit in relation to the Rio Tinto contracts and their related projects. The material terms of the cost reimbursement agreement are set out at paragraph 61 of Jeffrey Birkbeck's affidavit.

[30] The Comstock Group has secured a commitment for Debtor-In-Possession ("DIP") financing ("DIP Financing") from BMO (in such capacity, the "DIP Lender") in the amount of $7,800,000 under the terms of a DIP Commitment Letter dated July 9, 2013 (the "DIP Loan"), pursuant to which the DIP Financing will provide the Comstock Group with sufficient liquidity

to implement its initial restructuring initiatives pursuant to the CCAA and to continue with its core profitable projects during its restructuring.

[31] The DIP Financing conditions include a priority charge in favour of BMO in its capacity as DIP Lender, in priority to all other charges save and except the administration charge, and in priority to all present construction lien and trust claims, save and except in relation to those construction liens and trust claims arising in respect of the specific contracts and projects to which the DIP Loan is advanced following the date of such contract-specific and project-specific advances.

[32] The proposed DIP Financing contemplates that the DIP Lender will be granted a court-ordered priority charge (the "DIP Lender's Charge"), which is intended to rank in priority to all other charges save and except the administrative charge and will not apply to any holdbacks owing in respect of the Rio Tinto Kitimat, British Columbia project.

[33] Comstock's counsel advises that the DIP Financing is essential to the Comstock Group's restructuring and the maintenance of a substantial portion of the Comstock Group's large-scale construction project.

[34] The Comstock Group's counsel submits that the Comstock Group will not be able to obtain alternative financing and maintain its operations without DIP Financing and, as such, submits that court approval of the DIP Financing, including the DIP Credit Agreement and the DIP Lender's Charge, is necessary and in the best interests of the Comstock Group and its stakeholders.

[35] The 13-week cash flow forecast that was filed projects that, subject to obtaining DIP Financing, Comstock Group will have sufficient cash to fund its projected operating costs during this period. In the absence of the liquidity provided by the proposed DIP Financing, counsel submits that the Comstock Group would be unable to meet its obligations as they come due or continue as a going concern and, accordingly, is insolvent.

Continuation Under the CCAA

[36] Continuations of BIA Part III proposal proceedings under the CCAA are governed by section 11.6(a) of the CCAA which provides:

> 11.6 Notwithstanding the Bankruptcy and Insolvency Act,
>
> (a) proceedings commenced under Part III of the Bankruptcy and Insolvency Act may be taken up and continued under this Act only if a proposal within the meaning of the Bankruptcy and Insolvency Act has not been filed under that Part.

[37] Comstock, CCL Realty and CCL Equities have not filed a proposal under the BIA. I am satisfied that each member of the Comstock Group has satisfied the statutory condition prescribed by section 11.6(a) of the CCAA.

[38] I am also satisfied that the evidence filed by the Comstock Group supports a finding that continuation under the CCAA to permit stabilization of Comstock's projects and to enable a going concern sale of Comstock's business and assets is consistent with the purposes of the CCAA. Counsel submits, and I accept, that such stability and continuation of contracts afforded by a continuation under the CCAA would set the conditions for maximizing recovery for the senior secured creditor, preserve employment for many of the 1,000 independent contractors, and maintain the local economies that are highly integrated into the projects which Comstock services. Further, avoidance of the social and economic losses which would result from the liquidation and the maximization of value would be best achieved outside of bankruptcy.

[39] I am also satisfied that continuation under the CCAA is consistent with the jurisprudence on this issue. In arriving at this conclusion, I have considered the following cases: *Hemosol Corp. (Re)*, 34 B.L.R. (4th) 113, 36 C.B.R. (5th) 286, (Ont. S.C.J.); *(Re) Clothing for Modern Times*, 2011 ONSC 7522; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60; *Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.); and *Re Nortel Networks Corp.*, 55 C.B.R. (5th) 229 (Ont. S.C.J.).

[40] Comstock Group has also complied with section 10.2 of the CCAA insofar as the required cash flow statements have been filed.

[41] I am satisfied the record establishes that each entity within the Comstock Group is a "company" within the meaning of the CCAA, and that each entity of the Comstock Group is a debtor company within the meaning of the definition of "debtor company" as they are each insolvent and have each committed an act of bankruptcy in filing their respective NOIs.

[42] I am also satisfied that the Comstock Group meets the traditional test for insolvency (BIA, section 2) and the expanded test for insolvency based on a looming liquidity condition (see *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.); leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to SCC refused, [2004] S.C.C.A. No. 336 [*Stelco*]). In arriving at this conclusion in respect of the expanded test for insolvency, I have taken into account that there has been a decline in Comstock's financial performance due to cost overruns and litigation claims; Comstock Group has been unable to meet its covenants under the Credit Agreement and is in default under the Credit Facility; Comstock Group was not able to obtain additional or alternative financing outside of a court-ordered or statutory mandated process; there is no reasonable expectation that Comstock Group, in the near term, will be able to generate sufficient cash flow to support its existing debt obligations; and the cash flow forecast indicates that without additional funding, the Comstock Group will exhaust its available cash resources and will, thus, be unable to meet its obligations as they become due.

[43] I am satisfied that it is both necessary and appropriate to grant relief to Comstock under the CCAA. A stay of proceedings is appropriate in order to preserve the *status quo* and enable the Comstock Group to pursue and implement a rationalization of its business.

[44] The Comstock Group's counsel submits that certain suppliers to the Comstock Group are critical to its operations and that they must be paid in the ordinary course in order to avoid

disruption to its operations during the CCAA proceedings. Failure to pay these suppliers would likely result in them discontinuing critical ongoing services, which could ultimately put customer, supplier or Comstock's own personnel at risk on the job site. Accordingly, Comstock seeks authorization in the Initial Order to pay obligations owing to its suppliers, regardless of whether such obligations arise before or after the commencement of the CCAA proceedings, if in the opinion of Comstock and with the consent of the monitor, the supplier is critical to the business and ongoing operations.

[45] I am satisfied that this request is appropriate in the circumstances and it is to be included in the Initial Order.

Priority Charges

[46] Comstock Group seeks approval of certain court-ordered charges over its assets relating to its administrative costs, interim financing and the indemnification of its sole director and officer. The Initial Order contemplates that the Administration Charge, the DIP Charge, and the Director's Charge will rank in priority to all other present and future security interests, trusts, liens, construction liens, trust claims, charges and encumbrances, claims of secured creditors, statutory or otherwise, in favour of any person.

[47] The Administration Charge is contemplated to be in the amount of $1 million. The authority to grant such a charge is contained in section 11.52 of the CCAA. The list of factors to consider in approving an administration charge include:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

See *Re Timminco Ltd.*, 2012 ONSC 106.

[48] Having reviewed the record and considered the foregoing, I am satisfied that the Administration Charge, with the requested priority ranking, is warranted and necessary and the same is granted in the amount of $1 million.

[49] Section 11.52(1) of the CCAA provides that the court may make such an order on notice to the secured creditors who are likely to be affected by the security. Notification of this motion has not been provided to all secured creditors and, accordingly, this issue is to be revisited on the comeback hearing.

[50] Comstock Group also seeks approval of the DIP Commitment Letter providing the DIP Loan of up to $7,800,000 to be secured by a charge over the assets of the Comstock Group. The DIP Lender's Charge is to be subordinate in priority to the Administration Charge.

[51] The authority to grant a DIP financing charge is contained in section 11.2 of the CCAA. The factors to be considered are set out in section 11.2(4) the CCAA.

[52] Counsel submits that the following factors support the granting of the DIP Lender's Charge, many of which incorporate the considerations enumerated in section 11.2(4):

(a) the cash flow forecast indicates Comstock will require additional borrowing;

(b) Comstock cannot obtain alternative new financing without new liquidity and a reduction of its significant indebtedness;

(c) the proposed DIP Lenders have indicated that they will not provide the DIP Loan if the DIP Lender's Charge is not approved;

(d) the DIP Loan is essential to the initiation of the restructuring;

(e) the Comstock business is intended to continue to operate on a going concern basis during the CCAA proceedings under the direction of management with the assistance of advisors and the monitor;

(f) the DIP Credit Agreement and the DIP Lender's Charge are necessary and in the best interests of the Comstock Group and its stakeholders; and

(g) the proposed monitor is supportive of the DIP Loan and the DIP Lender's Charge.

[53] I am satisfied, having considered the foregoing factors, that the granting of a super-priority for DIP Financing is both necessary and appropriate in these circumstances.

[54] It is also necessary to consider the specific request for the creation of a super-priority in respect of a DIP Charge over construction lien claimants and various trust claimants. This issue was addressed at paragraphs 120-138 of the Comstock factum which reads:

> 120. Granting the Initial Order substantially in the form sought is consistent with the purpose of the CCAA, the leading jurisprudence with respect to priority, and is fair and reasonable to all affected parties under these exigent and urgent circumstances. Over 1,000 jobs are at stake, the progress of major infrastructure projects with national importance is in the balance, the safety of workers is in jeopardy, and the relevant local economies are relying upon the proper application of the CCAA's overriding purpose to effect a constructive solution in order to achieve a position way forward for all stakeholders.

121. In the event the DIP Charge, and the proposed priority thereof, is not authorized by this Honourable Court in the urgent and precarious circumstances confronting the Comstock Group and its stakeholders, the overriding purpose of the CCAA would be frustrated. The CCAA must always be read in light of the CCAA's overriding purpose – the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations.

122. In the recent Supreme Court decision *Sun Indalex Finance, LLC v. United Steelworkers*, Chief Justice McLachlin addressed the overarching purpose of the CCAA as being the provision of a constructive solution for all stakeholders and the avoidance of the devastating effects of bankruptcy or creditor initiated termination of business operations:

> "[I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > …the purpose of the CCAA… is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey*, (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made." [Emphasis added]

Sun Indalex Finance, LLC v. United Steelworkers ("Indalex"), 2013 SCC 7 at para. 205.

123. Parliament has granted the Court powers under the CCAA to preserve the *status quo* in order to enable a company to restructure its affairs and to permit time for a plan of compromise to be prepared, filed, and considered by creditors. Section 11.2 of the CCAA establishes the provision of a super priority for DIP financing as a mechanism for accomplishing this goal.

124. The Ontario Legislature has created a statutory trust as a mechanism for accomplishing purpose of the *Construction Lien Act* (the "CLA"). In *Baltimore Aircoil of Canada Inc. v. ESD Industries Inc*., Justice Wilkins summarized the purpose and intent of the trust provisions of the CLA:

> "[31] The Construction Lien Act is a specific piece of legislation designed to remedy and rectify problems in the construction industry in Ontario. Section 8 creates trusts in respect of moneys in the hands of described persons under subsections 8(1)(a) and (b).
>
> …
>
> [36] The purpose and intent of the trust provisions of the Act is to impose the provisions of a trust on money owing or received, on account of a contract or sub-contract, which is for the benefit of the sub-contractors or other tradespeople who supplied services and materials to a job site. The legislation is clearly remedial in its effect. The legislation is clearly intended to rectify a circumstance in which persons who provide material and services to a job site, might find that money which was due to them in payment, has been used for other purposes."

Baltimore Aircoil of Canada Inc. v. ESD Industries Inc., 2002 CanLII 49492 (ONSC) at paras. 31, 36.

125. The Supreme Court of Canada's 2013 decision in *Indalex* is instructive when the Court is faced with a request for the creation of a super priority in respect of a DIP charge in favour of a DIP lender over a deemed trust.

126. In *Indalex*, the Supreme Court dealt with whether the priority established under s. 11.2 of the CCAA had priority over a deemed trust established provincially under s. 57(3) of the *Pension Benefits Act* RSO 1990, c. P-8. The Court unanimously agreed with the reasons of Deschamps J., who reasoned that:

> "[58] In the instant case, the CCAA judge, in authorizing the DIP charge,… did consider factors that were relevant to the remedial objective of the CCAA and found that Indalex had in fact demonstrated that the CCAA's purpose would be frustrated without the DIP charge. It will be helpful to quote the reasons he gave on April 17, 2009 in authorizing the DIP charge ((2009), 52 C.B.R. (5th) 61):
>
> > (a) the Applicants are in need of the additional financing in order to support operations during the period of a going concern restructuring:

> (b) there is a benefit to the breathing space that would be afforded by the DIP Financing that will permit the Applicants to identify a going concern solution;
>
> (c) there is no other alternative available to the Applicants for a going concern solution;
>
> …
>
> (f) the benefit to stakeholders and creditors of the DIP Financing outweighs any potential prejudice to unsecured creditors that may arise as a result of the granting of super-priority secured financing against the assets of the Applicants;
>
> …
>
> (h) the balancing of the prejudice weighs in favour of the approval of the DIP Financing.

[59] Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve the rights on June 12, 2009, are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate". 2009 CanLII 37906 (ON SC), (2009 CanLII 37906, at paras. 7 and 8).

[60] In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one

> hand, s. 30(7) of the PPSA required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the CCAA has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

Indalex, at paras. 58-60, concurred with by McLachlin, C.J. at para. 242 and Lebel J. at para. 265.

127. The Supreme Court's approach in *Indalex* is both the correct resolution of the priority issue on the grounds of paramountcy in circumstances where, but for the granting of priority over a statutory deemed trust in favour of the DIP lender, the DIP financing would not be advanced and the distressed company and its stakeholders would see the immediate halt to the restructuring. It is also the practical approach and manifestation of the CCAA's overriding purpose placed into reality.

