

2023 01G 0841

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of
15444781 Canada Inc.

AND IN THE MATTER OF the *Companies'*
Creditors Arrangement Act, R.S.C. 1985,
c. C-36, as amended ("**CCAA**")

SUMMARY OF CURRENT DOCUMENT	
Court File Number:	2023 01G 0841
Date of Filing Document:	December 8, 2023
Name of Party Filing or Person:	15444781 Canada Inc.
Application to which Document being filed relates:	Application to make an interim distribution, extend the stay of proceedings, and for other relief pursuant to the <i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36
Statement of Purpose in Filing:	To support the application

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

Joe Thorne
STEWART MCKELVEY
Suite 1100, Cabot Place
100 New Gower Street
P.O. Box 5038
St. John's, NL A1C 5V3

Telephone: 709.570.8850
Facsimile: 709.722.4565
Email: joethorne@stewartmckelvey.com

**Solicitors for the Applicant, 15444781
Canada Inc.**

TO: Counsel and others listed in the Service List at Schedule A to the Application

2023 01G 0841

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF an application of
15444781 Canada Inc.

AND IN THE MATTER OF the *Companies'*
Creditors Arrangement Act, R.S.C. 1985,
c. C-36, as amended ("**CCAA**")

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

SUMMARY OF CURRENT DOCUMENT	
Court File Number:	2023 01G 0841
Date of Filing Document:	December 8, 2023
Name of Party Filing or Person:	15444781 Canada Inc.
Application to which Document being filed relates:	Application to make an interim distribution, extend the stay of proceedings, and for other relief pursuant to the <i>Companies' Creditors Arrangement Act</i> , RSC 1985, c C-36
Statement of Purpose in Filing:	To support the application

OVERVIEW

1. On September 11, 2023, by Order of this Court, 15444781 Canada Inc. (the "**Applicant**") became the Applicant in this proceeding in place of Rambler Metals and Mining Canada Limited ("**Rambler Canada**") and 1948565 Ontario Inc. ("**1948**") (collectively, the "**Rambler Group**").
2. The Applicant seeks:
 - (a) an order abridging the notice periods pursuant to Section 11 of the CCAA and the *Rules of the Supreme Court, 1986*, Rule 3.03(1), Rule 6.04(2) and Rule 6.06;

- (b) an order pursuant to Section 11 of the CCAA, directing that the service on the service list set out in **Schedule A** to the notice of application is sufficient for the purposes of this application;
- (c) authorizing the Monitor to make an interim distribution to certain priority and secured creditors;
- (d) extending the Stay Period in respect of the Applicant to May 19, 2025;
- (e) releasing and discharging the DIP Lender's Charge, and amending the Administration Charge;
- (f) approving:
 - (i) the Monitor's Seventh Report and the Monitor's Supplemental Seventh Report and the activities of the Monitor and its counsel as reported therein;
 - (ii) approving the fees and disbursements of the Monitor and its counsel from the commencement of these CCAA Proceedings through October 31, 2023, as well as the estimated fees of the Monitor and its counsel to finalize these CCAA Proceedings;
- (g) Discharging the Monitor upon the execution and filing of a certificate by the Monitor confirming that a final distribution of available funds has been completed and that all remaining matters have been completed in order to permit the termination of these CCAA proceedings; and
- (h) such further and other relief as counsel may advise and this Court deems just.

FACTS

3. Rambler Canada relies on:

- (a) the Bradbury Affidavit, sworn February 22, 2023, and previously filed with the Court;
- (b) the Proposed Monitor's Pre-Filing Report, dated February 23, 2023;
- (c) the Monitor's First Report, dated March 3, 2023;
- (d) the Monitor's Second Report, dated March 13, 2023;
- (e) the Monitor's Third Report, dated April 5, 2023;
- (f) the Monitor's Fourth Report, dated May 12, 2023;
- (g) the Monitor's Fifth Report, dated June 28, 2023;
- (h) the Monitor's Sixth Report, dated August 31, 2023, and Confidential Supplement to the Sixth Report (filed under seal);
- (i) the Monitor's Seventh Report, dated December 1, 2023; and
- (j) the Monitor's Supplemental Seventh Report, dated December 8, 2023.

4. Rambler Group were granted protection from creditors under the CCAA by order of this Court, dated February 27, 2023 (the "Initial Order").

5. While Rambler Metals and Mining plc and Rambler Mines Limited were not held to be "debtor companies" for the purpose of the CCAA, those companies were made subject to the stay of proceedings for the Stay Period.

6. In the Initial Order, this Court authorized the Rambler Group to enter into a DIP Financing Agreement with the DIP Lenders referenced in the Initial CCAA Order (the “**DIP Lenders**”).
7. The Initial Order was subsequently amended several times – most recently as the FARIO dated May 16, 2023.
8. The Court issued a sales and investment solicitation process order (the “**SISP**”) on March 15, 2023, which directed and empowered the Monitor to administer the SISP.
9. The SISP resulted in a successful sale transaction. On August 30, 2023, Rambler Group and AuTECO executed the Subscription Agreement confirming the terms of the transaction to sell the shares of Rambler Group through a “reverse vesting” structure following Court approval.
10. On September 11, 2023, this Court granted orders:
 - (a) approving a “reverse vesting” transaction for the sale of the shares of Rambler Group (the “**ARVO**”);
 - (i) as part of that relief, the Applicant was incorporated and took on certain Excluded Liabilities and Excluded Assets (as defined in the ARVO) from Rambler Group;
 - (ii) the Applicant also became a “debtor company” under the CCAA and the Applicant in this proceeding, at which time the Rambler Group exited the CCAA and this proceeding;
 - (iii) the stay of proceedings for the Applicant was extended to December 31, 2023 (the “**Stay Period**”);

- (b) authorizing a claims identification process (the “**Claims Identification Order**”) in respect of claimants seeking priority ahead of the secured creditors of the Applicant (and former secured creditors of Rambler Group until the issuance of the ARVO); and
- (c) granting the Monitor enhanced powers over the Applicant upon the resignation of the Applicant’s sole director (the “**Enhanced Powers Order**”);
 - (i) those powers came into effect on October 20, 2023 upon the filing of the Monitor’s Certificate confirming the terms of the Enhanced Powers Order were met.

Reference: Monitor’s Seventh Report, dated December 1, 2023, at para 16

11. Since those orders were made, the Monitor has:

- (a) continued to assist the Rambler Group and the Applicant with communications in respect of this proceeding, including with employees, creditors, suppliers, and other stakeholders;
- (b) coordinated weekly update meetings with management to discuss and review ongoing matters related to the proceeding, warm idle operations, claim reviews, and matters related to closing the AuTECO Transaction;
- (c) administered the claims identification process pursuant to the Claims Identification Order;
- (d) monitored the actual cash flows of the Rambler Group relative to the August Forecast (set out in the Monitor’s Sixth Report), reported to the DIP Lenders until the DIP was repaid, and reported to AuTECO in support of the weekly operational

funding received by AuTECO pursuant to the Amended and Restated Subscription Agreement; and

- (e) negotiated the details of the proposed distribution with priority and secured creditors.

Reference: Monitor's Seventh Report, dated December 1, 2023, at para 13

Reference: Monitor's Supplemental Seventh Report, dated December 8, 2023

ISSUES

12. The issues in this application are:

- (a) Should the Monitor be permitted to make an interim distribution to certain creditors?
- (b) Should the Stay Period be extended?
- (c) Should the Charges in the FARIO be discharged or amended?
- (d) Should the Monitor's fees and disbursements, and those of its counsel be approved?
- (e) Should the Monitor be permitted to be discharged upon completion of certain remaining activities?

LAW AND ARGUMENT

The Interim Distribution Should be Approved

13. Section 11 of the CCAA provides the court with a broad discretion to make any orders it considers appropriate in the circumstances.

Reference: Section 11 of the *Companies' Creditors Arrangement Act*,
Memorandum of Fact and Law of the Applicants, Tab 1

14. The Supreme Court of Canada has confirmed that section 11 of the CCAA confers a very broad discretionary power on this Court to make any order it deems appropriate. This discretion must be exercised in furtherance of the remedial objectives of the CCAA, including whether:
- (a) the order is appropriate in the circumstances;
 - (b) the Applicant is acting in good faith; and
 - (c) the Applicant is acting with due diligence.

Reference: *Canada v. Canada North Group Inc.*, 2021 SCC 30,
Memorandum of Fact and Law of the Applicants, Tab 2, at
para 21

15. Pursuant to the Claims Identification Order, on September 12, 2023, the Monitor sent claims packages to all known creditors of the Applicant (and formerly of Rambler Group).
16. By the Claims Bar Date (October 11, 2023), the Monitor received seventy-two (72) proofs of claim from 63 claimants, of which 2 were late filed and unsecured. Of those 72 claims, 68 are Pre-Filing Claims and 4 are Restructuring Claims.
17. The primary purpose of the Claims Identification Order was to permit the Monitor to gather and assess any claims that alleged a priority ahead of the secured creditors of the Applicant.¹

¹ A number of claims were determined to be unsecured or subordinate to secured creditors, including lien claims, claims filed as secured but determined to be unsecured, and royalty claims in respect of

18. Courts sitting in insolvency routinely make orders authorizing interim distributions, including with holdbacks as proposed on this application. Factors to be considered on such applications include whether:

- (a) the recipient's security is valid and enforceable;
- (b) the distribution would result in significant interest savings; and
- (c) the distribution will leave the estate with sufficient liquidity.

Reference: *Re AbitibiBowater Inc*, 2009 QCCS 6461 at paras 71 – 75

19. The Applicant submits that all of these factors are met in this case.

Priority claims

20. Upon review of the claims filed, the Monitor determined that the following filed claims rank in priority to the secured creditors:

- (a) Service Canada in respect of its super priority for balances owing pursuant to payments made to Rambler Group employees under the wage earner protection program ("**WEPP**");
- (b) Canada Revenue Agency in respect of its deemed trust claim for deductions at source withheld by the Rambler Group pre-filing, and not submitted to CRA;
- (c) The Province of Newfoundland and Labrador in respect of amounts owing by Rambler Group for Health and Post Secondary Education Tax ("**HAPSET**"), which in the Monitor's view is akin to a deemed trust.

Excluded Contracts. Affected creditors have been advised of the Monitor's determination and, as of the date of this filing, have not expressed an intention to dispute.

Reference: Monitor's Seventh Report, dated December 1, 2023, at para 26

Secured claims

21. The Monitor received proofs of claim from the senior secured creditors of Rambler Group, which claims are governed by an intercreditor agreement.

Senior secured creditor- order of priority	Claim: \$CAD
NewGen - <i>First Lien capped at USD\$10M</i>	13,715,000
Sandstorm Gold Ltd.	2,414,656
NewGen - <i>balance of Claim</i>	14,129,613
Elemental Altus Royalties Corp.	21,569,362
Transamine S.A.	4,868,637
Senior secured creditor claims	56,555,268

Reference: Monitor's Seventh Report, dated December 1, 2023, at para 34

22. The Monitor has reviewed the secured creditors claims and has discussed this proposed interim distribution with each of them. The Monitor has previously confirmed that the secured creditors' security is valid and enforceable, and that their respective entitlements are governed by the intercreditor agreement among them.

Claims subject to holdback

23. Finally, certain proofs of claim filed by the Town of Baie Verte, the Town of South Brook, and the Town of Seal Cove have been subject to further review and requests for information (collectively, the "**Municipal Tax Claims**"). The Municipal Tax Claims are,

broadly, in respect of amounts owing by the Rambler Group for outstanding property tax, business tax, and water/sewer tax. Some of these claims arise from tax agreements, while others do not.

24. At the date of this application, the Monitor continues to review the Municipal Tax Claims for potential priority. The Monitor has requested additional information from the municipalities, but has not completed its priority review and determination. In the event that the Monitor's determination is challenged by the claimant or any other creditor, the Monitor intends to seek a further date before this Court in January 2024 to address such issues.
25. As a result, the Monitor has proposed to hold back an amount from this interim distribution representing the total of the Municipal Tax Claims – approximately CAD\$1.2 million.

Proposed distribution

26. The available consideration for an initial distribution to creditors consists of cash and AuTECO shares (the “Interim Distribution”).
27. Following review of the claims described above, the Monitor prepared a draft waterfall and circulated to secured creditors. The waterfall set out the Monitor's assessment of the priority and secured creditor claims, and the anticipated payments to be made in the Interim Distribution. The Monitor invited the secured creditors to:
 - (a) review and provide comments on the waterfall; and
 - (b) in accordance with the ARVO, make an election regarding receiving cash, shares, or a combination thereof.