128. The current case before the Court is analogous to *Indalex* in many respects:

(a) Comstock is in need of the additional financing in order to support operations during the period of a going concern restructuring;

(b) No creditor will advance funds to Comstock without the priming of the DIP facility;

(c) there is a benefit to the breathing space that would be afforded by the DIP facility that will permit Comstock to identify a going concern solution;

(d) there is no other alternative available to Comstock for a going concern solution;

(e) the benefit to stakeholders and creditors of the DIP facility outweighs any potential prejudice to unsecured creditors, secured creditors, and potential trust beneficiaries that may arise as a result of the granting of super-priority secured financing against the assets of the Comstock Group;

(f) the balancing of the prejudice weighs in favour of the approval of the DIP Financing;

(g) a deemed trust arises as a result of a provincial statute; and

(h) the federal and provincial laws are inconsistent as they give rise to different, and conflicting, priority.

129. The failure to continue Comstock as a going concern will result in substantial costs to all parties contracting with Comstock. The transition alone will require parties to, *inter alia*: (a) re-bid on proposals; (b) negotiate new union agreements; (c) endure significant business interruption and resumption costs; (d) risk the viability of projects; (e) significantly disrupt local economies and those connected to them; and (f) place the safety at workers at risk.

130. This case is also similar to *Indalex*, as there has not been the opportunity to provide notice to all affected parties. Comstock proposes that substituted service is a reasonable solution to the problem of providing notice in time-constrained circumstances.

131. In *Royal Oaks Mines Inc. Re*, Justice Blair, as he then was, cautioned against the priming of DIP financing where there had not been notice to affected parties. However, Justice Blair allowed that a super priority could be granted as a means to effect "what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period".

Royal Oak Mines Inc., Re, 1999 CanLII 14840 at para. 24.

132. In urgent CCAA filings where time compression and logistical constraints result in the limited or non-notification of certain secured creditors on the initial CCAA application, the desire to balance a distressed company's requirement to obtain vital and time-sensitive financing with the protection of other creditors' rights is put to the test. The customary comeback provisions in the Initial order is an appropriate protection afforded to such secured creditors in circumstances where delay of Court intervention would result in the imminent (or in the case of Comstock, immediate) expiry of the company's enterprise.

133. In such circumstances, it is open to secured creditors to seek to review such Court ordering of priorities and parties enjoying such priority in view of their advancement of funds pursuant to such Court-ordered charges may have to ensure such a review and further justify the continued operation of such priority later in the restructuring proceeding. This is a fair and practical result in urgent circumstances. Credit and priority should be given, at least initially, in such exigent circumstances to the "man in the arena" in the commercial conception of the Rooseveltian ethos – the DIP lender who advances funds in the face of limited

> notice to interested parties with a view to preventing the otherwise certain peril of a company in distress.
>
> 134. The inherent tension that arises between the prescribed notice requirements and the rush to the Court house steps in pan-Canadian CCAA applications is further ameliorated in situations where the secured creditors not receiving notice would not likely be affected when considered against the backdrop of the practical realities of restructuring scenarios and the alternatives to permitting the priming charge in favour of a DIP lender. In the current proceeding, the entities who have registered security interests in the Comstock Group appear to be equipment and vehicle lessors. In a shut-down scenario, their interests would be not likely be [sic] affected differently given that the receivables in such a case would not likely be collected to satisfy such interests.
>
> 135. Given the existent circumstances confronting Comstock and its stakeholders, and the large number of affected parties, it is necessary that the DIP loan be given the priority sought in order to allow Comstock to meet its urgent needs during the sorting out period.
>
> 136. The Proposal Trustee is of the view that the anticipated DIP Facility represents the only alternative available to the Comstock Group to ensure the continuation of operations. Furthermore, the Proposal Trustee is of the view that the costs associated with the DIP Facility, interest expense, permitted fees and expenses, and facility fees are commercially reasonable.
>
> 137. The Proposal Trustee is supportive of the Comstock Group's efforts to obtain the DIP financing so as to avoid liquidation and provide time to attempt to implement a restructuring and going concern sale. Without access to financing under the DIP Facility, the Comstock Group will face an immediate liquidity crisis and would have to cease operations.
>
> 138. The purpose of the CCAA, the application of paramountcy in relation to the taking of priority of DIP facilities over provincial deemed trusts, and the commercial realities of this case all militate in favour of the proposed priority of the DIP Loan as set out in the proposal Initial Order.

[55] This reasoning is applicable in this case and supports the conclusion that the DIP Charge is to have priority over construction lien claims and various trust claims. I accept the statements made at paragraph 128 of counsel's factum set out above. In my view, the Comstock Group is unlikely to survive without DIP Financing supported by the super priority DIP Charge, which is granted.

[56] Comstock Group also seeks a charge in the amount of $4.6 million over the assets of the Applicants (the "Director's Charge") to indemnify the sole director of the Comstock Group in respect of liabilities he may incur in his capacity as a director and officer of the Comstock

Group. The Director's Charge is to be subordinate to the Administration Charge and the DIP Lender's Charge.

[57] The authority to grant such a charge is set out in section 11.51 of the CCAA.

[58] I am satisfied that granting the Director's Charge, with the requested priority ranking, is warranted and necessary in the circumstances and is granted in the amount of $4.6 million. Again, I note that section 11.51 requires notice to secured creditors who are likely to be affected by the security or charge. Not all secured creditors have been notified and, accordingly, this issue is to be revisited at the comeback hearing.

Substituted Service

[59] Counsel advises that, in view of the extensive number of potentially interested parties, including contractors, subcontractors and tradespeople, the Comstock Group is of the view that notice of the effect of the proposed DIP Charge on one occasion in the The Globe and Mail (National Edition) and the Daily Commercial News, Ontario's only daily construction news newspaper, in a court-approved form, is reasonably likely to bring this application to the attention of contractors and subcontractors that may be affected. I accept this argument and authorize substituted service in the suggested manner.

Sealing of Documents

[60] Comstock's counsel requested that the Confidential Supplement be sealed in order to protect against the disclosure of sensitive and confidential financial information to third parties, the disclosure of which, it is submitted, could adversely affect the Comstock Group and its stakeholders. The "Confidential Supplement – Financial Statements" is documented as Exhibit J to the affidavit of Mr. Birkbeck sworn on July 9, 2013; paragraph 26 of the Birkbeck Affidavit refers to Financial Statements that will be provided to the court at the return of the motion, and paragraph 43 of the Birkbeck Affidavit requests that Confidential Exhibit "J" be sealed from the public record in its entirety.

[61] In my view, having considered section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 and the governing jurisprudence in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*], I am satisfied that the sealing order should be granted and the confidential material is to be sealed.

Discharge of the Interim Receiver

[62] On July 4, 2013, Comstock required $1.5 million in order to meet its payroll and independent contractor obligations. On July 3, 2013, Comstock brought a motion seeking an order authorizing BMO to make an immediate advance on a priority basis in order to permit Comstock to fund its payroll and independent contractor obligations. The motion was granted and on July 3, 2013, an order was issued appointing PwC as Interim Receiver for the limited and specific purpose of ensuring Comstock's payroll was funded by July 4, 2013 and granting the

Interim Receiver a priority charge, including in priority to construction lien and trust claimants, pursuant to the Interim Receiver's Borrowing Charge under the order.

[63] The Interim Receiver has now discharged its duties in connection with its limited purpose appointment and I am satisfied that it is appropriate and reasonable for the interim receivership proceedings to be terminated and to discharge the Interim Receiver. In making this order, I recognize that the contemplated DIP financing will be used, in part, to repay the Interim Receiver's borrowings to BMO, leaving no further purpose for the interim receivership proceedings. The fees and disbursements of the Interim Receiver and its counsel can roll over in to the Administration Charge and be approved as part of the monitor's fee approvals inside the CCAA proceedings.

Disposition

[64] In the result, the motion is granted. Two orders have been signed; namely, the Initial Order under the CCAA, which recognizes a continuation of the restructuring proceedings under the CCAA, and an order discharging PwC in its capacity as Interim Receiver of Comstock.

[65] A comeback hearing, as provided for in paragraph 61 of the Initial Order, is scheduled for Friday, July 19, 2013.

Morawetz J.

Date: July 16, 2013

TAB 2

SUPREME COURT OF CANADA

CITATION: Canada *v.* Canada North Group Inc., 2021 SCC 30

APPEAL HEARD: December 1, 2020
JUDGMENT RENDERED: July 28, 2021
DOCKET: 38871

BETWEEN:

Her Majesty The Queen in Right of Canada
Appellant

and

Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd., Ernst & Young Inc. in its capacity as monitor and Business Development Bank of Canada
Respondents

- and -

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS: (paras. 1 to 74) — Côté J. (Wagner C.J. and Kasirer J. concurring)

CONCURRING REASONS: (paras. 75 to 182) — Karakatsanis J. (Martin J. concurring)

JOINT DISSENTING REASONS: (paras. 183 to 253)	Brown and Rowe JJ. (Abella J. concurring)
DISSENTING REASONS: (paras. 254 to 265)	Moldaver J.

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

Her Majesty The Queen in Right of Canada *Appellant*

v.

Canada North Group Inc.,
Canada North Camps Inc.,
Campcorp Structures Ltd.,
DJ Catering Ltd.,
816956 Alberta Ltd.,
1371047 Alberta Ltd.,
1919209 Alberta Ltd.,
Ernst & Young Inc. in its capacity as monitor and
Business Development Bank of Canada *Respondents*

and

Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: Canada *v.* Canada North Group Inc.

2021 SCC 30

File No.: 38871.

2020: December 1; 2021: July 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Bankruptcy and insolvency — Priority — Source deductions — Priming charges — Employee source deductions not remitted to Crown by companies in receivership — Judge supervising restructuring proceedings under Companies' Creditors Arrangement Act ordering priming charges over debtor companies' assets in favour of interim lender, monitor and directors — Order giving priority to priming charges over claims of secured creditors and providing that they are not to be limited or impaired in any way by provisions of any federal or provincial statute — Property of debtor companies subject to deemed trust in favour of Crown for unremitted source deductions under Income Tax Act — Whether court has authority to rank priming charges ahead of Crown's deemed trust for unremitted source deductions — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 227(4.1) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2, 11.51, 11.52.

Canada North Group and six related corporations initiated restructuring proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"). In their initial *CCAA* application, they requested a package of relief including the creation of three priming charges (or court-ordered super-priority charges): an administration charge in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred, a financing charge in favour of an interim lender, and a directors' charge

protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The application included an affidavit from one of their directors attesting to a debt to Her Majesty The Queen for unremitted employee source deductions and GST. The *CCAA* judge made an order ("Initial Order") that the priming charges were to "rank in priority to all other security interests, . . . charges and encumbrances, claims of secured creditors, statutory or otherwise", and that they were not to be "otherwise . . . limited or impaired in any way by . . . the provisions of any federal or provincial statutes" ("Priming Charges"). The Crown subsequently filed a motion for variance, arguing that the Priming Charges could not take priority over the deemed trust created by s. 227(4.1) of the *Income Tax Act* ("*ITA*") for unremitted source deductions. The motion to vary was dismissed, and the Crown's appeal to the Court of Appeal was also dismissed.

Held (Abella, Moldaver, Brown and Rowe JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Côté** and Kasirer JJ.: The Priming Charges prevail over the deemed trust. Section 227(4.1) does not create a proprietary interest in the debtor's property. Further, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the *ITA*. As a result, there is no conflict between s. 227(4.1) of the *ITA* and the Initial Order made in this case, or between the *ITA* and s. 11 of the *CCAA*.

In general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. The most important feature of the *CCAA* is the broad discretionary power it vests in the supervising court: s. 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This jurisdiction is constrained only by restrictions set out in the *CCAA* itself and the requirement that the order made be appropriate in the circumstances — its general language is not restricted by the availability of more specific orders in ss. 11.2, 11.4, 11.51 and 11.52. As restructuring under the *CCAA* often requires the assistance of many professionals, giving super priority to priming charges in favour of those professionals is required to derive the most value for the stakeholders. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, would defy fairness and common sense.

Her Majesty does not have a proprietary interest in a debtor's property that is adequate to prevent the exercise of a supervising judge's discretion to order super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it. Section 227(4.1) does not create a beneficial interest that can be considered a proprietary interest, and it does not give the Crown the same property interest a common law trust would. Without attaching to specific property, creating the usual right to the enjoyment of property or the fiduciary obligations of a trustee, the interest created by s. 227(4.1) lacks the qualities that allow a court to refer to a beneficiary as a beneficial owner.

Furthermore, under Quebec civil law, it is clear that s. 227(4.1) does not establish a legal trust as it does not meet the three requirements set out in arts. 1260 and 1261 of the *Civil Code of Québec*. Although s. 227(4.1) provides that the assets are deemed to be held "separate and apart from the property of the person" and "to form no part of the estate or property of the person", the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): no specific property is transferred to a trust patrimony, and there is no autonomous patrimony to which specific property is transferred.