Reference: Monitor's Seventh Report, dated December 1, 2023, at para 37

28. Each secured creditor (except Transamine, who is not expected to receive a distribution) provided its election to the Monitor. The Monitor then estimated the cash and shares allocation in accordance with the relative priority of each secured creditor.
29. The Monitor has included in its Seventh Report the updated waterfall for the Interim Distribution (and the expected Final Distribution) including the cash and shares allocations. The Monitor's calculation of the share price allocation is set out in the Seventh Report.
30. Subsequent to the Seventh Report, the Monitor engaged in further discussions with certain secured creditors and other claimants in respect of the Interim Distribution, the Final Distribution, and certain Claims Identification Order matters.

Reference: Monitor's Supplemental Seventh Report, dated December 8, 2023

Proposed Distribution - in Order of Priority and by Claim Election

Priority Payables:		\$CAD
Cash on Hand - November 28, 2023		21,310,038
Priority Payables:		
WEPP Super Priority		(114,627)
CRA: Deemed Trust for Source Deductions		(3,189,689)
Government of Newfoundland & Labrador (HAPSET)		(612,334)
Holdback: Municipal and Property Tax		(1,205,223)
Holdback: Professional Fees		(500,000)
Cash Available for Interim Distribution to Senior Creditors		15,688,165
Interim Distribution:		Final Claim
		\$CAD
Cash Available for Interim Distribution to Senior Creditors		15,688,165
NewGen - Cap Amount (per Intercreditor Agreement)	13,573,000	(13,573,000)
Sandstorm	2,414,656	(2,115,165)
Remaining Cash Available for Interim Distribution		-
Share Value Available for Interim Distribution		18,360,000
NewGen - Remaining Claim After Cap Amount	14,129,613	(14,129,613)
Elemental	21,569,362	(4,230,387)
Remaining Share Value Available for Interim Distribution		-
Final Distribution:		Remaining Claim
		\$CAD
Cash Available for Final Distribution		6,750,000
Sandstorm (Remaning value of Claim)	299,491	(299,491)
NewGen - Remaining Claim	-	-
Elemental - Remaining Value of Claim	17,338,975	(6,450,509)
Remaining Cash Available for Final Distribution		-
Share Value Available for Final Distribution		6,750,000
Elemental - Remaining Value of Claim	10,888,466	(6,750,000)
Remaining Share Value Available for Final Distribution		-
Total Proposed Distribution: Interim & Final		\$CAD
Interim Cash: Priority Payables		3,916,650
Interim Cash: Senior Creditors		15,688,165
Interim Shares: Senior Creditors (40M shares, 10 day WAP estimate)		18,360,000
Final Cash: \$7.5M AUD		6,750,000
Final Share Value: \$7.5M AUD		6,750,000
Release of Holdbacks:		Unknown
Proposed Distribution		51,464,815

Reference: Monitor's Seventh Report, dated December 1, 2023, at para 43

31. The Interim Distribution includes two holdback amounts:
- (a) the Municipal Tax Claims, as described above; and
 - (b) CAD\$500,000 for professional fees of the Monitor and its counsel through to the expected termination of the CCAA;
 - (i) This holdback amount exceeds the Monitor's estimated ordinary course expenses to account for a potential priorities dispute regarding the Municipal Tax Claims and/or the requirement of the Monitor to realize on the security granted to the Applicant with regard to the second closing payment.
32. The Applicant submits that the Proposed Distribution is fair and reasonable, will result in significant savings of interest with respect to the secured claims, and will leave sufficient liquidity in the estate through to the end of the CCAA.
33. Further, the second and final payment by AuTECO of AUD\$7.5 million in cash and AUD\$7.5 million in AuTECO shares ("**Stage Two Purchase Price**") is to be paid to the Monitor within 18 months of the first closing payment, and will be applied to a final distribution along with any remaining proceeds in the estate.

The Stay Period Should be Extended

34. Section 11.02(2) of the CCAA permits the Court to extend the stay of proceedings for the Applicant for any period the Court deems fit.

Reference: Section 11.02(2) of the *Companies' Creditors Arrangement Act*,
Memorandum of Fact and Law of the Applicants, Tab 1

35. As set out in the ARVO, the Applicant stepped into the shoes of Rambler Group in this proceeding and became subject to the Stay Period (as defined in the ARVO).

Reference: ARVO, at para 20(b)

36. The Applicant seeks to extend the Stay Period from December 31, 2023 to May 19, 2025. The length of this extension is to accommodate the timing of the Stage Two Purchase Price, which is not due from AuTECO until an outside date of 18 months from the date of the first payment.
37. Although the Applicant and Monitor do not anticipate a significant amount of work to be done between this application and the Stage Two Purchase Price, the Monitor will need to carry out certain additional duties, including:
- (a) complete the interim distribution in accordance with this application, if granted;
 - (b) adjudicate the claims subject to the interim distribution holdback amount;
 - (c) complete the final distribution subject to Court approval once the Stage Two Purchase Price is received;
 - (d) pay approved fees, disbursements, and other amounts;
 - (e) prepare materials required to assign the Applicant into bankruptcy; and
 - (f) file the Monitor's discharge certificate once all remaining activities have been completed.
38. On an application to extend a stay of proceedings, the debtor must satisfy this Court that it has acted, and is acting, in good faith, and with due diligence.

Reference: Section 11.02(3) of the *Companies' Creditors Arrangement Act*, Memorandum of Fact and Law of the Applicants, Tab 1

39. The Applicant submits that it has acted, and continues to act, in good faith and with due diligence in this CCAA proceeding, as set out in the Monitor's Seventh Report.

40. No creditor will suffer prejudice as a result of the stay extension.

The Charges Should be Discharged or Amended

DIP Lender's Charge

41. As provided in the ARVO, the DIP Loan was repaid in full, inclusive of interest, on October 24, 2023.

Reference: Monitor's Seventh Report, dated December 1, 2023, at para 18

42. As a result, the DIP Lender's Charge set out in the FARIO is no longer necessary. The Applicant requests that the DIP Lender's Charge be discharged.

Administration Charge

43. Section 11.52 of the CCAA authorizes this Court to grant a priority charge in respect of professional fees and disbursements on notice to affected secured creditors.

Reference: Section 11.52 of the *Companies' Creditors Arrangement Act*,
Memorandum of Fact and Law of the Applicants, Tab 1

44. This Court granted an Administration Charge in the Initial Order, which amount was subsequently increased in the FARIO to CAD\$1,350,000. That amount was based on cashflows and professional fees forecast in the early stages of this proceeding.
45. Since that time, the Rambler Group, its counsel, the Monitor, and its counsel have incurred fees that have been paid through the proceeding.
46. At this stage, the majority of professional fees have been spent and the quantum of the necessary Administration Charge is reduced. In the Monitor's Seventh Report, it proposed a holdback of CAD\$350,000.00 for professional fees through to the anticipated conclusion of this proceeding. The Monitor recommended an Administration Charge of

CAD \$500,000.00 to account for those fees and for any potential additional costs associated with disputes regarding the proposed distribution and/or the Monitor's assessment of claims.

Reference: Monitor's Seventh Report, dated December 1, 2023, at paras 43(c) and (d)

47. The Applicant submits that the Administration Charge remains necessary through the end of this proceeding, in light of the factors to be considered when granting an Administration Charge.

Reference: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, Memorandum of Fact and Law of the Applicant, Tab 4, at para 54

48. On that basis, the Applicant requests that the Administration Charge be reduced from CAD\$1,350,000 to CAD\$500,000.00.

The Monitor's Fees and its Activities Should be Approved

The Monitor's Fees and Disbursements

49. This Court has authorized the Monitor to apply to pass its accounts in the FARIO:

32. *THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency.*

Reference: FARIO, dated May 16, 2023, at para 32

50. On application to pass accounts, this Court must evaluate the accounts based on the "overriding principle of reasonableness". The Court is not required to do a line-by-line

reconciliation of invoices. Rather, the focus is on assessing the reasonableness of the accounts and the overall value contributed by the Monitor and its counsel.

Reference: *Bank of Nova Scotia v Diemer*, 2014 ONCA 851, Memorandum of Fact and Law of the Applicant, Tab 5, at para 45

51. The Applicant submits that it is not necessary or desirable for the Court to engage in a review of each individual entry to determine whether the Monitor's and its counsel's accounts are fair and reasonable. The Monitor's activities have been extensively reported in the Monitor's Reports filed in this proceeding – and such activities have been approved through the Sixth Report, dated August 31, 2023.
52. When reviewing the fees of the Monitor and its counsel, the following non-exhaustive factors should be considered:
 - (a) the nature, extent and value of the assets being handled;
 - (b) the complications and difficulties encountered;
 - (c) the degree of assistance provided by the company, its officers or its employees;
 - (d) the time spent;
 - (e) the Monitor's knowledge, experience and skill;
 - (f) the diligence and thoroughness displayed;
 - (g) the responsibilities assumed;
 - (h) the results achieved; and

- (i) the cost of comparable services when performed in a prudent and economical manner.

Reference: *Nortel Networks Corp. (Re)*, 2017 ONSC 673, Memorandum of Fact and Law of the Applicant, Tab 6, at para 14

- 53. Based on the materials filed in support of the Monitor's request to pass its accounts, and the degree of Court oversight and involvement throughout this proceeding, the Applicant submits that the Monitor's and its counsel's accounts are fair and reasonable.

The Activities in the Seventh Report and Supplemental Seventh Report

- 54. A request to approve a monitor's report "is not unusual" and there are good policy and practical reasons for the court to approve a monitor's activities. In particular, court approval:
 - (a) allows the Monitor to move forward with next steps in the CCAA proceedings;
 - (b) brings the Monitor's activities before the Court;
 - (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;
 - (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
 - (e) provides protection for the Monitor not otherwise provided by the CCAA; and
 - (f) protects the creditors from the delay and distribution that would be caused by:

- (i) re-litigation of steps taken to date; and
- (ii) potential indemnity claims by the Monitor.

Reference: *Re Target Canada Co.*, 2015 ONSC 7574, Memorandum of Fact and Law of the Applicant, Tab 7, at paras 12 and 22

55. The activities of the Monitor through its Sixth Report, dated August 31, 2023, and the Confidential Supplement to the Sixth Report, dated August 31, 2023, were approved by this Court in the ARVO.

Reference: ARVO, at para 24

56. The Monitor has acted responsibly and carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the FARVO and the other orders made in this proceeding.
57. The Applicant submits that the Monitor's activities in the Seventh Report and the Supplemental Seventh Report filed for this application should be approved.

The Monitor Should be Permitted to File for its Discharge and to Terminate this Proceeding

58. The Applicant proposes to terminate these CCAA proceedings and have the Monitor discharged upon the filing of the Termination Certificate (defined below) certifying that all "Remaining Activities" (as defined in the Seventh Report and outlined below) have been completed.
59. Such termination orders, including provisions for pre- and post-termination steps, have been granted in a number of other CCAA proceedings.

Reference: In the Matter of a Plan of Compromise or Arrangement of GolfTown Canada Holdings Inc. et al (March 29, 2018), Toronto, CV-19-629552-00CL; In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp. (February 15,

2022), Toronto, CV-21-00673304-00CL, Memorandum of Fact
and Law of the Applicant, Tab 8

60. The Applicant submits that the proposed termination of this proceeding – subject to the additional steps set out in this application and the Monitor's Seventh Report – is appropriate for several reasons:
- (a) the Applicant has no business operations – its only business is assisting the Monitor with the claims process and other residual matters;
 - (b) since the ARVO was granted, the Applicant, in consultation with the Monitor and subject to the Monitor's Enhanced Powers Order, has acted in good faith and with due diligence to take all necessary steps to complete the sale transaction and to carry out the steps mandated by the Claims Identification Order;
 - (c) all outstanding matters to be resolved before this proceeding is terminated will be completed by the Applicant and the Monitor as set out below and in the Monitor's Seventh Report, and will be confirmed by the Monitor in a certificate (the **"Termination Certificate"**); and
 - (d) the Monitor supports the termination of the CCAA Proceedings on the terms set out in the proposed CCAA Termination Order.
61. In order for the Monitor to file the Termination Certificate and terminate these proceedings, it must:

- (a) complete the interim distribution, if granted;
- (b) review and determine the Municipal Tax Claims and advise the secured creditors of the Monitor's decision (pursuant to paragraph 30(a) of the Claims Identification Order);
 - (i) in the event any secured creditor opposes the Monitor's decision, it will apply to this Court for directions pursuant to paragraph 30(b) of the Claims Identification Order;
- (c) complete the final distribution once the Stage Two Purchase Price has been received, in order of priority and in accordance with any order of this Court;
- (d) pay Court-approved fees and disbursements of the Monitor and its counsel, and the final fees and disbursements of the Monitor and its counsel and the Applicant's legal counsel;
- (e) complete other administrative matters, including filing tax returns if necessary, to give effect to the actions above

(collectively, the "**Remaining Activities**").

62. The Applicant submits that the proposed CCAA Termination Order is appropriate in the circumstances, and the Applicant has acted in good faith and with due diligence.

RELIEF SOUGHT

63. The Applicant therefore requests:

- (b) an order abridging the notice periods pursuant to Section 11 of the CCAA and the *Rules of the Supreme Court, 1986*, Rule 3.03(1), Rule 6.04(2) and Rule 6.06;

- (i) an order pursuant to Section 11 of the CCAA, directing that the service on the service list set out in **Schedule A** hereto is sufficient for the purposes of this application;
- (j) authorizing the Monitor to make the Interim Distribution;
- (k) extending the Stay Period to May 19, 2025;
- (l) releasing and discharging the DIP Lender's Charge, and amending the Administration Charge;
- (m) approving:
 - (i) the Monitor's Seventh Report and the Monitor's Supplemental Seventh Report and the activities of the Monitor and its counsel as reported therein;
 - (ii) approving the fees and disbursements of the Monitor and its counsel from the commencement of these CCAA Proceedings through October 31, 2023, as well as the estimated fees of the Monitor and its counsel to finalize these CCAA Proceedings;
- (n) Discharging the Monitor and terminating these proceedings upon the filing of the Termination Certificate by the Monitor confirming that the final distribution of available funds has been completed and that the Remaining Activities have also been completed to permit the termination of these proceedings; and
- (o) such further and other relief as counsel may advise and this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED at St. John's, Newfoundland and Labrador, this ^{8th} day of December, 2023.

Joe Thorne

Joe Thorne
STEWART MCKELVEY
Suite 1100, Cabot Place
100 New Gower Street
P.O. Box 5038
St. John's, NL A1C 5V3

Telephone: 709.570.8850
Facsimile: 709.722.4565
Email: joethorne@stewartmckelvey.com

Solicitors for the Applicant, 15444781
Canada Inc.

TO: Counsel and others listed in the Service List at Schedule A to the
Application

LIST OF AUTHORITIES

	TAB
Excerpts from <i>Companies' Creditors Arrangement Act</i> , R.S.C. 1985, c. C-36	1
<i>Canada v. Canada North Group Inc.</i> , 2021 SCC 30	2
<i>Re Abitibowater Inc.</i> , 2009 QCCS 6461 (CanLII) (QC SC)	3
<i>Canwest Publishing Inc./Publications Canwest Inc., Re</i> , 2010 ONSC 222	4
<i>Bank of Nova Scotia v Diemer</i> , 2014 ONCA 851	5
<i>Nortel Networks Corp. (Re)</i> , 2017 ONSC 673	6
<i>Re Target Canada Co.</i> , 2015 ONSC 7574	7
In the Matter of a Plan of Compromise or Arrangement of GolfTown Canada Holdings Inc. et al (March 29, 2018), Toronto, CV-19-629552-00CL; In the Matter of a Plan of Compromise or Arrangement of Harte Gold Corp. (February 15, 2022), Toronto, CV-21-00673304-00CL	8



CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to November 14, 2023

À jour au 14 novembre 2023

Last amended on April 27, 2023

Dernière modification le 27 avril 2023

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

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.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

- a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

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.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

- a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;
- b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

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

Persons deemed to be directors

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

2005, c. 47, s. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has effect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit or guarantee in relation to the company.

2005, c. 47, s. 128.

11.05 [Repealed, 2007, c. 29, s. 105]

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

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

Présomption : administrateurs

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

2005, ch. 47, art. 128.

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la personne — autre que la compagnie visée par l'ordonnance — qui a des obligations au titre de lettres de crédit ou de garanties se rapportant à la compagnie.

2005, ch. 47, art. 128.

11.05 [Abrogé, 2007, ch. 29, art. 105]

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

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

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Bankruptcy and Insolvency Act matters

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; and

(b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from

(i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or

(ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(a) if the trustee is or, at any time during the two preceding years, was

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Lien avec la Loi sur la faillite et l'insolvabilité

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;

b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :

(i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,

(ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

Personnes qui ne peuvent agir à titre de contrôleur

(2) Sauf avec l'autorisation du tribunal et aux conditions qu'il peut fixer, ne peut être nommé pour agir à titre de contrôleur le syndic :

a) qui est ou, au cours des deux années précédentes, a été :



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: Brown and Rowe JJ. (Abella J. concurring)
(paras. 183 to 253)

DISSENTING REASONS: Moldaver J.
(paras. 254 to 265)

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

CANADA v. CANADA NORTH GROUP INC.

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** *Intervenors*

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 *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.

Distinguished: *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; **considered:** *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94; **referred to:** *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Pacific National Lease Holding Corp., Re* (1992), 72 B.C.L.R. (2d) 368; *Grant Forest Products Inc., Re* (2009), 57 C.B.R. (5th) 128; *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169; *In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1; *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299; *Triton Électronique inc. (Arrangement*

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; *Metcalf & 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)

9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 43(1), 50.4(1), 67, 81.1, 81.2, 86(3).

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23(3), (4).

Civil Code of Québec, arts. 1260, 1261, 1278, 1306, 1313.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1) "secured creditor", 3(1), 6(3), 10(2)(c), 11, 11.09, 11.2, 11.4, 11.51, 11.52, 36, 37 to 39.

Employment Insurance Act, S.C. 1996, c. 23, ss. 23(4), 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 18(5) "security interest", 116, 153(1), Part XII.5, Part XIII, 222, 223(1) to (3), (5), (6), 224(1), (1.2), (1.3) "secured creditor", "security interest", 227(4), (4.1), (4.2), (9), (9.2), (9.3), (9.4), (10.1), (10.2).

Income Tax Regulations, C.R.C., c. 945, s. 2201.

Income War Tax Act, R.S.C. 1927, c. 97 [previously S.C. 1917, c. 28], s. 92(6), (7) [ad. 1942-43, c. 28, s. 31].

Interpretation Act, R.S.C. 1985, c. I-21, ss. 8.1, 8.2.

Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, pp. 2041-42.

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1).

Authors Cited

Black's Law Dictionary, 11th ed., by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019, "beneficial owner".

Brender, Mark D. "Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation" (2003), 51 *Can. Tax J.* 311.

Brown, Catherine. "Beneficial Ownership and the Income Tax Act" (2003), 51 *Can. Tax J.* 401.

Canada. Canada Revenue Agency. *Tax collections policies* (online: <https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/ic98-1/tax-collections-policies.html>; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC30_1_eng.pdf).

- Canada. Department of Finance. *Unremitted Source Deductions and Unpaid GST*. Ottawa, April 7, 1997.
- Cuming, Ronald C. C., Catherine Walsh, and Roderick J. Wood. *Personal Property Security Law*, 2nd ed. Toronto: Irwin Law, 2012.
- Duggan, Anthony, and Jacob Ziegel. “Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security” (2007), 57 *U.T.L.J.* 227.
- Gillese, Eileen E. *The Law of Trusts*, 3rd ed. Toronto: Irwin Law, 2014.
- Grenon, Aline. “Common Law and Statutory Trusts: In Search of Missing Links” (1995), 15 *Est. & Tr. J.* 109.
- Halsbury’s Laws of Canada — Bankruptcy and Insolvency*, 2017 Reissue, contributed by Michael J. Hanlon. Toronto: LexisNexis, 2017.
- Hanlon, Michael J., Vicki Tickle, and Emily Csiszar. “Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown’s Deemed Trust for Source Deductions”, in Janis P. Sarra et al., eds., *Annual Review of Insolvency Law 2018*. Toronto: Thomson Reuters, 2019, 897.
- Houlden, L. W., G. B. Morawetz, and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed. rev. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2021, release 3).
- Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Thomson Reuters, 2021 (loose-leaf updated 2021, release 2).
- Lamoureux, Martin. *The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III* (online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/lamou/harm3.html>; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC30_2_eng.pdf).
- Le Robert* (online: <https://dictionnaire.lerobert.com/definition/particulier>), “*en particulier*”.
- McFarlane, Ben, and Robert Stevens. “The nature of equitable property” (2010), 4 *J. Eq.* 1.
- Penner, J. E. “The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust” (2014), 27 *Can. J.L. & Jur.* 473.
- Prévost, Alain. “Que reste-t-il de la fiducie réputée en matière de régimes de retraite?” (2016), 75 *R. du B.* 23.
- Salembier, Paul. *Legal and Legislative Drafting*, 2nd ed. Toronto: LexisNexis, 2018.

- Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. Toronto: Carswell, 2013.
- Sarra, Janis P., Geoffrey B. Morawetz, and L. W. Houlden. *The 2020-2021 Annotated Bankruptcy And Insolvency Act*. Toronto: Thomson Reuters, 2020.
- Simard, Roger P. "Priorités et droits spéciaux de la couronne", dans *JurisClasseur Québec — Collection droit civil — Sûretés*, vol. 1, par Pierre-Claude Lafond, dir. Montréal: LexisNexis, 2011, fascicule 4 (feuilles mobiles mises à jour novembre 2020, envoi n° 17).
- Smith, Lionel D. *The Law of Tracing*. Oxford: Clarendon Press, 1997.
- Smith, Lionel D. "Trust and Patrimony" (2008), 38 *R.G.D.* 379.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.
- Waters, D. W. M. "The Nature of the Trust Beneficiary's Interest" (1967), 45 *Can. Bar Rev.* 219.
- Waters' Law of Trusts in Canada*, 4th ed., by Donovan W. M. Waters, Mark R. Gillen, and Lionel D. Smith. Toronto: Carswell, 2012.
- Wood, Roderick J. "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85.
- Wood, Roderick J. "The Floating Charge in Canada" (1989), 27 *Alta. L. Rev.* 191.
- Wood, Roderick J., and Rick T. G. Reeson. "The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*" (2000), 15 *B.F.L.R.* 515.
- Ziegel, Jacob S. "Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*" (2004), 45 *C.B.R.* (4th) 244.

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. Bieganeck, 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

those assets to become the property of the Crown” (A.F., at para. 46). The Crown rests this argument on the wording of the section. First, it says that property equal in value to the amount deemed to be held in trust by a person is deemed to be held “separate and apart from the property of the person”. Second, it says that the property deemed to be held in trust is deemed “to form no part of the estate or property of the person”. Third, it says that the property deemed to be held in trust “is property beneficially owned by Her Majesty notwithstanding any security interest in such property”. The Crown submits that, as a result of Her Majesty’s proprietary interest, amounts subject to the deemed trust cannot be considered assets of the debtor in CCAA proceedings.

[39] In order to determine whether s. 227(4.1) confers a proprietary or ownership interest upon Her Majesty, we must look at the nature of the rights afforded to Her Majesty by the deemed trust and compare them to the rights ordinarily afforded to an owner. To begin with, it is clear that the statute does not purport to transfer legal title to any property to Her Majesty. Instead, the Crown’s argument places considerable weight on the common law meaning of the words “beneficially owned by Her Majesty” and “in trust”. Trusts and beneficial ownership are equitable concepts that are part of the common law. As in all cases of statutory interpretation, the meaning of these words is a question of parliamentary intent. In the interpretation of a federal statute that uses concepts of property and civil rights, reference must be had to ss. 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21. These sections provide:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and,

unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.

[40] In other words, where Parliament uses a private law expression and is silent as to its meaning, courts must refer to the applicable provincial private law. This is known as the principle of complementarity. However, as both these sections also make clear, Parliament is free to derogate from provincial private law and create a uniform rule across all provinces (see R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 158-59).

[41] In this case, Parliament has expressly chosen to dissociate itself from provincial private law. Section 227(4.1) says that it operates “[n]otwithstanding 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”. In *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, the majority found that, through these words, Parliament has created a standalone scheme of uniform application across all provinces (paras. 11-13). The nature of the deemed trust created by s. 227(4.1) must thus be understood on its own terms.