Section 227(4.1) states that the Receiver General shall be paid the proceeds of a debtor's property "in priority to all such security interests", as defined in s. 224(1.3), but court-ordered super-priority charges under s. 11 of the *CCAA* or any of the sections that follow it are not security interests within the meaning of s. 224(1.3). Section 224(1.3) defines "security interest" as meaning "any interest in, or for civil law any right in, property that secures payment or performance of an obligation" and including "an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for". The grammatical structure of this provision evidences Parliament's intent that the list have limiting effect, such that only the instruments enumerated and instruments that are similar in nature fall within the definition. Court-ordered super-priority charges are utterly different from any of the interests listed in s. 227(4.1) because they were not made for the sole benefit of the holder of the

charge, nor were they made by consensual agreement or by operation of law. Instead, they were ordered by the *CCAA* judge to facilitate the restructuring in furtherance of the interests of all stakeholders. This interpretation is consistent with the presumption against tautology, which suggests that Parliament intended interpretive weight to be placed on the examples, and with the *ejusdem generis* principle, which limits the generality of the final words on the basis of the narrow enumeration that precedes them.

Preserving the deemed trusts under s. 37(2) of the *CCAA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Similarly, granting Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full under s. 6(3) does not modify the deemed trust created by s. 227(4.1) in any way. In any event, s. 6(3) comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise.

Finally, whether Her Majesty is a "secured creditor" under the *CCAA* or not, the supervising court's power in s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders. Although ss. 11.2, 11.51 and 11.52 of the *CCAA* may attach only to the property of the debtor's company, there is no such restriction in s. 11. That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary.

Per **Karakatsanis** and Martin JJ.: There is no conflict between the *ITA* and *CCAA* provisions at issue in this appeal. The broad discretionary power under s. 11 of the *CCAA* permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

Section 227(4.1) of the *ITA* provides that a deemed trust attaches to property of the employer to the extent of unremitted source deductions "notwithstanding any security interest in such property" or "any other enactment of Canada". Although this provision clearly specifies that the Crown's right operates notwithstanding other security interests, the content of that right for the purposes of insolvency cannot be inferred solely from the text of the *ITA*. Section 227(4.1) states that the amount of the unremitted source deductions is "beneficially owned" by the Crown, but there is no settled doctrinal meaning of the term "beneficial ownership", and s. 227(4.1) modifies even those features of beneficial ownership that are widely associated with it under the common law.

As a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law. In the case of the deemed trust in s. 227(4.1), there is no identifiable trust property and therefore no certainty of subject matter. Moreover, without specific property being transferred to the trust patrimony, s. 227(4.1) does not satisfy the requirements of an autonomous patrimony contemplated by the *Civil Code of Québec* in arts. 1260, 1261 and 1278. As a result, s. 227(4.1) traces the value of the unremitted source deductions, capping the Crown's right at that value, and the specific

property that constitutes the debtor's estate remains unchanged, with the debtor continuing to have control over it.

The *Bankruptcy and Insolvency Act* ("*BIA*") and the *CCAA* each give the deemed trust meaning for their own purposes. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. To realize these goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process. In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67(1)(a) excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among creditors. Section 67(2) provides an exception for deemed trusts that are not true trusts. Section 67(3) provides a further exception by stating that s. 67(2) does not apply in respect of the Crown's deemed trust for unremitted source deductions under the *ITA* and other statutes. The result of this scheme is that the debtor's estate — to the extent of the unremitted source deductions — is not "property of a bankrupt divisible among his creditors", as required by s. 67(1) of the *BIA*. Section 67 therefore gives content to the Crown's right of beneficial ownership under s. 227(4.1) of the *ITA*: the amount of the unremitted source deductions is taken out of the pool of money that is distributed to creditors in a *BIA* liquidation.

In contrast, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies. Due to its remedial nature, the *CCAA* is famously skeletal in nature and there is no rigid formula for the division of assets. When a debtor's restructuring is on

the table, the goal pivots, and interim financing is introduced to facilitate restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scheme under the *BIA*.

The Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by both ss. 37(2) and 6(3) of the *CCAA*. Section 37(2) provides that the Crown continues to beneficially own the debtor's property equal in value to the unremitted source deductions; the unremitted source deductions "shall . . . be regarded as being held in trust for Her Majesty". Although this signals that, unlike deemed trusts captured by s. 37(1), the Crown's deemed trust continues and confers a stronger right, s. 37(2) does not explain what to do with that right for the purposes of a *CCAA* proceeding. It does not, for example, provide that trust property should be put aside, as it would be in the *BIA* context. Section 6(3) gives specific effect to the Crown's right by requiring that a plan of compromise provide for payment in full of the Crown's deemed trust claims within six months of the plan's approval. As such, the Crown can demand to be paid in full in priority to all "security interests", including priming charges. The remedial goal of the *CCAA* is at the forefront of providing flexibility in preserving the Crown's right to unremitted source deductions in s. 37(2), and in giving a concrete effect to that right in s. 6(3) of the *CCAA*. The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is consistent with the different schemes and purposes of the *BIA* and *CCAA*.

Sections 11.2, 11.51 and 11.52 of the *CCAA*, which allow the court to order priming charges over a company's property, do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. Instead, that authority comes from s. 11 of the *CCAA*. Section 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the requirements of good faith and due diligence on the part of the applicant. It can be used to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions for two reasons. First, ranking a priming charge ahead of the Crown's deemed trust does not conflict with the *ITA* provision. So long as the Crown is paid in full under a plan of compromise, the Crown's right under s. 227(4.1) remains intact "notwithstanding any security interest" in the amount of the unremitted source deductions. Second, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. Interim financing is often crucial to the restructuring process. If there is evidence that interim lending cannot be obtained without ranking the interim loan ahead of the Crown's deemed trust, such an order could further the *CCAA*'s remedial goals. In general, the court should have flexibility to order super-priority charges in favour of parties whose function is to facilitate the proposal of a plan of compromise that, in any event, will be required to pay the Crown in full.

Per Abella, **Brown** and **Rowe** JJ. (dissenting): The appeal should be allowed. The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) and the related deemed trust provisions under the the *ITA*, the *CPP*, and the *EIA* (collectively, the "Fiscal Statutes") bear only one plausible interpretation: the

Crown's deemed trust enjoys priority over all other claims, including priming charges granted under the *CCAA*. Parliament's intention when it amended and expanded s. 227(4) and 227(4.1) of the *ITA* was clear and unmistakable: it granted this unassailable priority by employing the unequivocal language of "notwithstanding any . . . enactment of Canada". This is a blanket paramountcy clause; it prevails over all other statutes. No similar "notwithstanding" provision appears in the *CCAA*. Indeed, it is quite the opposite: unlike most deemed trusts which are nullified in *CCAA* proceedings by the operation of s. 37(1) of the *CCAA*, s. 37(2) preserves the deemed trusts of the Fiscal Statutes.

The Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the *CCAA*, and the priming charges provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* fall under the definition of "security interest", because they are "interests in the debtor's property securing payment or performance of an obligation", i.e. the payment of the monitor, the interim lender, and directors. As the definition of "security interest" in the *ITA* includes "encumbrances of any kind, whatever, however or whenever arising, created, deemed to arise or otherwise provided for", there is no reason that the definition would preclude the inclusion of an interest that is designed to operate to the benefit of all creditors. This is sufficient to decide the appeal.

This finding does not leave the deemed trust provisions in the Fiscal Statutes in conflict with the *CCAA*. Section 11 of the *CCAA* contains a grant of broad

supervisory discretion and the power to "make any order that it considers appropriate in the circumstances", but that grant of authority is not unlimited. Parliament avoided any conflict between the *CCAA* and the *ITA* by imposing three restrictions that are significant here. First, although s. 37(1) of the *CCAA* provides that "property of the debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision", s. 37(2) provides for the continued operation of the deemed trusts under the Fiscal Statutes in a *CCAA* proceeding. In addition, while the deemed trusts are not "true trusts" and the commingling of assets renders the money subject to the deemed trusts untraceable, tracing has no application to s. 227(4.1). Second, the unremitted source deductions are deemed not to form part of the property of the debtor's company. If there is a default in remittances, the Crown is deemed to obtain beneficial ownership in the tax debtor's property in the amount of the unremitted source deductions that it can collect "notwithstanding" any other enactment or security interest. However, priming charges can attach only to the debtor's property, so the Crown's interest under the deemed trust is not subject to the Priming Charges. Third, under the definition of "secured creditor" in s. 2 of the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes. That definition must be read as "secured creditor means . . . a holder of any bond of the debtor company secured by . . . a trust in respect of, all or any property of the debtor company", which makes it manifestly clear that the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes.

Giving effect to Parliament's clear intent to grant absolute priority to the deemed trust does not render s. 6(3) or s. 11.09 of the *CCAA* meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*. Section 6(3) of the *CCAA*, which protects the Crown's claims under the deemed trusts as well as claims not subject to the deemed trusts under the Fiscal Statutes, operates only where there is an arrangement or compromise put to the court. In contrast, the deemed trusts arise immediately and operate continuously from the time the amount was deducted or withheld from employee's remuneration, and apply to only unremitted source deductions. Without s. 6(3), the Crown would be guaranteed entitlement only to unremitted source deductions when the court sanctions a compromise or arrangement, and not to its other claims under s. 224(1.2) of the *ITA*, because most of the Crown's claims rank as unsecured under s. 38 of the *CCAA*. However, s. 6(3) does not explain the survival of the deemed trust or the rights conferred on the Crown under the deemed trust. Their survival is explained by s. 37(2), which continues the operation of s. 227(4.1), or by s. 227(4.1), which provides that the proceeds of the trust property "shall be paid to the Receiver General in priority to all such security interests". Finally, s. 6(3) protects different interests than those captured by the deemed trusts, and the right not to have to compromise under s. 6(3) is a right independent of the Crown's right under deemed trusts.

Section 11.09 of the *CCAA*, which permits the court to stay the Crown's enforcement of its claims under the deemed trust claims, can apply to the Crown's deemed trust claims, but it does not remove the priority granted by the deemed trusts.

Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. The deemed trust is not a "true" trust and it does not confer an ownership interest or the rights of a beneficiary to the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec*. The requirements of "true" trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust as the deemed trust is a legal fiction with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*.

Finally, concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges would not lead to absurd consequences. The conclusion that interim financing would simply end was not supported by the record, and there are usually enough funds available to satisfy both the Crown claim and the court-ordered priming charges. Equally unfounded is the claim that confirming the priority of the deemed trusts would inject an unacceptable level of uncertainty into the insolvency process. Interim lenders can rely on the company's financial statements to evaluate the risk of providing financing.

Per **Moldaver** J. (dissenting): There is substantial agreement with the analysis and conclusions of Brown and Rowe JJ. However, there are two points to be addressed. First, the question of the nature of the Crown's interest should be left to

another day. This is because, properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to direct that the Crown's interest under s. 227(4.1) of the *ITA* — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

Second, while there is agreement that s. 37(2) of the *CCAA* can be interpreted as an internal restriction on s. 11, if this interpretation is mistaken, s. 11 is nonetheless restricted by s. 227(4.1), as Parliament has expressly indicated the supremacy of s. 227(4.1) over the provisions of the *CCAA*. The Crown's deemed trust claim must thus take priority over all court-ordered priming charges, whether they arise under the specific priming charge provisions, or under the court's discretionary authority. A necessary consequence of the absolute supremacy of the Crown's deemed trust claim is that the Crown's interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Unlike s. 227(4.1), which is focused on ensuring the priority of the Crown's claim, s. 6(3) merely establishes a six-month timeframe for payment to the Crown in the event that the debtor company succeeds in staying viable as a going concern. Accordingly, if s. 6(3) gave effect to the Crown's interest, the Crown could be ranked last, so long as it is paid within six months of any arrangement. Such an outcome would be plainly inconsistent with the absolute priority of the Crown's claim. Further, as s. 6(3) does not apply where a liquidation occurs under the *CCAA*, the Crown would be deprived of its priority over security interests in such circumstances.

It cannot be doubted that Parliament considered the potential consequences of its legislative actions, including any consequences for *CCAA* proceedings. If circumstances do arise in which the priority of the Crown's claim threatens the viability of a particular restructuring, it clearly lies with the Crown to be flexible so as to avoid any consequences that would undermine the remedial purposes of the *CCAA*.

Cases Cited

By Côté J.

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relatif à), 2009 QCCS 1202; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224; *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795; *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567; *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182; *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715.

By Karakatsanis J.

Considered: *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; **referred to:** *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166; *Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952; *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Guarantee Company of North America v. Royal Bank of*

Canada, 2019 ONCA 9, 144 O.R. (3d) 225; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70; *Foskett v. McKeown*, [2001] 1 A.C. 102; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161; *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273; *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274.

By Brown and Rowe JJ. (dissenting)

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Canada (Attorney General) v. Caisse populaire d'Amos*, 2004 FCA 92, 324 N.R. 31; *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758; *R. v. Verette*, [1978] 2 S.C.R. 838; *Toronto-Dominion Bank v. Canada*, 2020 FCA 80, [2020] 3 F.C.R. 201; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R.

379; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94; *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237; *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278; *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289; *R. v. McIntosh*, [1995] 1 S.C.R. 686.

By Moldaver J. (dissenting)

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APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Wakeling and Schutz JJ.A.), 2019 ABCA 314, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 95 B.L.R. (5th) 222, [2019] 12 W.W.R. 635, 11 P.P.S.A.C. (4th) 157, 2019 D.T.C. 5111, [2019] A.J. No. 1154 (QL), 2019 CarswellAlta 1815 (WL Can.), affirming a decision of Topolniski J., 2017 ABQB 550, 60 Alta. L.R. (6th) 103,

52 C.B.R. (6th) 308, [2018] 2 W.W.R. 731, [2017] A.J. No. 930 (QL), 2017 CarswellAlta 1631 (WL Can.). Appeal dismissed, Abella, Moldaver, Brown and Rowe JJ. dissenting.