[42] With that said, it is also clear that Parliament has chosen to use terms with established legal meanings in constructing the deemed trust. While the meaning of these terms is not to be based on their precise meaning under Alberta common law, it is difficult to attempt to understand s. 227(4.1) without any reference to how these concepts generally operate. Despite the protestations of my colleagues Justices Brown and Rowe, I do not see how we could begin to understand the meaning of the words “deemed trust”, “held in trust” or “beneficially owned” without reference to the civil law or common law. The law of trusts in both civil law and common law thus provides critical context for understanding Parliament’s intent. From a civil law perspective, some courts have found it awkward to apply the idea of beneficial ownership under s. 227(4.1) in Quebec “on the ground that it is a concept that is obviously derived from the common law” (*Canada (Attorney General) v. Caisse populaire d’Amos*, 2004 FCA 92, 324 N.R. 31, at para. 48). I agree with the following observation by Noël J.A. (as he then was):

It is not the task of the judiciary to determine whether it is appropriate for Parliament to use common law concepts in Quebec (or to use civil law concepts elsewhere in Canada) for the purpose of giving effect to federal legislation. The task of the courts is limited to discovering Parliament’s intention and giving effect to it. [para. 49]

[43] Under Quebec civil law, it is clear that s. 227(4.1) does not establish a trust within the meaning of the *Civil Code of Québec* (“C.C.Q.”). Articles 1260 and 1261 C.C.Q. provide the following:

1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

As this Court held in *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31, “Three requirements must therefore be met in order for a trust to be constituted [under Quebec civil law]: property must be transferred from an individual’s patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property.”

[44] Under s. 227(4.1) of the *ITA*, however, no specific property is transferred to a trust patrimony. Indeterminacy remains as to which assets are subject to the deemed trust, *ergo*, as to which assets left the settlor’s patrimony and entered the trust’s patrimony. 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”, this is not sufficient to constitute an autonomous patrimony such as the one contemplated by the civilian trust regime. It flows from the autonomous nature of the trust patrimony that assets held in trust must be property in which none of the settlor, trustee or beneficiary has any property right. But this runs afoul of the interest created by s. 227(4.1), because nothing in that provision deprives the person whose assets are subject to a deemed trust of property rights in these assets. Therefore,

the main element of a civilian trust is absent in the deemed trust established by s. 227(4.1): there is no autonomous patrimony to which specific property is transferred.

[45] Furthermore, under s. 227(4.1), the person whose assets are subject to the deemed trust would act as trustee. Again, this is inconsistent with the definition of a trustee in civil law. The person whose assets are subject to a deemed trust pursuant to s. 227(4.1) does not “undertak[e], by his acceptance, to hold and administer” a trust patrimony (art. 1260 C.C.Q.). But most importantly, the fact that assets subject to the deemed trust are indeterminate makes the trustee’s role effectively impossible to play. The C.C.Q. provides that the trustee “has the control and the exclusive administration of the trust patrimony” and “acts as the administrator of the property of others charged with full administration” (art. 1278). Thus, the trustee under s. 227(4.1) would be required to administer its own property — or at least an indefinite part of it — in the interest of Her Majesty (art. 1306 C.C.Q.). The trustee would be subject to obligations impossible to fulfill, such as the obligation not to mingle the administered property with its own (art. 1313 C.C.Q.). Obviously, one cannot act as an administrator of the property of others with respect to one’s own property. It is therefore clear that the interest created by s. 227(4.1) has little, if anything, in common with the trust in civil law.

[46] In the common law, a trust arises when legal ownership and beneficial ownership of a particular property are separated (see *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224, at para. 18). “Because a trust

divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the ‘hallmark’ characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary’s enjoyment” (para. 17 (footnote omitted)). As Rothstein J. wrote, because of this fiduciary relationship, “[t]he beneficial owner of property has been described as ‘the real owner of property even though it is in someone else’s name’” (*Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 4, quoting *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570).

[47] While the precise rights given to a beneficial owner may vary according to the terms of the trust and the principles of equity, I agree with the Crown that, where this type of interest exists, it will generally be inappropriate for the supervising judge to order a super-priority charge over the property subject to the interest, although the broad power conferred on the court by s. 11 of the *CCAA* would enable it to do so. Property held in trust cannot be said to belong to the trustee because “in equity, it belongs to another person” (*Henfrey*, at p. 31). However, a close examination of the nature of the interest created by s. 227(4.1) of the *ITA* reveals that it does not create this type of interest because “[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted” (R. J. Wood and R. T. G. Reeson, “The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*” (2000), 15 *B.F.L.R.* 515, at p. 532). In other words, the

key attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.

[48] According to the common law understanding of a trust, the legal owner or trustee owes a fiduciary duty to the equitable owner or beneficiary. The fiduciary relationship impresses the office of trustee with three fundamental duties: the trustee must act honestly and with reasonable skill and prudence, the trustee cannot delegate the office, and the trustee cannot personally profit from its dealings with the trust property or its beneficiaries (see *Valard*, at para. 17). This severely restricts what the trustee may do with trust property and creates a relationship significantly different from the one between a debtor and a creditor. For instance, while a debtor may attempt to reduce its debt or reach a compromise, a trustee cannot, since it must always act in the best interest of the beneficiary and cannot consider its own interests. Similarly, while a debtor is liable to a creditor until the debt is repaid, a trustee is not liable to a beneficial owner where property is lost, unless it was lost through a breach of the standard of care owed (see E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 14). In the case of the deemed trust, however, Parliament did not create such a fiduciary relationship. Parliament expressly contemplated a potential compromise between Her Majesty and the debtor in s. 6(3) of the *CCAA*. In addition, the terms of the *ITA* do not require that the debtor actually keep the property subject to the deemed trust separate and use it solely for the benefit of Her Majesty. In fact, Her Majesty does not enjoy the benefit of Her interest in the property while the property is held by the debtor. Instead, Parliament

contemplated that the debtor would continue to use and dispose of the property subject to the trust for its own business purposes (see *First Vancouver*, at paras. 42-46).

[49] Another core attribute of beneficial ownership is certainty as to the property that is subject to the trust (see Gillese, at p. 39). Many deemed trusts fail to provide for certainty of subject matter. For instance, in *Henfrey*, the Court considered the deemed trust created by the British Columbia *Social Service Tax Act*, R.S.B.C. 1979, c. 388. Like s. 227(4.1) of the *ITA*, the *Social Service Tax Act* provided that tax collected but not remitted was deemed to be held in trust for Her Majesty. It further provided that unremitted amounts were deemed to be held separate and apart from and form no part of the assets or estate of the tax collector. While McLachlin J. found that the property was identifiable at the time the tax was collected, she noted that “[t]he difficulty in this, as in most cases, is that trust property soon ceases to be identifiable. The tax money is mingled” (p. 34). Therefore, she concluded that there was no trust under general principles of equity. The legislature’s attempt to resolve this problem by deeming the amounts to be separate from and form no part of the tax debtor’s property was merely a tacit acknowledgment that “the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust” (p. 34).

[50] In *First Vancouver*, this Court examined the nature of the interest created by s. 227(4.1) of the *ITA*. Writing for the Court, Iacobucci J. held that this provision creates a charge which “is in principle similar to a floating charge over all the assets of

the tax debtor in the amount of the default” (para. 40). He concluded that Parliament specifically intended to create a charge with fluidity, a charge that could readily float over all of the debtor’s assets rather than attach to a particular one (para. 33). Parliament’s intention was to capture any property that comes into the possession of the tax debtor whilst simultaneously allowing any asset to be alienated and the proceeds of disposition to be captured (para. 5).

[51] This lack of certainty as to the subject matter of the trust is even starker in the present case than in *Henfrey* or in *Sparrow Electric*, where there was certainty as to the assets until they were mingled. Section 227(4.1) purports to bring all assets owned by the debtor within its reach. Despite the wording of the section, this interest — one of the same nature as a “floating charge” — has no particular property to which it attaches. Without certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary’s interest and thus “[t]he notion of a trust without a *res* simply cannot be made sensible or coherent” (Wood and Reeson, at pp. 532-33 (footnote omitted); see also *Sparrow Electric*, at para. 31).

[52] Parliament’s decision to avoid certainty of subject matter was an intentional modification to the deemed trust following this Court’s decision in *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. In *Dauphin Plains*, the Court refused to enforce Her Majesty’s claim because the Crown had failed to establish that the moneys purported to be deducted actually existed or were kept in

such a way as to be traceable (p. 1197). Traceability is another key aspect of a beneficial interest, since it allows the beneficial owner to enjoy the benefits of ownership, such as income from the property. It also ensures that the beneficial owner is responsible for the costs of ownership. By choosing not to attach Her Majesty's claim to any particular asset, Parliament has protected Her Majesty from the risks associated with asset ownership, including damage, depreciation and loss. I agree with Gonthier J., who, speaking of the predecessor to s. 227(4.1) (albeit in dissent), said that "this subsection is antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter of the trust and the fund or asset which the subject matter is being traced into" (*Sparrow Electric*, at para. 37). Had Parliament wanted to confer a beneficial ownership interest upon Her Majesty, it would have had to impose these associated risks as well.

[53] For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor's estate is equally ineffective at preventing a judge from ordering super priorities over the debtor's property. Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor's estate.

[54] This interpretation is supported by the existence of s. 227(4.2) of the *ITA*, which specifically anticipates other interests taking priority over the deemed trust (something that would be impossible if there were an ownership interest). It states that "[f]or the purposes of subsections 227(4) and 227(4.1), a security interest does not

include a prescribed security interest”. In the *Income Tax Regulations*, C.R.C., c. 945, s. 2201(1), the Governor in Council has defined “prescribed security interest” as a registered mortgage “that encumbers land or a building, where the mortgage is registered . . . before the time the amount is deemed to be held in trust by the person”. Therefore, in certain situations, mortgage holders take priority over Her Majesty.

[55] I reiterate that, without specific property to attach to, there can be no trust. The fact that s. 227(4.1) specifically anticipates that the character of assets will change over time and automatically releases any assets that the debtor chooses to alienate from the deemed trust means that Parliament had in mind something different from beneficial ownership in the common law sense of the word. I tend to agree with Noël J.A.’s assessment of s. 227(4.1): “The deemed trust mechanism, whether applied in Quebec or elsewhere, effectively creates in favour of the Crown a security interest . . .” (*Caisse populaire d’Amos*, at para. 46).

[56] Other scholars agree that s. 227(4.1) “merely secures payment or performance of an obligation” (R. J. Wood, “Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*” (2020), 63 *Can. Bus. L.J.* 85, at p. 95; see also A. Duggan and J. Ziegel, “Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security” (2007), 57 *U.T.L.J.* 227, at pp. 245-46). Wood and Reeson reach the particularly damning conclusion that “[t]he concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking” and thus “the use of inappropriate legal concepts” has led to the creation of a “statutory

provision [that] is deeply flawed” (pp. 531-32). They “suspec[t] that the intention of the drafters was that Revenue Canada should obtain a charge on all the assets of the debtor”, and they state that “the statutory deemed trust is nothing more than a legislative mechanism that is intended to create a non-consensual security interest in the assets of the employer” (p. 533).

[57] Nonetheless, for our purposes it is not necessary to conclusively determine whether the interest created by s. 227(4.1) should be characterized as a security interest. What is clear is that s. 227(4.1) does not create a beneficial interest that can be considered a proprietary interest. Like the deemed trust at issue in *Henfrey*, it “does not give [the Crown] the same property interest a common law trust would” (p. 35). 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. Therefore, I do not accept the Crown’s argument that Her Majesty has 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.

(2) Does Section 227(4.1) of the *ITA* Create a Super Priority That Conflicts With a Court-Ordered Super-Priority Charge?

[58] The Crown also refers to the part of s. 227(4.1) which 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). In the Crown’s view, court-ordered super-priority charges under s. 11 of the CCAA or any of the sections that follow it are security interests within the meaning of s. 224(1.3) and therefore Her Majesty’s interest has priority over them.

[59] My colleagues Justices Brown and Rowe point to the legislative history of s. 227(4.1) as evidence that Parliament intended Her Majesty’s deemed trust to have “absolute priority” over all other security interests (para. 201). In particular, they rely upon Justice Iacobucci’s comment in *Sparrow Electric* that “it is open to Parliament to step in and assign absolute priority to the deemed trust” by using the words “shall be paid to the Receiver General in priority to any such security interest” (reasons of Brown and Rowe JJ., at para. 202, citing *Sparrow Electric*, at para. 112). They further rely upon the press release accompanying the amendments, which stated that the deemed trust was to have absolute priority.

[60] With respect, I disagree with this reasoning. *Sparrow Electric* dealt with a type of interest very different from the one before us now. In *Sparrow Electric*, this Court held that a fixed and specific charge over the tax debtor’s inventory had priority over Her Majesty’s deemed trust created by the *ITA*. Thus the purpose of the amendments was to “clarify that the deemed trusts for unremitted source deductions and GST apply whether or not other security interests have been granted in respect of the inventory or trade receivables of a business” (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997), at p. 2). If Parliament

had intended that the deemed trust have absolute priority, it would not have enacted s. 227(4.2) at the same time. As noted above, s. 227(4.2) provides that “a security interest does not include a prescribed security interest”, and thus specifically envisions that the deemed trust will not have absolute priority. In my view, by using the words “in priority to all such security interests” in s. 227(4.1), Parliament intended that the priority be absolute not over all possible interests, but only over security interests as defined in s. 224(1.3). What must therefore be determined is whether a court-ordered super-priority charge under the *CCAA* falls within that definition.

[61] Section 224(1.3) 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

[62] This definition is expansive. However, the list of illustrative security interests makes it clear that a super-priority charge created under the *CCAA* cannot fall within its meaning. Court-ordered super-priority charges are utterly different from any of the interests listed. These super-priority charges are granted, not for the sole benefit of the holder of the charge, but to facilitate restructuring in furtherance of the interests of all stakeholders. In this way, they benefit the creditors as a group. The fact that Parliament chose to provide a list of examples whose nature is so unlike that of a court-ordered super-priority charge demonstrates that it must have had a very different type

of interest in mind when drafting s. 224(1.3). I could not agree more with Professor Wood about the limited class of interests that Parliament had in mind:

[Court-ordered super-priority charges] are fundamentally different in nature from security interests that arise by way of agreement between the parties and from non-consensual security interests that arise by operation of law. Court-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group. Given the fundamentally different character of court-ordered charges, it would be reasonable to expect that they would be specifically mentioned in the ITA definition of a security interest if they were to be included. [Emphasis added; p. 98.]

[63] My colleagues Brown and Rowe JJ. allege that this interpretation of s. 224(1.3) is contrary to our Court’s decision in *Caisse populaire Desjardins de l’Est de Drummond*, where Rothstein J. wrote that the provided examples “do not diminish the broad scope of the words ‘any interest in property’ (para. 15; see also para. 14). With respect, I disagree with my colleagues. As Justice Rothstein explained at para. 40, his comments were made in response to the argument that the list of examples of security interests was exhaustive. I agree with him that the list of examples provided is not exhaustive. However, the examples remain illustrative of the types of interests that Parliament had in mind and are clearly united by a common theme or class because Parliament employed a compound “means . . . and includes” structure to establish its definition: “*security interest* means any interest in, or for civil law any right in, property that secures payment or performance of an obligation and includes . . .”. In my view, this structure 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. The critical difference between the listed security interests and super-priority charges ordered under s. 11 of the CCAA or any of the sections that follow it explains both why the latter are excluded from the list of specific instruments and why there can be no suggestion that they may be included in the broader term “encumbrance” at the end of that list. The *ejusdem generis* principle supports this position by limiting the generality of the final words on the basis of the narrow enumeration that precedes them (*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1040). All of the other instruments arise by agreement or by operation of law. Therefore, court-ordered super-priority charges under s. 11 or any of the sections that follow it are different in kind from anything on the list.

[64] Using the list of specific examples to ascertain Parliament’s intent in this case is also consistent with the presumption against tautology. In *McDiarmid Lumber Ltd. v. God’s Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. defined this presumption in the following way:

It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain: Sullivan, at p. 158. Thus, “[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose” (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

[65] The *ITA* contains two definitions of “security interest”, in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define “security interest” in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: “*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation”. The presumption against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they “have a specific role to play in advancing the legislative purpose” (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

[66] To come back to *Caisse populaire Desjardins de l’Est de Drummond*, I agree with Rothstein J. that the definition of “security interest” in s. 224(1.3) of the *ITA* is expansive such that it “does not require that the agreement between the creditor and debtor take any particular form” (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed,

in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

[67] Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of “security interest”, it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, “The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation” (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as “a key aspect of the debtor’s ability to attempt a workout”, one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that “nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors” (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

[68] In conclusion, 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. I therefore respectfully disagree with my colleague Justice Moldaver’s suggestion that there may be a conflict between s. 11 of the *CCAA* and the *ITA* (para. 258). The Initial Order’s super-priority charges prevail over the deemed trust.

C. *Was It Necessary for the Initial Order to Subordinate Her Majesty’s Claim Protected by a Deemed Trust in This Case?*

[69] Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court’s equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

[70] As discussed above, a supervising court’s authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the *CCAA* and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those provisions authorize the court to grant certain priming charges that rank ahead of the claims of “any secured creditor”. While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a “secured creditor” under the *CCAA*. Professor Wood is of the view that Her Majesty is not a “secured creditor” under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the *CCAA* create “two distinct approaches — one

that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor” (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of “secured creditor” under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court’s power in s. 11, which “permits courts to create priming charges that are not specifically provided for in the *CCAA*” (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

[71] My colleagues Brown and Rowe JJ. also argue that “priming charges cannot supersede the Crown’s deemed trust claim because they may attach *only to the property of the debtor’s company*” (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the *CCAA* contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] “In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties” (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the

debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the CCAA is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

[72] 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. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the CCAA. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

[73] It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating CCAA proceedings. As this Court recently recognized, CCAA proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the CCAA regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating CCAA proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

[74] I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[75] When a company seeks to restructure its affairs in order to avoid bankruptcy, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

[76] In this case, the CCAA judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and

employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

[77] Section 227(4.1) of the *ITA* provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates “notwithstanding any security interest in such property” and “[n]otwithstanding . . . any other enactment of Canada”. Sections 11.2, 11.51 and 11.52 of the *CCAA* give the court authority to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immovable object (R. J. Wood, “Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*” (2020), 63 *Can. Bus. L.J.* 85).

[78] The appellant, the Crown, argues that s. 227(4.1) of the *ITA* creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge

cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

[79] In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the *CCAA*. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

[80] For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to “beneficial ownership” under s. 227(4.1) of the *ITA* must be interpreted in the specific statutory context in which it arises. Here, the Crown’s right to unremitted source deductions in a *CCAA* restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown’s interest fits within the relevant statutory definition of “secured creditor” under the *CCAA*, it is not captured by the court’s authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA*. However, in my view, 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. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

II. Facts

[81] In July 2017, the Court of Queen’s Bench of Alberta issued an order granting the Debtor Companies protection under the CCAA (Alta. Q.B., No. 1703-12327, July 5, 2017 (Initial Order)). The Initial Order provided for priming charges in the following order of priority: (1) an Administration Charge of \$500,000 in favour of the court-appointed Monitor, Ernst & Young Inc.; (2) an Interim Lender’s Charge of \$1,000,000 in favour of the interim lender, Business Development Bank of Canada (BDBC); and (3) a Directors’ Charge of \$150,000 (together, Priming Charges). The Interim Lender’s Charge was later increased to \$3,500,000 and the Administration Charge to \$950,000.

[82] Paragraph 44 of the Initial Order provided that the Priming Charges have priority over the claims of secured creditors:

Each of the Directors’ Charge, Administration Charge and the Interim Lender’s Charge . . . 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 . . . in favour of any Person.

[83] Paragraph 46 of the Initial Order provided that the Priming Charges “shall not otherwise be limited or impaired in any way by . . . (d) the provisions of any federal or provincial statutes”.

[84] At the time of the Initial Order, two of the Debtor Companies had failed to remit source deductions and owed the Crown \$685,542.93. The Crown applied to vary

the Priming Charges in the Initial Order on the basis that paras. 44 and 46(d) failed to recognize the Crown's legislated interest in unremitted source deductions. The Crown argued that s. 227(4.1) of the *ITA*, s. 23(4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (*CPP*), and s. 86(2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (*EIA*), require the Crown's claims for unremitted source deductions to have priority over the claims of all other creditors of a debtor, notwithstanding any other federal statute, including the *CCAA*. In these reasons, I will only refer to s. 227(4.1) of the *ITA* as the relevant *ITA*, *CPP* and *EIA* provisions are identical and the latter two statutes cross-reference the *ITA*.

III. Decisions Below

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

[85] The application judge held that court-ordered priming charges under ss. 11.2, 11.51 and 11.52 of the *CCAA* have priority over the Crown's deemed trust for unremitted source deductions. First, she concluded that the Crown's deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest because the definition of "security interest" in the *ITA* includes an interest created by a deemed or actual trust, and it would be inconsistent to interpret the Crown's interest under s. 227(4.1) contrary to its enabling statute. She also reasoned that the deemed trust is a security interest because it lacks certainty of subject matter and is therefore not a true trust.

[86] Second, the application judge concluded that s. 227(4.1) of the *ITA* and ss. 11.2, 11.51 and 11.52 of the *CCAA* are not inconsistent because any conflict can be avoided by interpretation. She reasoned that the policy objectives of both Acts have to be respected because they were enacted by the same government. On the one hand, the collection of source deductions is at the heart of the *ITA*. On the other, the *CCAA* aims to facilitate business survival. The application judge concluded that, without the court’s ability to order priming charges, interim lending “would simply end”, along with “the hope of positive *CCAA* outcomes” (para. 102). The goals of both Acts can therefore only be achieved if priority is given “to those charges necessary for restructuring”, while the deemed trust ranks in priority to all other secured creditors (para. 112).

B. *Court of Appeal of Alberta, 2019 ABCA 314, 93 Alta. L.R. (6th) 29 (Rowbotham and Schutz JJ.A., Wakeling J.A. Dissenting)*

[87] A majority of the Court of Appeal dismissed the Crown’s appeal. It agreed with the application judge that the Crown’s deemed trust under s. 227(4.1) of the *ITA* creates a security interest rather than a proprietary interest. It also agreed that the Crown’s position failed to reconcile the objectives of the *ITA* and *CCAA*, and given the importance of interim lending, concluded that absurd consequences could follow if the Crown’s position prevailed.

[88] Wakeling J.A. disagreed. He concluded that s. 227(4.1) of the *ITA* makes two unequivocal statements: first, that the Crown is the beneficial owner of the debtor’s property to the extent of the unremitted source deductions; and second, that this amount

must be paid to the Crown notwithstanding the security interests of any other secured creditors, including, in his opinion, the holders of a priming charge. As a result, it was unnecessary to reconcile policy objectives. In his view, the notwithstanding clause in s. 227(4.1) was conclusive because the relevant CCAA provisions lacked the same language. As a result, there was “no need to look beyond the four corners of s. 227(4.1) to determine the scope of the unassailable priority it creates” (para. 135). Finally, Wakeling J.A. noted that there is perfect correlation between the purpose of the *ITA* and the plain meaning of s. 227(4.1).

IV. Parties’ Submissions

A. *The Appellant the Crown*

[89] The Crown’s submissions before this Court echo the dissent at the Court of Appeal: the text of s. 227(4.1) unequivocally states that unremitted source deductions become the property of the Crown. The Crown argues that the plain meaning of s. 227(4.1) aligns with its purpose, which is to protect the largest source of government revenue.

[90] The Crown makes two principal submissions. First, it submits that the Crown’s interest under s. 227(4.1) of the *ITA* is a proprietary interest rather than a security interest because the text of s. 227(4.1) causes the unremitted source deductions to become the property of the Crown. There is no need to rely on the “notwithstanding clause” in s. 227(4.1) because the *ITA* and CCAA provisions work harmoniously; the

priming charges can only attach to a company's property and s. 227(4.1) provides that the unremitted source deductions are beneficially owned by the Crown.

[91] Second, the Crown submits in the alternative that, even if its interest is a security interest, it ranks ahead of the priming charges. This is because a priming charge under the *CCAA* is a security interest within the meaning of the *ITA*, and s. 227(4.1) specifically states that the deemed trust ranks ahead of all other security interests.

B. *The Respondent Business Development Bank of Canada*

[92] The respondent BDBC, urges this Court to follow the approach taken by the courts below. It submits that the Crown's interest under the deemed trust is a security interest because (1) the enabling statute, the *ITA*, defines a deemed trust as a security interest; (2) this Court, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, characterized the deemed trust as a "floating charge", which is a security interest; and (3) the opposite conclusion, that it is a proprietary interest, would be at odds with commercial reality. As the definition of "secured creditor" in the *CCAA* includes the holder of a deemed trust, that Act contemplates that a priming charge can rank ahead of the Crown's deemed trust. Thus, ss. 11.2, 11.51 and 11.52 of the *CCAA* contemplate that a priming charge can rank ahead of the Crown's deemed trust.