Michael Taylor and *Louis L'Heureux,* for the appellant.

Darren R. Bieganek, Q.C., and *Brad Angove,* for the respondents Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd., DJ Catering Ltd., 816956 Alberta Ltd., 1371047 Alberta Ltd., 1919209 Alberta Ltd. and Ernst & Young Inc. in its capacity as monitor.

Jeffrey Oliver and *Mary I. A. Buttery, Q.C.*, for the respondent the Business Development Bank of Canada.

Kelly J. Bourassa, for the intervener the Insolvency Institute of Canada.

Randal Van de Mosselaer, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

The reasons of Wagner C.J. and Côté and Kasirer. JJ. were delivered by

CÔTÉ J. —

I. Overview

[1] The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), has a long and storied history. From its origins in the Great Depression to its revival and reinvention during the 1970s and 1980s, the *CCAA* has played an important role in Canada's economy. Today, the *CCAA* provides an opportunity for insolvent companies with more than $5,000,000 in liabilities to restructure their affairs through a plan of arrangement. The goal of the *CCAA* process is to avoid bankruptcy and maximize value for all stakeholders.

[2] In order to facilitate the restructuring process, courts supervising *CCAA* restructurings may authorize an insolvent company to incur certain critical costs associated with this process. Supervising courts may also secure payment of these costs by ordering a super-priority charge against the insolvent company's assets. Today, our Court is called upon to determine whether a supervising court may order super-priority charges over assets that are subject to a claim of Her Majesty protected by a deemed trust created by s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*").

[3] The Crown raises two arguments as to why a supervising court should be unable to subordinate Her Majesty's interest to super-priority charges. First, the Crown says that s. 227(4.1) creates a proprietary interest in a debtor's assets and a court cannot attach a super-priority charge to assets subject to Her Majesty's interest. Second, the Crown says that even if s. 227(4.1) does not create a proprietary interest, it creates a

security interest that has statutory priority over all other security interests, including super-priority charges.

[4] Both of these arguments must fail. As this Court has previously held, the *CCAA* generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts. In all cases where a supervising court is faced with a deemed trust, the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the *ITA* are examined in their entirety, it is clear that the *ITA* does not establish a proprietary interest because Her Majesty's claim does not attach to any specific asset. Further, there is no conflict between the *CCAA* order and the *ITA*, as the deemed trust created by the *ITA* has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the *CCAA* does not fall within that definition. For the reasons that follow, I would therefore dismiss the appeal.

II. Background

[5] Canada North Group and six related corporations ("Debtors") initiated restructuring proceedings under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but soon changed course and sought to restructure under the *CCAA*. In their initial *CCAA* application, they requested a package of relief standard to *CCAA* proceedings, including a thirty-day stay on all proceedings against them, the appointment of a monitor and the creation of three super-priority charges. The first

charge they requested was an administration charge of up to $1,000,000 in favour of counsel, a monitor and a chief restructuring officer for the fees they incurred. The second was a $1,000,000 financing charge in favour of an interim lender. The third was a $150,000 directors' charge protecting their directors and officers against liabilities incurred after the commencement of the proceedings. The Debtors included in their initial motion an affidavit from one of their directors attesting to a $1,140,000 debt to Her Majesty The Queen for source deductions and Goods and Services Tax ("GST").

[6] Justice Nielsen of the Court of Queen's Bench heard the motion together with a cross-motion by the Debtors' primary lender, Canadian Western Bank, seeking the appointment of a receiver. Justice Nielsen granted an initial order in favour of the Debtors on the terms requested in the initial application, aside from a $500,000 reduction in the administration charge (Alta. Q.B., No. 1703-12327, July 5, 2017 ("Initial Order")). The terms of that order included the following with regard to priority:

> Each of the Directors' Charge, Administration Charge and the Interim Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person. [Emphasis deleted; para. 44.]

Justice Nielsen further ordered that these charges "shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes" (para. 46).

[7] Three weeks after the Initial Order was granted, the Debtors sought supplementary orders extending the stay of proceedings and increasing the interim financing to $2,500,000. Canadian Western Bank again filed a motion to appoint a receiver. At the hearing of the three motions, counsel for Her Majesty appeared in order to advise that Her Majesty would be filing a motion to vary the Initial Order on the ground that the order failed to recognize Her priority interest in unremitted source deductions (the portion of remuneration that employers are required to withhold from employees and remit directly to the Canada Revenue Agency ("CRA")).

[8] The Crown filed the motion soon after. Its argument for variance was grounded in the nature of Her Majesty's interest in the Debtors' property. It argued that the nature of Her Majesty's interest is determined by s. 227(4.1) of the *ITA* and that that provision creates a proprietary interest:

> **(4)** Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.
>
> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be

property of the person, equal in value to the amount so deemed to be held in trust is deemed

> **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
>
> **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

III. Judgments Below

A. *Court of Queen's Bench, 2017 ABQB 550, 60 Alta. L.R. (6th) 103*

[9] Justice Topolniski heard Her Majesty's motion to vary the Initial Order. Despite the delay between the Initial Order and the motion to vary, Topolniski J. found that she had jurisdiction to hear the motion based on the discretion and flexibility conferred by the *CCAA*. However, she dismissed the motion on the ground that s. 227(4.1) of the *ITA* creates a security interest that can be subordinated to court-ordered super-priority charges.

[10] Justice Topolniski relied upon *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274, and *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002]

2 S.C.R. 720, to conclude that the deemed trust created by s. 227(4.1) of the *ITA* is not a proprietary interest. Rather, the *ITA* creates something similar to a floating charge over all the debtor's assets, which permits the debtor to alienate property subject to the deemed trust. These characteristics are inconsistent with a proprietary interest, and thus s. 227(4.1) does not create such an interest.

[11] Justice Topolniski also considered whether s. 227(4.1) creates a security interest that requires Her Majesty's interest to take priority over court-ordered charges. She acknowledged that the *CCAA* preserves the operation of the deemed trust, but she found that it also authorizes the reorganization of priorities by court order. Because each of the charges included in the Initial Order was critical to the restructuring process, they were necessarily required by the *CCAA* regime.

B. *Leave to Appeal, 2017 ABCA 363, 54 C.B.R. (6th) 5*

[12] Following the dismissal of the Crown's motion, the Debtors determined that there were sufficient assets in the estate to satisfy both Her Majesty and the beneficiaries of the three court-ordered super-priority charges in full. However, the Crown sought and obtained leave to appeal in order to seek appellate guidance on the nature of Her Majesty's priority.

C. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29*

[13] The Court of Appeal dismissed the appeal. It was divided as to whether the super-priority charges had priority over Her Majesty's claim. Justice Rowbotham wrote for the majority and agreed with the motion judge that s. 227(4.1) of the *ITA* creates a security interest, in accordance with this Court's earlier finding in *First Vancouver* that the deemed trust is like a "floating charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

[14] After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or

at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

[15] Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the *CCAA* cannot permit discretion to be exercised without regard for s. 227(4.1) of the *ITA*, nor can ss. 11.2, 11.51 and 11.52 of the *CCAA* be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

[16] The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the *ITA*. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the *ITA* to

determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

[17] In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the *ITA*, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. *CCAA Regime*

[18] The *CCAA* is part of Canada's system of insolvency law, which also includes the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to

complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

[19] The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

[20] The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 42, quoting

J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

[21] The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the *CCAA* confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

[22] On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (*Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

[23] In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

[24] As this Court held in *Century Services*, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over

orders made under the specific provisions. These include, for example, key employee retention plan charges (*Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

[25] In *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), to protect employee pensions. Justice Deschamps wrote for a unanimous Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the *PPSA* ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

[26] Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was

necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

[27] After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the *PPSA* provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

[28] There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings . . . . The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus*

Capital, at para. 52, quoting *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

[29] This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, at para. 51 (CanLII)).

[30] Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and

develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

[31] It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (*Triton Électronique inc. (Arrangement relatif à)*, 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd.* [*v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.)] . . . Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the *Bank Act*, S.C. 1991, c. 46, were to be interpreted as being immune from the

provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

B. *Nature of the Interest Created by Section 227(4.1) of the ITA*

[32] The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the *ITA*. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

[33] Section 153(1) of the *ITA* requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the

withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the *ITA* provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the *ITA*, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

[34] When a company seeks protection under the *CCAA*, s. 37(1) of the *CCAA* provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the *CCAA* exempts the deemed trusts created by s. 227(4) and (4.1) of the *ITA* from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the *ITA*.

[35] Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the *CCAA*, which provides as follows:

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> **(a)** subsection 224(1.2) of the *Income Tax Act* . . . .

[36] Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the *ITA* in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also applies to numerous claims that are not protected by the deemed trust, including penalties, interest, withholdings on non-resident dispositions and certain retirement contributions (see ss. 224(1.2) and 227(10.1) of the *ITA*, the latter of which refers to amounts payable under ss. 116, 227(9), (9.2), (9.3), (9.4) and (10.2), Part XII.5 and Part XIII). Equating the deemed trust with the right under s. 6(3) renders s. 37(2) of the *CCAA* and the deemed trust meaningless. I therefore proceed, as this Court did in *Indalex*, by assessing the interest created by s. 227(4.1) of the *ITA* without regard to the *CCAA* (*Indalex*, at para. 48).

[37] Section 227(4.1) provides:

> **(4.1)** Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed
>
> > **(a)** to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and
> >
> > **(b)** to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest
>
> and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

(1) Does Section 227(4.1) of the *ITA* Create a Proprietary or Ownership Interest in the Debtor's Assets?

[38] This appeal — like previous appeals to this Court — does not require the Court to exhaustively define the nature and content of the interest created by s. 227(4.1) of the *ITA* (*Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, and *First Vancouver*). All that is necessary is to determine whether s. 227(4.1) confers upon Her Majesty an interest in the debtor's property that precludes a court from ordering charges with priority over Her Majesty's claim. The Crown argues that s. 227(4.1) does so by giving Her Majesty a proprietary interest in the debtor's assets, which "causes

TAB 3

500-09-029763-216 – 500-09-029765-211

COURT OF APPEAL OF QUÉBEC

(Montréal)

On appeal from a judgment of the Superior Court, District of Montréal, rendered on October 27, 2021 by the Honourable Justice Martin Castonguay.

Nos. **500-09-029763-216 C.A.M.** – 500-11-060355-217 S.C.M.

THE ATTORNEY GENERAL OF CANADA

APPELLANT

v.

CHRONOMÉTRIQ INC.

HEALTH MYSELF INNOVATIONS INC.

RESPONDENTS
(Debtors / Petitioners)

- and -

RICHTER ADVISORY GROUP INC.

RESPONDENT
(Proposal Trustee)

- and -

CANADIAN IMPERIAL BANK OF COMMERCE

CANADIAN BANKERS' ASSOCIATION

INSOLVENCY INSTITUTE OF CANADA

INTERVENERS

(Style of cause continues next page)

APPELLANTS' BRIEF

Dated April 8, 2022

Nos. **500-09-029765-211 C.A.M.** – 500-11-060355-217 S.C.M.

L'AGENCE DU REVENU DU QUÉBEC

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v.

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- and -

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(Proposal Trustee)

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CANADIAN IMPERIAL BANK OF COMMERCE
CANADIAN BANKERS' ASSOCIATION
INSOLVENCY INSTITUTE OF CANADA

INTERVENERS

Me Kim Sheppard
Me George Bódy
Department of Justice Canada
Québec Regional Office
East Tower, 9th Floor
Guy-Favreau Complex
200 René-Lévesque Blvd. West
Montréal, Québec
H2Z 1X4

Tel.: 514 283-8460 (Me Sheppard)
Tel.: 780 495-7595 (Me Bódy)
Fax: 514 283-8427
kim.sheppard@justice.gc.ca
george.body@justice.gc.ca

Lawyers for the Appellant
The Attorney General of Canada

Me Daniel Cantin
Larivière Meunier (Revenu Québec)
Sector 528
3800 de Marly Street
Québec, Québec
G1X 4A5

Tel.: 418 652-5245
Fax: 418 577-5327
danielcantin@revenuquebec.ca

Lawyer for the Appellant
L'Agence du revenu du Québec

Me Hugo Babos-Marchand
McCarthy Tétrault LLP
Suite 2500
1000 De La Gauchetière Street West
Montréal, Québec
H3B 0A2

Tel.: 514 397-4156
Fax: 514 875-6246
hbmarchand@mccarthy.ca

Lawyer for the Respondents

Me Sylvain Rigaud
Me Joshua Bouzaglou
Woods LLP
Suite 1700
2000 McGill College Avenue
Montréal, Québec
H3A 3H3

Tel.: 514 736-4871 (Me Rigaud)
Tel.: 514 736-4866 (Me Bouzaglou)
Fax: 514 284-2046
srigaud@woods.qc.ca
jbouzaglou@woods.qc.ca

Lawyers for the Intervener
Canadian Imperial Bank of Commerce

Me Christian Lachance
Me Benjamin Jarvis
Davies Ward Phillips & Vineberg LLP
26th Floor
150 McGill College Avenue
Montréal, Québec
H3A 3N9

Tel.: 514 841-6576 (Me Lachance)
Tel.: 514 807-0621 (Me Jarvis)
Fax: 514 841-6499
clachance@dwpv.com
bjarvis@dwpv.com

Lawyers for the Intervener
Canadian Bankers' Association

Me Alain Riendeau
Me Brandon Farber
Fasken Martineau DuMoulin LLP
Suite 3500
800 Victoria Square
Montréal, Québec
H4Z 1E9

Tel.: 514 397-7678 (Me Riendeau)
Tel.: 514 397-5179 (Me Farber)
Fax: 514 397-7600
ariendeau@fasken.com
bfarber@fasken.com

Lawyers for the Intervener
Insolvency Institute of Canada

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APPELLANTS' ARGUMENT

OVERVIEW

1. Employee source deductions are the cornerstone of Canada's personal income tax collection system.[1]

2. The *Income Tax Act* (ITA) and other federal and provincial statutes[2] (Fiscal Statutes), require employers[3] to withhold prescribed amounts from their employees' remuneration and to remit those amounts to the Crown.[4] Those withholdings are not the employer's property. When an employer does not remit those amounts, and instead uses them to satisfy other claims, the Crown is exposed as an involuntary creditor.