C. *The Respondent Ernst & Young, in its Capacity as Monitor*

[93] Both BDBC and Ernst & Young (together, Respondents) submit that the Crown's deemed trust is a security interest and that the statutes can be interpreted harmoniously to avoid a conflict. The Monitor submits that a court-ordered priming charge is not a security interest within the meaning of s. 227(4.1) of the *ITA* because it is not specifically listed in the definition of security interest under the *ITA*, and as a taxing statute, the *ITA* requires a strict, textual approach to interpretation.

[94] The Monitor also highlights that the Crown is a unique creditor because it has immediate information available to it respecting remittance and can certify and pursue amounts owing immediately.

V. Issue

[95] The issue on appeal is whether court-ordered priming charges under the *CCAA* can rank ahead of the Crown's deemed trust for unremitted source deductions, as created by s. 227(4.1) of the *ITA* and related provisions of the *CPP* and *EIA*. It is clear from the wording of s. 227(4.1) of the *ITA* that, if there is any conflict with a provision from another Act, s. 227(4.1) is to prevail. Accordingly, this appeal turns on whether, and to what extent, the *CCAA* regime conflicts with s. 227(4.1) of the *ITA*. In answering that question, I proceed in four steps:

1. What rights does s. 227(4.1) of the *ITA* confer on the Crown in respect of unremitted source deductions?

2. How is the Crown's deemed trust for unremitted source deductions treated in Parliament's insolvency regime?
3. Do ss. 11.2, 11.51 and 11.52 of the *CCAA* permit the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?
4. If not, does s. 11 of the *CCAA* allow the court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions?

VI. Analysis

A. *What Rights Does Section 227(4.1) of the ITA Confer on the Crown in Respect of Unremitted Source Deductions?*

(1) General Scheme and Background of Sections 227(4) and 227(4.1) of the ITA

[96] Section 153(1) of the *ITA* requires employers to deduct and withhold amounts from their employees' wages (source deductions) and remit those amounts to the Receiver General by a specified due date. When source deductions are made, s. 227(4) deems that they are held separate and apart from the property of the employer and from property held by any secured creditor of the employer, notwithstanding any security interest in that property. Source deductions are deemed to be held in trust for Her Majesty for payment by the specified due date.

[97] If source deductions are not paid by the specified due date, s. 227(4.1) extends the trust in s. 227(4). It deems that a trust attaches to the employer's property to the extent of any unremitted source deductions; that the trust existed from the moment the source deductions were made; and that the trust did not form part of the estate or property of the employer from the moment the source deductions were made (all regardless of whether the employer's property is subject to a security interest). It also deems that, to the extent of any unremitted source deductions, the employer's property is property "beneficially owned" by the Crown, notwithstanding any security interest in the employer's property:

(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.

[98] The *ITA* defines “security interest” in s. 224(1.3):

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

[99] As emphasized by the Crown, ss. 227(4) and 227(4.1) were amended to their current form — excerpted above — to reverse the effect of this Court’s decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411. The Crown submits that, in explicitly reversing *Sparrow Electric*’s result, Parliament meant to always give the Crown super-priority in an insolvency. I do not agree that such a broad conclusion can be drawn from this legislative history. In *Sparrow Electric*, the issue was who, between a lending bank and the Crown, had priority in the debtor’s bankruptcy. The bank had a general security agreement over all of the debtor’s property, which it entered into several months before successfully petitioning the debtor into bankruptcy. While the debtor also owed the Crown \$625,990.86 in unremitted source deductions at the time of the bankruptcy, the first instance of non-remittance to the Crown was *after* the bank entered its general security agreement.

[100] Iacobucci J., writing for a majority of the Court, held in favour of the bank. At that time, the deemed trust was worded differently, triggering only upon an event of “liquidation, assignment, receivership or bankruptcy”, and the amount of the unremitted source deductions was only deemed to be held “separate from and form no

part of the estate in liquidation, assignment, receivership or bankruptcy” (para. 13 (emphasis added)). The majority therefore concluded that the deemed trust did not attach to the debtor’s property because, at the relevant time, that property was already “legally the [bank’s]” (para. 98). Because the bank had a fixed and specific charge over all of the debtor’s property, there was nothing left for the trust to attach to. The trust could not be effective unless there was some unencumbered asset in the bankruptcy out of which the trust could be deemed (para. 99).

[101] After *Sparrow Electric*, Parliament amended the deemed trust to ensure that, in a case like *Sparrow Electric*, the deemed trust attached notwithstanding any security interest held in the debtor’s property (*First Vancouver*, at para. 27). As Iacobucci J. explained in *First Vancouver*, Parliament intended “to grant priority to the deemed trust in respect of property that is also subject to a security interest regardless of when the security interest arose in relation to the time the source deductions were made or when the deemed trust takes effect” (para. 28).¹

[102] In this appeal, the Crown argues that a court-ordered priming charge under the CCAA is a security interest for the purposes of the Crown’s deemed trust. I agree that the definition of “security interest” in s. 224(1.3) of the *ITA* is broad, capturing

¹ It bears noting, however, that ss. 227(4) and 227(4.1) of the *ITA* do not give the Crown priority over all creditors. They explicitly carve out an exception for the rights of unpaid suppliers (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 81.1) and the rights of farmers, fisherman, and aquaculturists (s. 81.2). In addition, s. 227(4.2) of the *ITA* carves out an exception for a prescribed security interest, defined in the *Income Tax Regulations*, C.R.C., c. 945, s. 2201. Broadly, a prescribed security interest is a mortgage in land or a building which is registered before the failure to remit the source deductions at issue (Regulatory Impact Analysis Statement, SOR/99-322, *Canada Gazette*, Part II, vol. 133, No. 17, August 18, 1999, at pp. 2041-42).

“any interest in . . . property that secures payment or performance of an obligation and includes an interest . . . created by or arising out of a . . . charge . . . , however or whenever arising, created, deemed to arise or otherwise provided for”. However, Wood makes the observation that court-ordered charges are fundamentally different in nature from the security interests that arise by consensual agreement or by operation of law enumerated in s. 224(1.3) because “they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group” (Wood (2020), at p. 98). As a result, he reasons that “it would be reasonable to expect that they would be specifically mentioned in the ITA definition of security interest if they were to be included” (p. 98).

[103] While s. 227(4.1) undeniably operates notwithstanding any security interest — and priming charge — over the debtor’s property, the legislative history post-*Sparrow Electric* says nothing about the Crown’s specific right to unremitted source deductions, pursuant to the deemed trust, when a company undergoes restructuring under the CCAA. Even if, as the Crown insists, a priming charge under the CCAA is a security interest for the purposes of the Crown’s deemed trust (and I do not settle that debate in these reasons), that does not define what *rights* the Crown has, in a CCAA restructuring, pursuant to its deemed trust. This Court has never considered how s. 227(4.1) of the ITA interacts with the CCAA regime in light of the seminal insolvency decisions in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, and *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271. This appeal calls on this Court to do so.

(2) The Right of Beneficial Ownership in Section 227(4.1) of the ITA

[104] The Crown argues that s. 227(4.1) creates a proprietary right in the Crown because it gives the Crown beneficial ownership of the amount of the unremitted source deductions. Because this is an *ownership* right, the amount of the unremitted source deductions is taken out of the debtor's estate, effectively giving the Crown super-priority. In other words, the Crown agrees with the dissent in the Court of Appeal: that property is the Crown's property and a CCAA judge cannot order a charge over it. The Respondents, in line with the Court of Appeal majority, submit that s. 227(4.1) creates a security interest and can therefore be subordinated to a priming charge under the CCAA.

[105] These submissions rely heavily on characterizing the Crown's interest as either a "security interest" or as "proprietary" in nature. However, in my view, defining an entitlement as one or the other does not resolve the issues on appeal because neither characterization has essential features in the abstract. Rather, a statutory entitlement takes its character from the statutory provision. General concepts of "proprietary right" and "security interest" — or of "property," "trust" and "beneficial ownership" — are of limited assistance in this analysis.

[106] This Court has noted that property is often understood as a "bundle of rights" and obligations (*Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 43). Depending on which rights someone holds, their "bundle of rights" can be viewed as a weak or robust proprietary interest. For this reason, the

holder of a security interest has been described as having a proprietary right in its security. In *Sparrow Electric*, for example, both Iacobucci J., writing for the majority, and Gonthier J., writing for the dissent, explained the secured creditor in that case as having a proprietary right in, and effectively owning, the debtor's property that secured its debt (paras. 42 and 98).

[107] Similarly, Ronald C. C. Cuming, Catherine Walsh and Roderick J. Wood state that, in the context of personal property security legislation, a secured creditor holds a proprietary right in collateral. This is because, for these authors, “[t]he defining characteristic of a proprietary right . . . is that it is . . . enforceable against the world”, and the right of a secured creditor with a perfected security interest is enforceable against the world (*Personal Property Security Law* (2nd ed. 2012), at p. 613). Without an explanation for what the terms mean in a particular context, it is difficult to draw any conclusion from characterizing something as one or the other. (While there is a clear difference between a right *in rem* (available against the world at large) and a right *in personam* (available against a determinate set of individuals), whether the term “proprietary right” means a “right *in rem*” or the term “security interest” means a “right *in personam*” depends upon the statutory context. In any event, the submissions before this Court were not framed in these terms).

[108] This Court explained in *Saulnier* that, when analyzing the definition of property under a statute, there is little use in considering property in the abstract or even under the common law because “Parliament can and does create its own lexicon” for

particular purposes (para. 16; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286, at paras. 11-12). Indeed, “interests unknown to the common law may be created by statute” (*Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952, at p. 999, citing Ross J. in *Town of Lunenburg v. Municipality of Lunenburg*, [1932] 1 D.L.R. 386 (N.S.S.C.), at p. 390). As a result, caution is required before importing definitions from other contexts, relying on statements or description from cases out of context, and employing general concepts like “proprietary right” and “security interest”. It is crucial in this appeal to stay within the bounds of the statutory provisions being interpreted.

[109] Section 227(4.1) states that the amount of the unremitted source deductions is “beneficially owned” by the Crown. However, it does not follow that this right of beneficial ownership is absolute or that the term imports specific rights that flow from it. This is not a case where Parliament has used a term with an established legal meaning — leading to an inference that Parliament has given the term that meaning in the statute in question (*R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 20). The concept of beneficial ownership does not have a precise doctrinal meaning in the common law of Canada, and it does not exist in the civil law of Quebec. It is also not used consistently in the *ITA*. The meaning of “beneficially owned” in s. 227(4.1) can only be understood in the specific, relevant statutory context in which it arises. To that end, while s. 227(4.1) uses the mechanism of a trust and confers some type of beneficial ownership on the Crown, it modifies even those features of beneficial ownership that are widely associated with it under the common law.

[110] As a federal statute with national application, the *ITA* rests on the private law of the provinces. This relationship of complementarity is codified in s. 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21. However, the federal statute can derogate and dissociate itself from the private law when it legislates on a matter that falls within its jurisdiction: see M. Lamoureux, “*The Harmonization of Tax Legislation Dissociation: A Mechanism of Exception Part III*” (online). As I shall explain, the trust created by s. 227(4.1) disassociates itself from the requirements of a trust in both the provincial common law and civil law.

[111] I proceed as follows: (1) there is no settled doctrinal meaning of the term beneficial ownership; and (2) s. 227(4.1) does not create a true trust because there is no certainty of subject matter. A lack of certainty of subject matters means that the Crown cannot, through tracing, claim appreciation of trust value and the trustee (tax debtor) is free to dispose of trust property. These features render the Crown’s beneficial ownership weaker than generally understood at common law. The result is an interest “unknown to the common [or civil] law”. We cannot, therefore, look at s. 227(4.1) in isolation to define the way in which the Crown’s “beneficially owned” property under s. 227(4.1) should be treated in an insolvency — that clarification must come from, and indeed does come from, Parliament’s insolvency legislation.

(i) No Settled Doctrinal Meaning

[112] Beneficial ownership is most commonly used in the law of trusts to broadly distinguish between who has legal title to property (the trustee) and who has beneficial

enjoyment of that property (the beneficiary). *Black's Law Dictionary* (11th ed. 2019), for example, defines a “beneficial owner” as “[o]ne recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else, esp. one for whom property is held in trust” (p. 1331).

[113] Despite this common usage, there is no clear definition of the rights flowing from the term “beneficial ownership” under the common law (see, e.g., C. Brown, “Beneficial Ownership and the Income Tax Act” (2003), 51 *Can. Tax J.* 401; M. D. Brender, “Beneficial Ownership in Canadian Income Tax Law: Required Reform and Impact on Harmonization of Quebec Civil Law and Federal Legislation” (2003), 51 *Can. Tax J.* 311, at p. 316). As well, the *Civil Code of Québec* does not have a concept of beneficial ownership (see *Canada (Attorney General) v. Caisse populaire d’Amos*, 2004 FCA 92, 324 N.R. 31, at paras. 48-49).

[114] The term itself is also contentious within the academy, giving rise to a heated debate about whether a trust beneficiary should be thought of as an *owner* at all (see, e.g., D. W. M. Waters, “The Nature of the Trust Beneficiary’s Interest” (1967), 45 *Can. Bar Rev.* 219; L. D. Smith, “Trust and Patrimony” (2008), 38 *R.G.D.* 379; B. McFarlane and R. Stevens, “The nature of equitable property” (2010), 4 *J. Eq.* 1; J. E. Penner, “The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust” (2014), 27 *Can. J.L. & Jur.* 473; Brender, at p. 316). The conventional view is that a trust beneficiary only has a right *in personam* against the trustee to enforce the terms of the trust, which is not a proprietary right in the trust property. A different view

is that a trust beneficiary has equitable ownership of trust property, despite the existence of an intermediary with legal title (Brown, at pp. 413-14). Some suggest that there is a midway approach in Canada: depending on the context, a beneficiary's right is either a personal right against the trustee or a proprietary right in trust property (Brender, at p. 316).

[115] In “Beneficial Ownership and the Income Tax Act”, Brown notes the debate in the academy and analyzes how the terms “beneficial ownership”, “beneficial owner”, and “beneficially owned” are used in the *ITA*. After examining 26 provisions invoking beneficial ownership in the *ITA*, she concludes that its meaning is “no longer obvious” (p. 452).

[116] This Court need not resolve the ongoing debate. However, it serves to highlight that “the real question is what is the nature of a beneficiary’s interest in a trust when considered in the context of the legislation that is sought to be applied” (Brown, at p. 419). In the *ITA* context, Brown concludes that “the matter of what ‘beneficial ownership’ means for tax purposes must be settled within the structure of the *ITA*” (p. 435). Further, whether the beneficiary’s rights within the *ITA* are *in rem* or *in personam* will often depend on a combination of factors, like the wording of the deeming provision, private law concepts, case law, and tax policy (see pp. 435-36).

[117] In my view, the works cited above belie the notion that s. 227(4.1) of the *ITA*, and its use of the concept of beneficial ownership, is unequivocal in meaning. Not only is there no settled definition of beneficial ownership under the common law, there

also appears to be no consistent meaning of the term in the *ITA*. And the concept does not exist in Quebec civil law. The meaning of beneficial ownership when used in a statute must always be construed within the context of the particular provision in which it occurs. What is necessary is careful scrutiny of s. 227(4.1), and specifically, the right of beneficial ownership it gives the Crown, particularly in the context of a statutory deemed trust with no specific subject matter.

(ii) Section 227(4.1) Does Not Create a “True” Trust

[118] A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation of law, a statutory deemed trust “is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property” (*Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, “Common Law and Statutory Trusts: In Search of Missing Links” (1995), 15 *Est. & Tr. J.* 109, at p. 110).

[119] Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; see also *Friends of Toronto Public Cemeteries Inc. v. Public Guardian and Trustee*, 2020 ONCA 282, 59 E.T.R. (4th) 174, at para. 163).

[120] Section 227(4.1), for example, does not fulfill the ordinary requirements of the common law of trusts (see R. J. Wood and R. T. G. Reeson, “The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*” (2000), 15 *B.F.L.R.* 515, at pp. 522-24). There is no identifiable trust property and therefore no certainty of subject matter (*Henfrey*, at p. 35). To use the terminology in *Henfrey*, s. 227(4.1) is not a “true” trust (p. 34). 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: see *Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31.

[121] This departure from a standard requirement of trust formation — certainty of subject matter — results in at least two features of s. 227(4.1) that are at odds with the operation of ordinary trusts. First, through equitable tracing, the beneficiary of a trust can claim appreciation in trust value, but this advantage is impossible without identifiable trust property (*Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at pp. 79 and 92-93; *Foskett v. McKeown*, [2001] 1 A.C. 102 (H.L.), at pp. 129-31; L. D. Smith, *The Law of Tracing* (1997), at pp. 347-48). The tracing mechanism in s. 227(4.1) provides that the value of any unremitted source deductions continues to survive in the assets remaining in the tax debtor’s hands. Section 227(4.1) traces the *value* of the unremitted source deductions, necessarily capping the Crown’s right at that value. In *Sparrow Electric*, Gonthier J. explained that such a tracing mechanism is “antithetical to tracing in the traditional sense, to the extent that it requires no link at all between the subject matter

of the trust and the fund or asset which the subject matter is being traced into” (para. 37; see also Wood and Reeson, at p. 518; Smith (1997), at pp. 310-20 and 347-48; R. J. Wood, “The Floating Charge in Canada” (1989), 27 *Alta. L. Rev.* 191, at p. 221).

[122] While s. 227(4.1) gives the Crown beneficial ownership in the value of unremitted source deductions, it does not allow the Crown to claim more than the value of the source deductions. In other words, it gives the Crown the right of beneficial ownership without at least some of the advantages that beneficial ownership often entails.

[123] Second, a trustee cannot normally dispose of trust property in the ordinary course of the trustee’s business. Section 227(4.1), however, allows the tax debtor to dispose of its property, conveying clear title to property subject to the trust.

[124] This was the point made by Iacobucci J. in *First Vancouver* when he likened the deemed trust in s. 227(4.1) to a floating charge. Because a floating charge is a security interest, the Respondents rely on Iacobucci J.’s analogy to argue that s. 227(4.1) only creates a security interest as opposed to a proprietary right. I disagree with the Respondents’ submission — the limited analogy to a floating charge in that context cannot be relied on in this case to liken the Crown’s interest to a security interest for the purposes of the CCAA.

[125] One of the issues in *First Vancouver* was whether the deemed trust in s. 227(4.1) continued to attach to property that had been sold by the tax debtor to a

third-party purchaser for value. The Court concluded that, in the event of a sale to a third party, “the trust property is replaced by the proceeds of sale of such property” (para. 40). This is because the deemed trust “does not attach specifically to any particular assets of the tax debtor so as to prevent their sale” and the tax debtor is thereby “free to alienate its property in the ordinary course” (para. 40). In this way, “the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor” (para. 40). As a result, the deemed trust in s. 227(4.1) would not override the rights of third-party purchasers for value (para. 44).

[126] In short, the deemed trust in s. 227(4.1) clearly “anticipate[s] that the character of the tax debtor’s property will change over time” (*First Vancouver*, at para. 41). In making these statements, Iacobucci J. did not, however, equate the deemed trust in s. 227(4.1) to a floating charge for all purposes. Otherwise, the trust would not attach until an event of crystallization, and s. 227(4.1) clearly contemplates that the trust attaches from the moment source deductions are made or withheld (see s. 227(4.1)(a) and (b); see also A. Duggan and J. Ziegel, “Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security” (2007), 57 *U.T.L.J.* 227, at p. 246; Wood (1989), at p. 195).

[127] The Court’s limited analogy to a floating charge in *First Vancouver* helps explain why “beneficial ownership” in s. 227(4.1) again means something narrower than it does outside of that statutory context. The Crown’s right of beneficial ownership does not prevent the trustee from disposing of trust property until the Canada Revenue

Agency (CRA) enforces the deemed trust (Canada Revenue Agency, *Tax collections policies* (online); see also *ITA*, ss. 222, 223(1) to (3), (5) and (6) and 224(1)). Freely disposing of trust property, including for one's own business purposes, is obviously not something a trustee can do under the common law.

[128] The Crown's reliance on s. 227(4.1)(b) of the *ITA* is misplaced for similar reasons. That clause specifies that the amount of the unremitted source deductions is deemed to "form no part of the estate or property of the person from the time the amount was so deducted or withheld". The Crown argues that this is further clarification that a CCAA judge cannot order a charge over that amount. Again, the deeming words of s. 227(4.1)(b) must be interpreted in the context of a trust without certainty of subject matter. To say that a certain *amount* does not form part of the debtor's estate or property reiterates that the Crown has an interest in that amount; it also clarifies that the debtor's interest in its estate is reduced by that amount. However, it does not change the *makeup* of the estate itself — it does not change the specific property that constitutes the debtor's estate. So long as the thing that is deemed not to form part of the debtor's estate or property is an amount or value of money rather than property with a specific subject matter, the debtor's estate remains unchanged and the debtor continues to have control over it.

[129] To conclude, beneficial ownership under s. 227(4.1) is a manipulation of the concept of beneficial ownership under ordinary principles of trust law. The logical

incoherence of s. 227(4.1) has prompted some scholars to criticize the provision as using inappropriate legal concepts. For example, Wood and Reeson state:

... we believe that the design of [s. 227(4.1) of the *ITA*] is deeply flawed. . . . In large measure, the difficulties have as their source the use of inappropriate legal concepts. The concept of a trust is used in the legislation, but in virtually every respect the characteristics of a trust are lacking. The employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a *res*. The law of tracing is similarly corrupted. The tracing exercise does not seek to identify a chain of substitutions, and a proprietary claim is available without the need for a proprietary base.

...

The misuse of the trust concept and the perversion of conventional tracing principles empty these concepts of meaning and will pose a threat to the rationality of the law. [Footnote omitted; pp. 531-33.]

[130] Others have similarly commented that, in substance, s. 227(4.1) only creates a security interest (J. S. Ziegel, “Crown Priorities, Deemed Trusts and Floating Charges: *First Vancouver Finance v. Minister of National Revenue*” (2004), 45 C.B.R. (4th) 244, at p. 248; Duggan and Ziegel, at pp. 239 and 245-46; M. J. Hanlon, V. Tickle and E. Csiszar, “Conflicting Case Law, Competing Statutes, and the Confounding Priority Battle of the Interim Financing Charge and the Crown’s Deemed Trust for Source Deductions”, in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 897).

[131] Similarly, in *Caisse populaire Desjardins de Montmagny*, this Court rejected the Crown’s argument that s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (*ETA*), which is nearly identical to s. 227(4.1) of the *ITA*, created a proprietary

right in the Crown (paras. 20-27). In that case, the debtor companies owed goods and services tax (GST) at the time of their respective bankruptcies. As the Crown's GST claims are unsecured in bankruptcy, the tax authorities took the position that amounts owing up to the date of the bankruptcy were the Crown's property. This Court unanimously disagreed with that position, concluding that the manner and mechanism of collecting GST was not consistent with a proprietary right (paras. 21-23).

[132] In any event, treating s. 227(4.1) as only effectively creating a security interest would not resolve the issues in this appeal without reference to how the Crown's interest arises under the CCAA. As noted above, broad general characterizations do not help in defining the specific attributes of this deemed trust. This Court must grapple with the fact that s. 227(4.1) is both structured as a security interest, like a charge, but also uses the mechanism of a deemed trust.

[133] The takeaway for this appeal is that the structure of s. 227(4.1), on its own, does not shed light on what to do with the Crown's beneficial ownership of unremitted source deductions in the insolvency regimes. Although the provision is clear 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*. The unique statutory device manipulates private law concepts and cannot be carried through to a logical conclusion for the purposes of insolvency. For this reason, it is not surprising that the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and the

CCAA specifically articulate how the deemed trust for unremitted source deductions should be treated.

[134] I now turn to that half of the equation: Parliament’s insolvency regime.

B. *How Is the Crown’s Deemed Trust for Unremitted Source Deductions Treated in Parliament’s Insolvency Regime?*

(1) Parliament’s Insolvency Regime

[135] There are three main statutes in Parliament’s insolvency regime: the CCAA, which is at issue in this appeal, the *BIA* and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (*WURA*). (The *WURA* covers insolvencies of financial institutions and certain other corporations, like insurance companies, and is not relevant to this appeal (s. 6(1); 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 39)). In *Century Services*, Deschamps J., writing for the majority, described insolvency as

the factual situation that arises when a debtor is unable to pay creditors Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors’ enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor’s assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation. [para. 12]

[136] The *BIA* contains both a liquidation regime and a restructuring regime (*Century Services*, at paras. 13 and 78). The liquidation regime provides a detailed statutory scheme of distribution whereby the debtor's assets are liquidated and distributed to creditors. In contrast, the restructuring regime allows debtors to make proposals to their creditors for the adjustment and reorganization of debt. The *BIA* is available to debtors, either natural or legal persons, owing \$1000 or more (s. 43(1)).