3. To protect the Crown from this sort of misappropriation, Parliament gave absolute priority to the Crown by explicitly deeming the property of the debtor to be held in trust "notwithstanding the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province, or any other law". Parliament also ensured that the deemed trust for unremitted payroll deductions retains its priority in

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1 In *First Vancouver Finance v. M.R.N.*, 2002 SCC 49 at para. 22 [*First Vancouver Finance*], the SCC stated that: "The collection of source deductions has been recognized as 'at the heart' of income tax collection in Canada". As mentioned in *Pembina on the Red Development Corp. Ltd. v. Triman Industries Ltd.* (1991), 85 DLR (4th) 29 (Man. C.A.), close to 90% of all personal income taxes paid in Canada are collected in this manner.

2 *Income Tax Act,* RSC 1985, c. 1 (5th Supp) [ITA], as amended; the *Canada Pension Plan*, RSC 1985, c. C-8 [CPP], the *Employment Insurance Act*, SC 1996, c. 23 [EIA], the *Taxation Act*, CQLR, c. I-3 [TA], the *Tax Administration Act*, CQLR, c. A-6.002 [TAA] and the *Act respecting the Québec Pension Plan*, CQLR, c. R-9 [QPP].
The provisions of the statutes are virtually identical. The Crown will refer only to the ITA provision in this factum and when referring collectively to the statutes, will refer to the "Fiscal Statutes".

3 Although the obligation under section 153 of the ITA is for "...every person paying", for easier reading, we will refer to "employer" in this Factum.

4 Both the provincial and federal tax authorities.

insolvency and restructuring proceedings under the *Bankruptcy and Insolvency Act* (BIA).[5] Courts do not have authority to override these provisions.

4. In this case, in the context of a Division 1 proposal under the BIA, Chronométriq Inc. and a related corporation requested the Court to grant priming charges that would take priority over the Crown's deemed trust claims. Despite the absolute priority described above, the Court issued the order sought by the Debtors. The Court erred.

5. There is no provision in the BIA that gives the Court authority to subordinate the Crown's deemed trust claims to any charge on the debtor's property under a Division 1 proposal, not even the Court's inherent jurisdiction recognized under section 183 of the BIA.

6. The recent decision of the Supreme Court of Canada (SCC) in *Canada v. Canada North Group Inc.*[6] (*Canada North*), relied upon by the Debtors to obtain their Priming Charge Order, is not applicable in the present matter. That decision was issued in the context of a *Companies' Creditors Arrangement Act*[7] (CCAA) proceeding. Consistent with the significant flexibility and discretion associated with that statute, the SCC concluded that supervising judges have the ability, under section 11—a provision at the heart of the CCAA which provides broad discretion to judges—to subordinate the Crown's deemed trust claims where such an order will achieve the objectives of the CCAA. In contrast, the BIA is a rules-based statute that does not contain a similar provision applicable to Division 1 proposals.

7. On a procedural level, the Court below did not give the Crown a reasonable opportunity to present its arguments. Despite the importance of the issues in this case, and that the Crown was served with the Motion less than four (4) hours before the hearing, the Court denied the Crown's request for an adjournment. This was a denial of justice.

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5 *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3.
6 *Canada v. Canada North Group Inc.*, 2021 SCC 30 [*Canada North*].
7 *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.

PART I – FACTS

8. Chronométriq Inc. and its wholly owned subsidiary, Health Myself Innovations Inc. (collectively, the Debtors) were corporations carrying on business in Québec, providing healthcare management and patient engagement software for healthcare professionals.

9. At all material times, the Debtors were indebted to the Crown for over $3.1 million for sources deductions and related amounts.[8]

10. On October 26, 2021, the Debtors sought protection from their creditors by filing Notices of Intention to file a proposal (NOIs) under the BIA. Richter Advisory Group Inc. was appointed as Trustee.

11. The next day, at 10:27 am, the Debtors notified the Crown with a Motion seeking, amongst other things, an order ranking creditor charges in the amount of $1,450,000[9] on the Debtors' property in priority to the Crown's deemed trust pursuant to sections 50.6, 64.1, 64.2 and 183 of the BIA.[10] [11]

12. The Debtors also requested that the Court declare that the priority of the Priming Charges would bind any subsequent trustee in bankruptcy, notwithstanding the provisions of any federal or provincial statute.[12]

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8 See paragraph 42 of the Motion, **Appellants' Brief (hereinafter "A.B."), p. 64**.

9 The Priming Charges requested totalling $1,450,000 were comprised of: $1,000,000 Interim Lender's Charge, $200,000 Administration Charge for post-filing professional fees (fees of the counsel for the Debtors, the Trustee and counsel for the Trustee) and $250,000 Directors and Officers' Charge.

10 *Motion for the Issuance of an Order Authorizing and Approving Interim Financing, a Sale and Investment Solicitation Process, and Administrative Charge, a Directors and Offices Charge, a Key Employee Retention Program, Procedural Consolidation of the Estates, and Other Relief* (Notification by email and Exhibits R-1 to R-13 are found at Schedule III), **A.B., p. 57ff.**

11 See paragraph 34 of the Priming Charge Order, **A.B., p. 39**.

12 See paragraph 37(d) of the Priming Charge Order, **A.B., p. 39**.

13. The Motion was returnable before the Court at 2:15 pm the same day, leaving the Crown with only 3 hours and 48 minutes to prepare for the hearing.

14. Considering the importance and complexity of the legal questions raised by the Motion, the Crown sought an adjournment to allow sufficient time to prepare for the hearing.[13] This was the first motion before the Superior Court of Québec requesting to prime charges over the Crown's deemed trust in the context of BIA proceedings since the SCC issued its decision in *Canada North*. CRA had a significant interest to protect its rights.

15. The Court denied the Crown's request.

16. At the hearing, the Debtors submitted an amended draft Order to the Court to clarify that the Priming Charge Order would apply to "trusts (statutory or otherwise)" and to increase the Interim Lender's Charge from $1 M to $1.6 M.[14] This amended draft Order was never submitted to the Crown and yet directly affected its rights.

17. Upon hearing the Motion, the Court issued the Priming Charge Order. It appears that the Court relied on the *Canada North* decision, as was submitted in the oral submissions by the Debtors.[15] As explained below, *Canada North* is not applicable in the present file.

18. When the Court rendered its reasons orally, it stated that it had the discretion to render the Priming Charge Order.[16] The Court, however, did not specify on which grounds it had authority to render such an Order under the BIA.

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13 The Crown sought an adjournment of between 10 and 14 days and alternatively sought an Order carving out the priority of the Charges over the deemed trust until the issue could be argued at a future date. To facilitate the continuation of operations, the Crown agreed to the approval of a portion of the Interim Lender's Charge to ensure the payment of the current salaries and critical supplier costs.

14 The total Priming Charges (Lender's Charge, Administration Charge, Directors and Officers Charge) sought was thereby increased to $2 050 000.

15 Transcript of proceedings held before the Honourable Martin Castonguay, J.C.S. on October 27, 2021 at pp. 79-82 [Transcript], **A.B., p. 296-299**.

16 Transcript at pp. 94 and 95, **A.B., p. 311 and 312**.

19. The Appellants appeal the Priming Charge Order rendered and challenge the terms of paragraphs 34 and 37(d), which read as follows:

> [34] ORDERS AND DECLARES that each of the Charges shall constitute a charge on the Property and that such Charges shall rank in priority to any and all other hypotecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**"), or trusts (statutory or otherwise) affecting the Property in favour of any person.
>
> [37] ORDERS AND DECLARES that notwithstanding:
>
> ...
>
> (d) the provisions of any federal or provincial statute; or
>
> ...
>
> the Charges shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors and shall not be void or voidable by any person, including any creditor of the Debtors, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable or reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.

20. The Priming Charge Order states at paragraph 5 that the Court considered:

> ...the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA"), in general, and sections 50.6, 64.1, 64.2, and 183 of the BIA, in particular;

but does not explain how the Court had authority under these provisions to subordinate the Crown's deemed trust to the Priming Charges.

21. On November 25, 2021, approximately one month after the Priming Charge Order was pronounced, on the application of the Debtors, the Court issued an *Extension,*

Approval, Vesting and Assignment Order approving an Asset Purchase Agreement between the Debtors as vendors and Telus Health Solutions Inc. as the purchaser.

22. In paragraphs 30 and 31 of that Order, the Court directed the net proceeds of sale to be paid to the Trustee and held until order of the Court. The net proceeds of sale remain with the Trustee. The net proceeds of sale (approximately $2.2M) are insufficient to pay both the $2M+ in advanced Priming Charges and the $3.1M in outstanding source deductions.

23. On December 8, 2021, the Debtors, having failed to file a proposal within the prescribed time, were deemed to have made an assignment in bankruptcy.

PART II – ISSUES IN DISPUTE

24. Did the Court have the authority under the BIA:

a. to subordinate the Crown's deemed trust claims for unremitted source deductions to the Priming Charges?

b. to declare that the Priming Charges shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors, notwithstanding the provisions of any federal or provincial statute?

25. Did the Court err in refusing the Appellants' request for an adjournment and violate the principles of natural justice (*audi alterem partem*)?

PART III – SUBMISSIONS

A. Standard of review is correctness

26. The determination of all of the issues listed above are questions of law. The standard of review on a question of law is correctness.[17]

B. The Court did not have the authority to subordinate the Crown's deemed trust claims to the Priming Charges

27. In directing the Priming Charges to rank in priority to any trusts, statutory or otherwise, the Court acted beyond its authority.

28. The deemed trust provisions governed by the Fiscal Statutes establish that when a person, such as the Debtors, fails to remit source deductions to the Crown, their property, equal in value to the unremitted source deductions, is deemed to be held in trust for the Crown, to form no part of their estate, and to be owned by the Crown. Further, the proceeds from such property shall be paid to the Crown in priority to all secured creditors.

29. These deemed trust provisions operate notwithstanding any federal enactment, *specifically including the BIA*, any provincial enactment, or any other law and the Court does not have authority to set aside these provisions. The blanket paramountcy provision of subsection 227(4.1) of the ITA supersedes the entire BIA[18], including sections 50.6, 64.1, 64.2 and 183. To hold that the Court can grant priority to the Priming Charges over the deemed trust is to ignore the words of the ITA.

30. This absolute priority of the Crown for unremitted payroll deductions is specifically preserved by the BIA.

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17 *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

18 Except sections 81.1 and 81.2, neither of which is applicable in this case.

31. Further, the provisions of the BIA governing the priming charges at issue did not permit the Court to subordinate the Crown's deemed trust claims to those priming charges. The Crown is not a secured creditor as defined in section 2 of the BIA.

32. It was equally not open to the Court to exercise its inherent jurisdiction to subordinate the deemed trusts to the Priming Charges, as doing so is contrary to the provisions of the ITA.

33. Finally, *Canada North*, a decision of the SCC rendered in the context of CCAA proceedings, is simply not applicable in the present case.

1. The deemed trust provisions of the ITA give the Crown an absolute priority over all secured creditors

a) Under subsection 227(4.1) of the ITA, the debtors' property is deemed to be held in trust for the Crown and proceeds have to be paid to the Crown in priority to all secured creditors

34. The purpose of the deemed trust is to protect the Crown's ability to collect source deductions made by employers.[19] Those source deductions comprise a significant portion of the federal government's annual tax revenues.[20]

35. An employer paying salaries or wages to an employee is required to deduct or withhold amounts on account of income tax obligations, *Canada Pension Plan* (CPP) (or *Québec Pension Plan* (QPP)) contributions and Employment Insurance (EI) premiums and to remit those deductions to the Crown.[21]

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19 Department of Finance Canada, Press Release 1997-030, "Unremitted Source Deductions and Unpaid GST" (7 April 1997) at p. 2.

20 *Toronto-Dominion Bank v. Canada*, 2020 FCA 80 at para. 40.

21 Section 153 of the ITA, section 21 of the CPP, section 59 of the QPP and section 82 of the EIA.

36. Those source deductions are withheld from employees' gross salaries or wages and are not part of the employer's property.

37. Amounts so collected are sometimes "misappropriated" by employers for their own use.[22] In the present case, the Debtors misappropriated approximately $3.1 million of source deductions.

38. Unlike creditors who can monitor the affairs of their debtor and regulate or terminate the supply of goods or services according to the risk of loss, the Crown is an involuntary creditor who must generally rely on the filings of taxpayers.[23]

39. Parliament therefore enacted powerful mechanisms designed to protect the collection of these payroll deductions, including the deemed trust mechanism.

(1) The deemed trust mechanism under the ITA

40. The deemed trust mechanism regarding payroll deductions is provided for in subsections 227(4) and (4.1) of the ITA, subsections 23(3) and (4) of the CPP, subsections 86(2) and (2.1) of the *Employment and Insurance Act* (EIA), section 1015 of the *Taxation Act* (TA), section 20 of the *Tax Administration Act* (TAA) and section 59 of the QPP.

41. The deemed trust operates in two stages.

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22 *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 SCR 411 at para. 26.

23 *First Vancouver Finance*, *supra* note 1 at para. 23; *Canada (Minister of National Revenue) v. HSBC Bank of Canada,* 2004 FC 467 at para. 15.

42. First, subsection 227(4) of the ITA[24] protects the original payroll deductions by way of a statutory trust by deeming those amounts to be held in trust for the Crown, separate and apart from the employer's other property:

Trust for moneys deducted	**Montant détenu en fiducie**
(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act.	(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi.

43. These original source deductions are to be remitted to the Crown at prescribed times.

44. Second, if an employer fails to remit its payroll deductions to the Crown as and when required, the "extension of trust" under subsection 227(4.1) of the ITA[25] is triggered and the deemed trust extends to:

- The debtor's property,
- The debtor's property held by the secured creditors of the debtor,
- The proceeds from that property.

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24 See also subsection 23(3) of the CPP and subsection 86(2) of the EIA.
25 See also subsection 23(4) of the CPP and subsection 86(2.1) of the EIA.

45. Subsection 227(4.1) provides:

Extension of trust	**Non-versement**
(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed: (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, and (b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.	(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne, et les biens détenus par son créancier garanti au sens du paragraphe 224(1.3) qui, en l'absence d'une garantie au sens du même paragraphe, seraient ceux de la personne, d'une valeur égale à ce montant sont réputés : a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu, séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie; b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est déduit ou retenu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à une telle garantie. Ces biens sont des biens dans lesquels Sa Majesté a un droit de bénéficiaire malgré toute autre garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

46. Consequently, under subsection 227(4.1) of the ITA, Parliament directed that the debtor's assets (equal in value to the unremitted source deductions) become the property of the Crown as of the date of the original withholdings, removing it from the estate or patrimony of the debtor. Parliament then mandated that the proceeds of that property shall be paid to the Crown in priority to the claims of all of the debtor's secured creditors. The closing words of subsection 227(4.1) ("shall be paid…") are framed in mandatory, not discretionary language.[26]

(2) The deemed trust supersedes any security interests

47. Parliament intended that the Crown's deemed trust capture all assets of tax debtors, including those subject to a security interest. Under subsection 227(4.1) of the ITA, the deemed trust specifically impresses property subject to a security interest within the meaning of subsection 224(1.3) of the ITA.

48. Given the broad definition of security interest in subsection 224(1.3) of the ITA, it is clear that Parliament wished to give the Crown's deemed trust priority over the widest possible variety of "security interests". Subsection 224(1.3) of the ITA reads as follows:

security interest means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes an interest, or for civil law a right, created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however, or whenever arising, created, deemed to arise or otherwise provided for (garantie)	**garantie** Intérêt ou, pour l'application du droit civil, droit sur un bien qui garantit l'exécution d'une obligation, notamment un paiement. Sont en particulier des garanties les intérêts ou, pour l'application du droit civil, les droits nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'elles soient créées, réputées exister ou prévues par ailleurs. (security interest)

26 *Interpretation Act,* RSC 1985, c. I-21, section 11; Ruth Sullivan, *Sullivan on the Construction of Statutes,* 6th ed. (Markham, Ont.: LexisNexis, 2014) at pp. 91-92; also *Baron v. Canada,* [1993] 1 SCR 416 at pp. 440-443.

49. As confirmed in *Caisse populaire Desjardins de l'Est de Drummond*, Rothstein J. writing for the SCC majority, stated that the term "security interest" under subsection 224(1.3) is broad in scope. It does not require any particular form but only that "the creditor's interest in the debtor's property secures payment or performance of an obligation".[27]

50. The SCC's decision in *Canada North* has not displaced the prevailing case law regarding the scope of subsection 224(1.3). The majority of justices in *Canada North* found that the Priming Charges under the CCAA are "security interests" as defined in subsection 224(1.3) of the ITA.[28]

51. In any event, even if the Priming Charges were not security interests within the meaning of subsection 224(1.3), which the Crown denies, the property in the present file is caught by the deemed trust, as it is "property of the person" within the meaning of 227(4.1) of the ITA.

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27 *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29 at para. 15 : [15] In order to constitute a security interest for the purposes of s. 227(4.1) ITA and s. 86(2.1) EIA, the creditor must hold "any interest in property that secures payment or performance of an obligation". The definition of "security interest" in s. 224(1.3) ITA does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor's interest in the debtor's property secures payment or performance of an obligation, there is a "security interest" within the meaning of this section. While Parliament has provided a list of "included" examples, these examples do not diminish the broad scope of the words "any interest in property": see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, at para. 68, and R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 61-68.

28 Four justices held the Priming Charges under the CCAA were security interests as defined in subsection 224(1.3):
- Justices Brown and Rowe (Abella J. concurring) – at paras. 206-214;
- Justice Moldaver is in substantial agreement with Justices Brown and Rowe – at para. 254;

Three justices held the Priming Charges are not "security interests" as defined in subsection 224(1.3):
- Justice Côté (Wagner CJ and Kasirer J concurring) – at para. 62.

Justice Karakatsanis (Martin J concurring) did not decide on the question (at para. 103).

b) Parliament ensured blanket paramountcy of the Crown's deemed trust

52. As seen above, the deemed trust provisions contain strong statutory language designed to give the Crown an absolute priority over competing creditors. There is more.

53. Subsection 227(4.1) of the ITA applies notwithstanding any other federal or provincial statutory provisions or law and specifically, notwithstanding the BIA[29]:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, …	(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, …

54. The term "notwithstanding" is defined by the Concise Oxford Dictionary to mean "without regard to or prevention by; not the less for;".[30]

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29 In contrast to the reasons of Madam Justice Côté and Madam Justice Karakatsanis in *Canada North* who did not address the effect of the notwithstanding phrase, Justices Brown and Rowe (Justice Abella concurring) and Justice Moldaver agreed that the notwithstanding phrase in ITA subsection 227(4.1) was effective to subordinate section 11 of the CCAA; at paras. 200, 259-260.

30 *Notwithstanding*, in J. B. Sykes, *Concise Oxford Dictionary of Current English*, 6th ed. (Oxford University Press, 1981). See also Bryan A. Garner, *Black's Law Dictionary*, 10th ed. (West Group, 2014) ("1. Despite; in spite of < notwithstanding the conditions listed above, the landlord can terminate the lease if the tenant defaults >"), Philip Babcock Gove, *Webster's Third New International Dictionary*, Unabridged (Merriam Webster, 2002) ("without prevention or obstruction from or by: in spite of <~ its wide distribution, it is an animal seldom encountered") and Bryan A. Garner, *Garner's Modern English Usage*, 4th ed. (Oxford University Press, 2016) ("notwithstanding is a formal word used in the sense 'despite', 'in spite of', or 'although'").

55. In *Re Engineered Buildings Ltd.*, Justice Cairns, writing on behalf of a unanimous Court, interpreted the phrase, "notwithstanding anything in this Act" to mean that "where the facts come within that subsection, no other part of the Act applies".[31]

56. The wording of subsection 227(4.1) of the ITA makes it unequivocal that the ITA subordinates the BIA (and all sources of law - every other federal statute, provincial statute, and any other law) that interferes with the balance of the provision.

57. Parliament chose to make exceptions for sections 81.1 and 81.2 of the BIA, by excluding certain property from the scope of the extension of trust. It made no exception however for sections 50.6, 64.1, 64.2, or 183 of the BIA.

58. In addition, there is no conflict between the ITA and the BIA because there is no paramountcy clause in sections 50.6, 64.1, 64.2, or 183 of the BIA. These provisions do not operate "notwithstanding" any provisions of the ITA and therefore remain subject to ITA deemed trust provisions.[32]

59. As demonstrated, subsection 227(4.1) of the ITA confers blanket paramountcy, ensuring that the provision will "absolutely, positively" prevail without regard to any other statutory provision specified in the clause.[33]

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31 *Re Engineered Buildings Ltd. and City of Calgary* (1966), 57 DLR (2d) 322 at p. 325, para. 14 citing Lord Watson's speech in *Tennant v. Union Bank of Canada* (an 1894 decision of the Judicial Committee of the Privy Council).

32 Therefore, the present case is readily distinguished from *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 [*Century Services*], in which the SCC resolved two competing blanket paramountcy clauses—in the CCAA and in the deemed trust of the *Excise Tax Act*.

33 Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, Minn.: Thomson/West, 2012) at p. 115 of 561.

2. *The absolute priority of the deemed trust is explicitly preserved by the BIA*

60. Subsection 67(3) of the BIA specifically preserves the absolute priority of the Crown and the application of the deemed trust mechanism pertaining to unremitted payroll deductions.

61. While subsection 67(2) of the BIA extinguishes all statutory deemed trusts in favour of the Crown, subsection 67(3) of the BIA explicitly and unambiguously preserves the deemed trusts for unremitted source deductions in the Fiscal Statutes as trusts in the BIA.

62. In *Century Services*, Justice Deschamps repeatedly expressed the statutory protection that Parliament afforded the ITA deemed trust in insolvency proceedings.[34] Although *Century Services* concerned the GST/HST deemed trust in a CCAA proceeding, Deschamps J. held that it was relevant that the ITA deemed trust is protected both in bankruptcy and in CCAA proceedings:

> ...Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trust assets and asserting Crown priority only in respect of source deductions. ...[72]

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34 *Century Services*, *supra* note 32 at para. 45.

63. In his concurring reasons, Fish J. also emphasized Parliament's "clear and unmistakable" intent to enforce the deemed trust for unremitted source deductions throughout insolvency proceedings.[35]

3. The specific priming charge provisions in the BIA do not give the Court authority to rank charges ahead of the deemed trust

64. In proposal proceedings, the BIA authorizes the Court to order charges against the ***debtor's property*** as security for the costs of professionals who assist the debtor company through the insolvency process[36], as security for funds advanced by interim lenders[37], and as security for indemnifying directors who continue in their positions through the insolvency proceeding.[38]

65. The BIA also permits the Court to order that the charges rank in priority to the claim of any ***secured creditor*** of the company.[39]

66. The Court could not rank the Priming Charges ahead of the deemed trust, because:

a. the Debtors' property was already deemed to be held in trust for the Crown under the deemed trust provisions and formed no part of the estate or patrimony of the Debtors, and

b. the Crown is not a "secured creditor" as defined in section 2 of the BIA.

67. In *Canada North*, Côté J and Karakatsanis J. held that the Court's authority to prioritize the charges did not arise from the specific priming charge provisions under the CCAA, but rather from section 11 of the CCAA, which provides extensive

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35 *Century Services*, *supra* note 32 at paras. 102-108.
36 Subsection 64.2(1) of the BIA.
37 Subsection 50.6(1) of the BIA.
38 Subsection 64.1(1) of the BIA.
39 Subsections 50.6(3), 64.1(2) and 64.2(2) of the BIA.

discretion to the supervising judge in CCAA proceedings.[40] Section 5 below explains that the BIA does not have any provision similar to section 11 of the CCAA.

68. Six of the nine Justices of the SCC in *Canada North* confirmed that the Crown is not a "secured creditor" as defined in section 2 of the CCAA.[41] The Court agreed the Crown's claims for outstanding source deductions cannot be subordinated by the specific priming provisions (11.2, 11.51, 11.52) of the CCAA.

69. The same reasoning applies to the specific priming charge provisions of the BIA. The Crown is not a secured creditor as defined in section 2 of the BIA and is therefore not affected by the Priming Charges created under the BIA.

70. Furthermore, subsections 50.6(1), 64.1(1) and 64.2(1) of the BIA only authorize the Court to charge ***the property of the debtor*** – not property owned by other people. Subsection 227(4.1)(b) of the ITA removed the property held in trust for the Crown from the estate or patrimony of the debtor before the commencement of proceedings under the BIA.[42]

71. Finally, and in any event, the language in subsection 227(4.1) of the ITA is clear and ensures primacy of the deemed trust by specifically subordinating the BIA to the ITA.[43]

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40 *Canada North*, *supra* note 6 at paras. 70, 163.

41 *Ibid.* at paras. 165, 227; none of the SCC justices opined otherwise. Justices Côté (Wagner CJ and Kasirer J concurring) did not pronounce themselves on the matter; Justices Karakatsanis (Martin J concurring), Brown, Rowe and Abella concluded that the Crown is not a secured creditor. Justice Moldaver is in substantial agreement with justices Brown and Rowe.

42 Subsections 67(2) and (3) of the BIA specifically preserve the statutory trust in the Fiscal Statutes.

43 In *Canada North*, *supra* note 6 at para. 205, Justices Brown and Rowe noted, "[205] Indeed, our colleagues' view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of subsection 227(4.1) of the ITA is insufficient to prevail over the priming charges, what language would possibly be sufficient? Courts must give proper effect to Parliament's plain statutory direction, and not strain to subvert it on the basis that Parliament's categorical language or "basket clause" did not itemize a particular security interest."

72. In conclusion, sections 50.6, 64.1 and 64.2 of the BIA did not give the Court authority to issue the Priming Charge Order and subordinate the Crown's deemed trust claims to the Priming Charges.

4. Section 183 of the BIA: The Court does not have the authority to prime charges over the deemed trust by virtue of its inherent jurisdiction

73. The Crown's absolute priority under the ITA takes precedence over the Court's authority to exercise its inherent jurisdiction under section 183 of the BIA.

a) Inherent Jurisdiction: Overview

74. The concept of inherent jurisdiction originated from the separation between legislative and judicial power, where the superior courts had jurisdiction to address issues that were not covered by legislation.[44]

75. The Court's inherent jurisdiction is therefore "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so", and which is derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law".[45]

76. Inherent jurisdiction has been used by the Courts in various contexts such as to permit a court to control its process or to fill in the gaps in legislation where a remedy is required but no law exists either directly authorizing the remedy or prohibiting it.[46]

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44 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Thomson Carswell, 2013) at p. 124 [Janis, *Rescue!*].

45 Sam Babe, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto, Ont.: Thomson Reuters, 2020) at p. 4 referring to *R. v. Caron*, 2011 SCC 5 at para. 24, citing I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at pp. 27, 51; see also *Procureure générale du Québec c. Asselin*, 2021 QCCS 1426 at paras. 22-30.

46 Janis, *Rescue!*, *supra* note 44 at p. 122.

b) The Superior Court's inherent jurisdiction under the BIA

77. Parliament conferred jurisdiction to superior courts in each province and territory with regards to insolvency and restructuring matters by enacting section 183 of the BIA.

78. The jurisdiction of the Superior Court of Québec is conferred more specifically by subsection 183(1.1) of the BIA, and reads as follows[47]:

Superior Court jurisdiction in the Province of Quebec	**Compétence de la Cour supérieure de la province de Québec**
(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.	(1.1) Dans la province de Québec, la Cour supérieure possède la compétence pour exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant son terme, tel que celui-ci est maintenant ou peut par la suite être tenu, pendant une vacance judiciaire et en chambre.

79. Subsection 183(1.1) confirms the inherent jurisdiction of the Court that may be relied on, as is entrenched in section 96 of the *Constitution Act, 1867*[48] and as also confirmed in section 49 of the *Civil Code of Procedure*[49] (CCP).

80. In *Sam Lévy & Associés Inc*, Justice Binnie of the SCC confirmed the nature of section 183 of the BIA in that the named courts "... retain their character as superior courts of inherent jurisdiction...".[50]

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47 Section 183(1.1) of the BIA was enacted to delete the words "in equity".

48 Babe, *supra* note 45 at p. 1; *Constitution Act*, 1867, 30 & 31 Vict., c. 3 (U.K.) at s. 96 [Constitution Act, 1867]: "preserves the continued existence of the superior courts and their jurisdiction by requiring that superior court judges be appointed by the Governor General rather than by the provinces".

49 *Code of Civil Procedure,* CQLR, c. C-25.01.

50 *Sam Lévy & Associés Inc v. Azco Mining Inc.*, 2001 SCC 92 at para. 20.

81. The Alberta and the Ontario Courts of Appeal equally interpret section 183 of the BIA to preserve the Court's inherent jurisdiction.[51]

82. Furthermore, in insolvency and restructuring matters, the Courts have consistently relied on section 183 of the BIA as authority to exercise their inherent jurisdiction.

83. The Superior Court of Québec therefore can rely on subsection 183(1.1) of the BIA to exercise its inherent jurisdiction in insolvency and restructuring matters, however, only within certain limits.

c) The limits of inherent jurisdiction

84. The Court's inherent jurisdiction is not limitless. Inherent jurisdiction cannot operate with respect to a matter where Parliament has already acted or when it would contravene with any statutory provision.[52]

85. The SCC confirmed this principle in *Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.* as follows:

> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will...
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> ...

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51 Babe, *supra* note 45 at p. 2 in referring to *Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc (Trustee of)*, 2006 ABCA 293 at para. 1; *Business Development Bank of Canada v. Astoria Organic Matters Ltd,* 2019 ONCA 269 at para. 64.

52 Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto, Ont.: Carswell, 2008) at p. 20 referring to Jacob, *supra* note 45 at p. 24; *Stelco Inc. (Bankruptcy), Re* (2005), 75 OR (3d) 5 at para. 44; also *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 49 [*Callidus Capital*].

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule.[53]

86. The Court did not have the authority to rely on its inherent jurisdiction in contradiction with the existing subsection 227(4.1) of the ITA to render the Priming Charge Order.

87. In doing so, the Court exceeded its authority.

5. Canada North is not applicable to Division I proposals

88. Although the SCC rendered the recent decision in *Canada North* with regards to the Court's authority to subordinate the Crown's deemed trust to priming charges[54], this decision is not applicable in the present matter.

89. *Canada North* was rendered in the context of CCAA proceedings where the SCC specified that the Court's authority to subordinate the Crown's deemed trust to the priming charges is pursuant to the broad grant of authority under section 11 of the CCAA[55]:

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53 *Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.*, [1976] 2 SCR 475 at p. 480.

54 In a 5-4 decision, five of the nine justices of the SCC dismissed the Crown's appeal, holding the Court had authority to rank charges above the Crown's deemed trust pursuant to section 11 of the CCAA, and four would have granted the appeal. However, the SCC's decision is not a 5-4 decision with clear lines; rather, the 160-page decision is comprised of four sets of reasons.
Dismissed Crown's appeal:
- Madam Justice Côté, with whom Chief Justice Wagner and Justice Kasirer concurred
- Madam Justice Karakatsanis, with whom Madam Justice Martin concurred

Would allow Crown's appeal:
- Justice Brown and Justice Rowe, with whom Madam Justice Abella concurred
- Justice Moldaver

55 *Canada North*, *supra* note 6 at paras. 21-24, 70-71, 167-168, 172-176, 178-181.

General power of court	Pouvoir général du tribunal
11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.	11 Malgré toute disposition de la Loi sur la faillite et l'insolvabilité ou de la Loi sur les liquidations et les restructurations, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

90. The proceedings in the present file are not governed by the provisions of the CCAA but by the BIA. The BIA does not contain a provision similar to section 11 of the CCAA.

91. In contrast to the language in section 183 of the BIA, as was considered by the Court in the present file, section 11 of the CCAA vests the supervising court in CCAA proceedings with broad powers.

92. The CCAA Court's jurisdiction is "*constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"*".[56] As explained in *Canada North*, the power conferred by section 11 is "vast".[57]

93. Justice Côté of the SCC recognized that the CCAA reorganization regime differs from the BIA reorganization regime (Division 1 proposals and in the present case) giving the Court in a CCAA proceeding more flexibility and larger powers:

> Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is

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[56] *Canada North*, *supra* note 6 at para. 21 referring to *Century Services*, *supra* note 32 at para. 14 and *Callidus Capital*, *supra* note 52 at para. 67.

[57] *Canada North*, *supra* note 6 at para. 21.

> restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism **with greater judicial discretion**, making it more responsive to complex reorganizations" (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).[58]
>
> [emphasis added]

94. Equally, at paragraph 140, Justice Karakatsanis wrote:

> While proposals under the BIA's restructuring regime similarly serve a remedial purpose, "this is achieved through a rules-based mechanism that offers less flexibility" (*Century Services*, at para. 15).[59]

95. Although reorganisations under Division I proposals and under CCAA proceedings may serve similar purposes, Parliament has chosen to maintain two distinct regimes. The SCC emphasized this distinction in *Century Services*[60]:

> Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate.
>
> [emphasis added]

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58 *Ibid.* at para. 18. The SCC also recognizes in *Callidus Capital*, *supra* note 52 at para. 73 "that the CCAA "offers a more flexible mechanism with greater judicial discretion" than the BIA (*Century Services*, *supra* note 32 at para. 14)". See also *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 at para. 51.

59 *Canada North*, *supra* note 6 at para. 140 referring to *Century Services*, *supra* note 32 at para. 15.

60 *Century Services*, *supra* note 32 at para. 78.

96. In maintaining two different regimes, the Court is still bound by all law enacted by Parliament[61], even if this means that an insolvency matter will be treated differently under the BIA and the CCAA.

97. In the present case, the Court's inherent jurisdiction, as recognized by section 183 of the BIA, does not grant the same discretionary powers as section 11 of the CCAA. The Court's authority to exercise its inherent jurisdiction is limited and cannot contravene any statute, including subsection 227(4.1) of the ITA.

98. The Court was therefore prohibited from exercising its inherent jurisdiction to grant the Priming Charge Order.

6. Conclusion

99. In the context of this case, the Court was bound by the relevant statutory provisions at issue and did not have the authority to subordinate the Crown's deemed trust claims to the Priming Charges, even if the outcome could have been different under the CCAA:

- the deemed trust provisions give an absolute priority to the Crown over all secured creditors, notwithstanding the BIA or any other federal or provincial statute or other law;
- the specific priming charge provisions are inapplicable to the Crown as the Crown is not a secured creditor who is subject to these provisions; and

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61 In exercising its constitutional authority pursuant to sections 91(3) (the raising of money by any mode or system of taxation) and 91(21) (bankruptcy and insolvency) of the *Constitution Act, 1867*, Parliament may enact any legislation it considers appropriate to give effect to government policy. Unless legislation is *ultra vires* or irredeemably violates a Charter right, the Courts must apply legislation as written, despite any misgivings about the legislator's wisdom. (See *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58 at paras. 38-41; *Franks v. A.G. of B.C. (B.C. Benefits Board)*, 1999 BCCA 165 at para. 8; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 at para. 76; *Canada North*, *supra* note 6 at para. 228.) The Court's role does not include re-opening a debate already concluded in Parliament. Policy is the bailiwick of Parliament, not the Courts.

- unlike section 11 of the CCAA, the Court's inherent jurisdiction, as recognized under section 183 of the BIA, cannot contravene subsection 227(4.1) of the ITA and therefore does not give the Court the discretionary powers that would allow it to displace the absolute priority of the Crown for unremitted payroll deductions.

C. *The Court did not have the authority to declare that its Order operates "notwithstanding the provisions of any federal statute"*

100. There is no specific provision in the BIA that authorizes the Court to declare its Order operates notwithstanding any other statute. Presumably, paragraph 37(d) is an exercise of the Court's inherent jurisdiction. However, as noted above, inherent jurisdiction cannot be exercised contrary to any law or rule. Thus, the Court cannot exercise inherent jurisdiction to declare its own Order operates notwithstanding the provisions of any federal statute.

D. *The Court violated the audi alteram partem principle*

101. The Crown was notified with the Debtors' motion less than four hours before the hearing. The Crown sought, but was denied an adjournment. The Crown was denied adequate time and opportunity to contest the Motion before the Court.

102. The Crown was equally denied the opportunity to make representations on the amended draft Priming Charge Order submitted by Respondents to the Court during the hearing.

103. This denial of justice and the result of the Priming Charge Order impacts the rights of the Crown.

104. Had the Crown been given an adequate opportunity to contest the Motion, it would have demonstrated that the Court did not have the authority to issue the impugned provisions of the Priming Charge Order.

105. As part of the guiding principles of procedure and as recognized in section 17 of the CCP, the Court must allow the parties to be heard and to have an opportunity to debate before rendering its decision.[62]

106. Each party is entitled to a reasonable opportunity to respond to the evidence against them. This right includes the right to adequately prepare and respond to opposing arguments and equally to ensure that the Court obtains the party's arguments and authorities necessary to make an informed and impartial decision.

107. These principles were reiterated by this Court in *L.M. c. J.M.*[63] as follows:

> [17] Le droit à une audition publique et impartiale (art. 23 Charte), le droit d'être entendu (art. 17, al. 1 C.p.c.), de même que le principe de contradiction (art. 17, al. 2 C.p.c.) sont des composantes de la règle de justice naturelle audi alteram partem.
>
> [18] À la base, cette règle vise à donner aux parties une possibilité raisonnable de répliquer à la preuve présentée contre elles[7]. Elle comprend également le droit de prendre connaissance de la plaidoirie adverse et celui d'y répondre afin de s'assurer que le tribunal puisse véritablement avoir devant lui tous les arguments et toutes les autorités nécessaires à une prise de décision éclairée et impartiale[8].
>
> [19] Même si le tribunal joue un rôle de plus en plus important dans la gestion de l'instance depuis l'entrée en vigueur du nouveau Code de procédure civile, il doit exercer ses pouvoirs « en accord avec les principes et les objectifs de la procédure » (art. 9, al. 2 C.p.c.). Comme l'indiquent les auteurs Denis Ferland et Benoît Emery :
>
> > 1-175 – Le tribunal veille au bon déroulement de l'instance et intervient pour en assurer la saine gestion, dans le respect des règles de justice naturelle, notamment le droit fondamental d'être pleinement entendu. [...].[9]

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62 Section 17 of the CCP applies pursuant to section 3 of the *Bankruptcy and Insolvency General Rules*, CRC, c. 368.

63 *L.M. c. J.M.*, 2019 QCCA 2185 at paras. 17-19.

108. The consequence of a breach of the rules of natural justice (*audi alterem partem*) is that the Priming Charge Order rendered is null.[64]

109. The Debtors and the Trustee had time to prepare their materials, present their position, evidence and arguments. Being served with the Motion materials less than four hours before the hearing, the Crown did not have a reasonable opportunity to consider its position, to marshall its arguments, and to prepare for the hearing of the Motion. This imbalance and denial of justice for the Crown violates the rules of natural justice.

110. The Court therefore erred in proceeding with the hearing and rendering the Priming Charge Order that is in appeal before this Court rendering the said Order null.

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64 *Lessard c. Brodeur*, 2006 QCCA 7.

PART IV – CONCLUSIONS

111. The Court erred in law in declaring the Priming Charges had priority over statutory deemed trusts and that the trustee was bound to apply that priority notwithstanding the provisions of any federal or provincial statute. No Court has the authority to make such declarations and as such, these declarations are of no force and effect.

112. The Court also erred in refusing the Crown's request for an adjournment.

113. THE APPELLANT ASKS THE COURT OF APPEAL TO:

(a) ALLOW the appeal;

(b) SET ASIDE the first instance Priming Charge Order declaring:

i. that the Lender Charge, the Administration Charge and the Directors' and Officers' Charge take priority over the Crown's deemed trust (paragraph 34 of the Priming Charge Order);

ii. a notwithstanding clause that had the effect of overriding the provisions of any federal statute (paragraph 37(d) of the Priming Charge Order);

(c) THE WHOLE with costs against the Respondents.

All of which is respectfully submitted.

Montréal, April 8, 2022

Department of Justice Canada

Department of Justice Canada
(Me Kim Sheppard)
(Me George Bódy)
Lawyers for the Appellant
The Attorney General of Canada

Québec, April 8, 2022

Larivière Meunier (Revenu Québec)

Larivière Meunier (Revenu Québec)
(Me Daniel Cantin)
Lawyers for the Appellant
L'Agence du revenu du Québec

PART V – AUTHORITIES

Appellants' Argument | Authorities

Jurisprudence *(cont'd)* **Paragraph(s)**

Doctrine

Doctrine *(cont'd)* **Paragraph(s)**

SCHEDULE I

JUDGMENT

Order appealed from (Martin Castonguay, J.S.C.), October 27, 2021

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: **500-11-060355-217**
ESTATE No.: **41-2777077**
ESTATE No.: **41-2777094**

DATE: **October 27, 2021**

PRESIDING: **THE HONOURABLE MARTIN CASTONGUAY, J.S.C.**

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF:

CHRONOMÉTRIQ INC.

Debtor/Petitioner

-and-

HEALTH MYSELF INNOVATIONS INC.

Debtor/Petitioner

-and-

RICHTER ADVISORY GROUP INC.

Proposal Trustee

ORDER AUTHORIZING AND APPROVING INTERIM FINANCING, AN ADMINISTRATION CHARGE, A SALE AND INVESTMENT SOLICITATION PROCESS, A DIRECTORS AND OFFICERS CHARGE, A KEY EMPLOYEE RETENTION PROGRAM, PROCEDURAL CONSOLIDATION OF THE ESTATES, AND OTHER RELIEF

[1] **ON READING** the *Motion for the Issuance of an Order Authorizing and Approving Interim Financing, A Sale and Investment Solicitation Process, an Administration Charge, a Directors and Officers Charge, a Key Employee Retention Program, Procedural Consolidation of the Estates, and other Relief*

("**Motion**") of ChronoMétriq Inc. and Health Myself Innovations Inc. (together, the "**Debtors**"), the affidavit and the exhibits in support thereof;

[2] **CONSIDERING** the notification/service of the Motion;

[3] **CONSIDERING** the submissions of counsel, the affidavit and exhibits in support of the Motion;

[4] **CONSIDERING** the report filed by Richter Advisory Group in support of the Motion;

[5] **CONSIDERING** the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("**BIA**"), in general, and sections 50.6, 64.1, 64.2, and 183 of the BIA, in particular; and

[6] **CONSIDERING** that all secured creditors likely to be affected by the charges resulting from the orders herein have been notified of the Motion.

THE COURT:

[7] **GRANTS** the Motion.

[8] **ORDERS** that capitalized terms not otherwise defined herein shall have the same meaning as ascribed thereto in the Motion.

NOTIFICATION/SERVICE

[9] **ORDERS** that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further notification/service thereof.

[10] **PERMITS** notification/service of this Order at any time and place and by any means whatsoever.

PROCEDURAL CONSOLIDATION

[11] **ORDERS** that the bankruptcy estates of the Debtors, Estate Nos. 41-2777077 and 41-2777094 (collectively, the "**Estates**") shall, subject to further order of the Court, be procedurally consolidated and shall continue under Estate No. 41-2777077, in such capacity, the "**Consolidated Proposal Proceeding**".

[12] **ORDERS** that without limiting the generality of the foregoing, the Proposal Trustee is hereby authorized and directed to administer the Estates on a consolidated basis for all purposes in carrying out its administrative duties and other responsibilities as Proposal Trustee under the BIA as if the Consolidated Proposal Proceeding were a single proceeding under the BIA, including without

limitation:

(a) the meeting of creditors of the Debtors may be convened and conducted jointly;

(b) the Proposal Trustee is authorized to issue consolidated reports in respect of the Debtors; and

(c) the Proposal Trustee is authorized to deal with all filings and notices relating to the proposal proceedings of the Debtors, each as required under the BIA on a consolidated basis.

[13] **ORDERS** any pleadings or other documents served or filed in the Consolidated Proposal Proceeding by any party shall be deemed to have been served or filed in each of the proceedings comprising the Consolidated Proposal Proceeding.

[14] **ORDERS** that a copy of this Order shall be filed by the Debtors in the court file for each of the Estates, but any subsequent document required to be filed will be hereafter only be required to be filed in the Consolidated Proposal Proceeding in Estate No. 41-2777077.

[15] **ORDERS** that the procedural consolidation of the Estates pursuant to this Order shall not:

(a) affect the legal status or corporate structure of the Debtors; or

(b) cause either Debtor to be liable for any claim for which it is otherwise not liable, or cause either Debtor to have an interest in an asset to which it otherwise would not have.

[16] **ORDERS** that the Estates are not substantively consolidated, and nothing in this Order shall be construed to that effect.

DIP TERM SHEET AND INTERIM FINANCING CHARGE

[17] **ORDERS** that the Debtors are hereby authorized to borrow from Canadian Imperial Bank of Commerce ("**Interim Lender**"), such amounts from time to time as the Debtors may consider necessary or desirable, in consultation the Proposal Trustee up to a maximum principal amount of $1,600,000 outstanding at any time, on the terms and conditions as set forth in the Amended and Restated DIP Term Sheet filed ("**DIP Term Sheet**") and in the Interim Financing Documents (as defined herein) to fund the expenditures of the Debtors and to pay such other amounts as are permitted by the terms of the Order and the Interim Financing Documents ("**Interim Facility**").

[18] **ORDERS** that the Debtors are authorized to execute and deliver such credit

agreements, security documents and other definitive documents (together with the DIP Term Sheet, the "**Interim Financing Documents**") as may be required by the Interim Lender in connection with the Interim Facility and the DIP Term Sheet, and the Debtors are hereby authorized to perform all of their obligations under the Interim Financing Documents.

[19] **ORDERS** that the Debtors shall pay to the Interim Lender, when due, all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other reasonably required advisors to or agents of the Interim Lender) on a full indemnity basis under the DIP Term Sheet and the other Interim Financing Documents (the "**Interim Lender Indebtedness**") and shall perform all of their other obligations to the Interim Lender pursuant to the DIP Term Sheet, the Interim Financing Documents and this Order.

[20] **DECLARES** that the Interim Lender be and is entitled to the benefit of and is hereby granted a charge, security and hypothec over the Debtors' present and future assets, rights, undertakings and property, movable, personal, corporeal or incorporeal, tangible or intangible and wherever situated, including all proceeds thereof (collectively the "**Property**") in the amount of $1,920,000 for the principal amount of $1,600,000 plus the additional mortgage of 20%, and all other amounts payable by the Debtors under the Interim Financing Documents ("**Interim Lender Charge**"), as continuing and collateral security for the Interim Lender Indebtedness and all obligations of the Debtors with respect to all amounts owing and all obligations required to be performed under or in connection with the Interim Financing Documents, which Interim Lender Charge shall have the priority established by paragraphs 33-34 hereof.

[21] **ORDERS** that the claims of the Interim Lender pursuant to the Interim Financing Documents shall not be compromised or arranged pursuant to a proposal or these proceedings and the Interim Lender, in that capacity, shall be treated as an unaffected creditor in these proceedings and in any proposal.

[22] **ORDERS** that the Interim Lender may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the Interim Lender Charge and the Interim Financing Documents in all jurisdictions where it deems it is appropriate; and

(b) notwithstanding the terms of the paragraph to follow, refuse to make any advance to the Debtors if the Debtors fail to meet the provisions of the DIP Term Sheet and the other Interim Financing Documents.

[23] **ORDERS** that the Interim Lender shall not take any enforcement steps with respect to its security or under the DIP Term Sheet (or underlying credit

agreements) or the Interim Lender Charge without providing at least 3 days written notice ("**Notice Period**") of a default thereunder to the Debtors, the Proposal Trustee and to creditors whose rights are registered or published at the appropriate registers or requesting a copy of such notice. Upon expiry of such Notice Period and without further Order of the Court, the Interim Lender shall be entitled to take any and all steps under its security, the DIP Term Sheet, the Interim Financing Documents, the Interim Lender Charge and otherwise permitted at law, but without having to send any additional demands under section 244 of the BIA, the *Civil Code of Quebec* or any other similar legislation. Upon demand or default under the Interim Financing Documents, the Interim Lender shall be under no obligation to make any further advance under the DIP Term Sheet or any other Interim Financing Document.

SISP

[24] **APPROVES AND AUTHORIZES** the SISP.

[25] **AUTHORIZES** the Proposal Trustee to conduct the SISP and to implement and perform any and all actions related thereto.

ADMINISTRATION CHARGE

[26] **ORDERS** that the Debtors shall pay the reasonable fees and disbursements of the Proposal Trustee, the Proposal Trustee's counsel, and the Debtors' counsel and other advisors, directly related to these BIA proceedings and the restructuring of the Debtors' business and affairs, whether incurred before or after this Order. The Debtors are hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Debtors on a weekly basis or on such other basis as such persons may agree in accordance with the cash flow approved by the Proposal Trustee and the Interim Lender.

[27] **DECLARES** that the Proposal Trustee, counsel to the Proposal Trustee, and counsel to the Debtors, are hereby granted a charge on the Property to the extent of the aggregate amount of $200,000, as continuing and collateral security for the professional fees and disbursements incurred both before and after the making of this Order and directly related to these proceedings under the BIA and the Debtors' restructuring, having the priority established by paragraphs 33-34 hereof ("**Administration Charge**").

D&O INDEMNIFICATION AND CHARGE

[28] **ORDERS** that the Debtors shall indemnity all of their directors and officers in office as at the date of the NOI filing or thereafter appointed ("**Directors and**

Officers") relating to any obligations or liabilities they may incur and which have accrued by reason of or in relation to their respective capacities as Directors or Officers of the Debtors after the commencement of these NOI proceedings, except where such obligations or liabilities were incurred as a result of such directors' or officers' gross negligence, wilful misconduct, or gross or intentional fault as further detailed subparagraph 64(4) of the BIA.

[29] **ORDERS** that the Directors and Officers are hereby granted a charge on the Property to the extent of an aggregate amount of $250,000 ("**D&O Charge**") as security for the indemnity provided in paragraph 28 of this Order. The D&O Charge shall have the priority set out in paragraphs 33-34 of this Order.

[30] **ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary:

(a) No insurer shall be entitled to be subrogated to or claim the benefit of the D&O Charge; and

(b) The Directors and Officers shall only be entitled to the benefit of the D&O Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the Directors and Officers are entitled to be indemnified in accordance with paragraph 28 of this Order.

KERP

[31] **ORDERS** that the Key Employee Retention Plan ("**KERP**") described in the Motion and summarized in the table filed under seal as Exhibit R-15 to the Motion is hereby approved, and the Debtors are hereby authorized and empowered to perform their obligations set forth thereunder, including by making the payments in accordance with the terms set out therein.

[32] **DECLARES** that the KERP contains sensitive and confidential information and shall be sealed in the Court file in this proceeding and segregated from, and shall not form part of, the public record.

PRIORITIES AND GENERAL PROVISIONS RELATING TO THE CHARGES

[33] **ORDERS AND DECLARES** that the priority of the Interim Lender Charge, the Administration Charge, and the D&O Charge (collectively, the "**Charges**") as between them with respect to the Property to which they apply shall be as follows:

(a) first, the Administration Charge;

(b) second, the D&O Charge; and

(c) third, the Interim Lender Charge;

[34] **ORDERS AND DECLARES** that each of the Charges shall constitute a charge on the Property and that such Charges shall rank in priority to any and all other hypotecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind (collectively, the "**Encumbrances**"), or trusts (statutory or otherwise) affecting the Property in favour of any person.

[35] **ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title, or interest filed, registered, published, recorded, or perfected subsequent to the Charges coming into existence.

[36] **ORDERS** that except as may be approved or ordered by this Court, the Debtors shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with the Charges unless the Court orders same or the beneficiaries of the Charges consent in writing thereto.

[37] **ORDERS AND DECLARES** that notwithstanding:

(a) the pendency of these proceedings;

(b) any application for a bankruptcy order pursuant to the BIA or any bankruptcy order made pursuant to such an application;

(c) the filing of any assignment for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statute; or

(e) any negative covenants, prohibitions, or other similar provisions with respect to borrowings, incurring debt or the creation of the Encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement to which the Debtors are a party;

the Charges shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors and shall not be void or voidable by any person, including any creditor of the Debtors, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable or reviewable transaction, under the BIA or any applicable law, nor shall they constitute oppressive or unfairly prejudicial conduct under any applicable law.