[137] The *CCAA* is predominantly a restructuring statute and access is restricted to companies with liabilities in excess of \$5 million (s. 3(1)). As Deschamps J. explained in *Century Services*, the purpose of the *CCAA* is remedial; it provides a means for companies to avoid the devastating social and economic consequences of commercial bankruptcies (paras. 15 and 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Liquidations do not only harm creditors, but employees and other stakeholders as well. The *CCAA* permits companies to continue to operate, “preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all” (*Century Services*, at para. 77). In enacting a restructuring statute, Parliament recognized that companies have more value as going concerns, especially since they are “key elements in a complex web of interdependent economic relationships” (para. 18).

[138] Due to its remedial nature, the *CCAA* is famously skeletal in nature (*Century Services*, at paras. 57-62). It does not “contain a comprehensive code that lays

out all that is permitted or barred” (para. 57, quoting *Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, per Blair J.A.). Under s. 11, for example, the court may make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act. Section 11 has been described as “the engine that drives this broad and flexible statutory scheme” (*Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36; see also 9354-9186 *Québec inc.*, at para. 48). Deschamps J. observed in *Century Services* that these discretionary grants of jurisdiction to the courts have been key in allowing the CCAA to adapt and evolve to meet contemporary business and social needs. Although judicial discretion must always be exercised in furtherance of the CCAA’s remedial purpose, it takes many forms and has proven to be flexible, innovative, and necessary (paras. 58-61; *U.S. Steel Canada Inc., Re*, 2016 ONCA 662, 402 D.L.R. (4th) 450, at para. 102).

[139] This is in contrast to the liquidation regime in the *BIA*, which has slightly different purposes. In *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, Gonthier J. explained that bankruptcy serves two goals: it “ensure[s] the equitable distribution of a bankrupt debtor’s assets among the estate’s creditors *inter se* [and it ensures] the financial rehabilitation of insolvent individuals” (para. 7; see also 9354-9186 *Québec inc.*, at para. 46). Similarly, Sarra and Houlden and Morawetz JJ. describe the purposes of the *BIA* as permitting both “an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community” and “the orderly and

fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis” (*The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at p. 2).

[140] To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process (*Century Services*, at para. 13; *Husky Oil*, at para. 85). It “provide[s] an orderly mechanism for the distribution of a debtor’s assets to satisfy creditor claims according to predetermined priority rules” (*Century Services*, at para. 15). The *BIA*’s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start (*Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 41). 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).

[141] Importantly, the specific goals of restructuring in the *CCAA*, in contrast to liquidation, result in the introduction of a key player: the interim lender. Interim financing, previously referred to as debtor-in-possession financing, is a judicially-supervised mechanism whereby an insolvent company is loaned funds for use during and for the purposes of the restructuring process. Before the 2009 amendments, there were no statutory provisions on interim financing in the *CCAA*, but the institution was well-established in the jurisprudence (L. W. Houlden, G. B. Morawetz and J. Sarra,

Bankruptcy and Insolvency Law of Canada (4th ed. rev. (loose-leaf)), vol. 4, at N§93; see also *Century Services*, at para. 62). The 2009 amendments codified much of the existing jurisprudence, and I discuss the statutory provisions in detail below.

[142] Interim financing is crucial to the restructuring process. It allows the debtor to continue to operate on a day-to-day basis while a workout solution is being arranged. A plan of compromise would be futile if, in the interim six months, the debtor was forced to close its doors. For this reason, Farley J., in *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. C.J. (Gen. Div.)), at para. 1, quoting *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at para. 24, observed that interim financing helps “keep the lights . . . on”. Similarly, in *Indalex*, Deschamps J. explained that giving interim lenders super-priority “is a key aspect of the debtor’s ability to attempt a workout” (para. 59, quoting J. P. Sarra, *Rescue! The Companies’ Creditors Arrangement Act* (2007), at p. 97). Without interim financing and the ability to prime (i.e., to give it priority) the interim lender’s loan, the remedial purposes of the CCAA can be frustrated (para. 58).

[143] With this background in mind, I turn now to consider the treatment of the Crown’s deemed trust for unremitted source deductions in Parliament’s insolvency regime.

(2) The Deemed Trust for Unremitted Source Deductions in the BIA and CCAA

[144] The statutes in this case are all federal statutes. The *ITA*, *BIA*, and *CCAA* make up a co-existing and harmonious statutory scheme, enacted by one level of government (see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337, on the presumption of coherence). An example of this co-existence is when, in the insolvency regime, Parliament modifies entitlements that it otherwise grants the Crown outside of insolvency. For example, through s. 222(3) of the *ETA*, Parliament provides for a statutory deemed trust in favour of the Crown for unremitted GST. Parliament also renders that deemed trust, which is nearly identical in language to s. 227(4.1) of the *ITA*, ineffective in the *BIA* and *CCAA* (*BIA*, ss. 67(2) and 86(3); *CCAA*, s. 37(1); *Century Services*, at paras. 51-56). As I shall explain, Parliament also deals specifically with the deemed trust in s. 227(4.1) of the *ITA* in the *BIA* and *CCAA*, albeit in different ways.

[145] In the *BIA*, the deemed trust for unremitted source deductions appears in s. 67(3). Section 67 is under the heading “Property of the Bankrupt”. 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 that any provincial or federal deemed trust in favour of the Crown does not qualify as a trust under s. 67(1)(a) unless it would qualify as a trust absent the deeming provision (in other words, unless it would qualify as a common law or true trust) (see *Caisse populaire Desjardins de Montmagny*, at para. 15; *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, 444 D.L.R. (4th) 273, at paras. 32-33). Section 67(3) states that s. 67(2) does not apply in respect of the Crown’s deemed trust for unremitted source deductions under the *ITA*, *CPP* or *EIA*.

Thus, while s. 67(2) provides in general terms an exception to s. 67(1)(a), that exception does not apply to the Crown's deemed trust for unremitted source deductions by virtue of s. 67(3).

[146] 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” (*BIA*, s. 67(1)). For the purposes of the *BIA*'s liquidation regime, it is effectively the Crown's *property*. Together, ss. 67(1)(a) and 67(3) give 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.

[147] In the *CCAA*, the Crown's deemed trust appears in ss. 37(2) and 6(3), alongside other deemed trusts and devices. Section 37(2) explicitly preserves the operation of s. 227(4.1) in *CCAA* proceedings:

37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a 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.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a provincial pension plan as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

[148] Due to this language, the Court in *Century Services* variously described the s. 227(4.1) trust as “surviv[ing]”, “continu[ing]”, and “remain[ing] effective” in the *CCCA* (see paras. 38, 45, 49, 53 and 79). The Crown relies on these observations to argue that the deemed trust remains fully intact in the *CCAA*, conferring a proprietary right on the Crown that cannot be subordinated to any other party.

[149] In my view, the Crown’s submission overextends the analysis in *Century Services*. The issue in that case was whether the deemed trust under s. 222(3) of the *ETA* for unremitted GST was effective in the *CCAA*. As mentioned, s. 222(3) is almost identical in wording to s. 227(4.1) of the *ITA*, providing that the deemed trust extends to property of the tax debtor equal in value to the amount of the unremitted GST and extends to property otherwise held by a secured creditor pursuant to a security interest.

Section 222(3) of the *ETA* also provides that the deemed trust operates despite any other enactment of Canada, except the *BIA*. Thus, under the *BIA*, the Crown priority for unremitted GST is lost. However, under the *CCAA*, s. 37(1) provides that statutory deemed trusts in favour of the Crown should not be regarded as trusts unless they would qualify as trusts absent the deeming language. The Court in *Century Services* grappled with the apparent conflict between s. 222(3) of the *ETA* and s. 37(1) (then s. 18.3(1)) of the *CCAA*.

[150] A majority of the Court reasoned that, through statutory interpretation, the apparent conflict could be resolved in favour of the *CCAA* (*Century Services*, at para. 44). Parliament had shown a tendency to move away from asserting Crown priority in insolvency. Under both the *BIA* and *CCAA*, it had enacted a general rule that deemed trusts in favour of the Crown are ineffective in insolvency. It had also explicitly carved out an exception to that general rule for unremitted source deductions. The logic of the *CCAA* suggested that only the deemed trust for unremitted source deductions survived (paras. 45-46).

[151] Thus, while the Court emphasized that the deemed trust in s. 227(4.1) “survives” in the *CCAA*, it did not comment on *how* it survives. This Court has never considered the scope of the deemed trust under the *CCAA*, especially in light of the purposes of the *CCAA* and the equivocal nature of the beneficial ownership conferred through the deeming provision. For this appeal, it is necessary to probe into ss. 37(2)

and 6(3) to determine *how* the *CCAA* construes the Crown’s right to unremitted source deductions.

[152] To that end, although s. 37(2) of the *CCAA* is almost identical to s. 67(3) of the *BIA*, it does not have the same effect because it is not nested under a provision like s. 67(1)(a). Section 37(2) of the *CCAA* carves out an exception to s. 37(1), which is different from s. 67(1)(a). While s. 67(1)(a) excludes trust property from property of the bankrupt divisible among creditors, s. 37(1) only provides that “property of a 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”. Unlike the *BIA*, the *CCAA* is silent on how trust property should be treated and silent on what constitutes property of the debtor in a restructuring context — indeed, there is no definition of property in the *CCAA* at all. This is in keeping with the *CCAA*’s comparatively skeletal nature.

[153] The result is that s. 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”. However, 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. In keeping with the *CCAA*’s flexibility, s. 37(2) says little about what the Crown’s unique right of beneficial ownership under s. 227(4.1) of the *ITA* requires. But

as I shall explain, s. 11 gives the court broad discretion to consider and give effect to the Crown's interest recognized in s. 37(2).

[154] In addition, s. 6(3) of the CCAA gives specific effect to the Crown's right under the deemed trust. Under that provision, the court cannot sanction a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's sanction (assuming the Crown does not agree otherwise):

(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*

[155] Pursuant to s. 6(3), then, the Crown's right under s. 227(4.1) includes a right *not to have to compromise*. The Crown can demand to be paid in full under the plan "in priority to all . . . security interests". The right is therefore different in kind than a security interest. While there may be some risk to the Crown that the plan may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim, the CCAA recognizes that there is societal value in helping a company remain a going concern. This remedial goal 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.

[156] In my view, the reason for this difference between the *BIA* and *CCAA* is straightforward. The purpose of a *BIA* liquidation is to give the debtor a fresh start and pay out creditors to the extent possible. The debtor's property has to be divided according to the statute's rigid priority scheme. To begin the process of distribution, it is necessary to pool together the debtor's funds and determine what is, and is not, available for creditors. A comprehensive definition of property of the debtor is necessary, and no flexibility is needed in the regime to facilitate the liquidation process. There is also no other overarching goal, like facilitating the debtor's restructuring, that requires an institution like interim financing or requires modifying entitlements.

[157] In a restructuring proceeding under the *CCAA*, however, there is no rigid formula for the division of assets. Certain debt might be restructured; other debt might be paid out. When a debtor's restructuring is on the table, the goal pivots, and interim financing is introduced to facilitate the restructuring. Entitlements and priorities shift to accommodate the presence of the interim lender — a new and necessary player who is absent from the liquidation scene.

[158] The fact that the Crown's right under s. 227(4.1) of the *ITA* is treated differently between the two statutes is therefore consistent with the different schemes and purposes of the Acts. This is not a circumstance where Parliament attempted to harmonize entitlements across the regimes (see, e.g., *Indalex*, at para. 51, per Deschamps J.). The *CCAA* gives the deemed trust meaning for its purposes. The

concrete meaning given is that a plan of compromise must pay the Crown in full within six months of approval.

C. *Do Sections 11.2, 11.51 and 11.52 of the CCAA Permit the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[159] In this case, the Initial Order subordinated the Crown's deemed trust to the Priming Charges. The courts below found that this authority is derived from ss. 11.2, 11.51 and 11.52 of the CCAA, which allow the court to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. For example, the relevant portions of s. 11.2, which are substantially similar to the relevant portions of ss. 11.51 and 11.52, read as follows:

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

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

[160] As priming charges can “rank in priority over the claim of any secured creditor”, the definition of “secured creditor” in s. 2(1) is key:

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds

[161] The Respondents submit, in line with the courts below, that the Crown is a “secured creditor” under the *CCAA* in respect of its interest in unremitted source deductions because the enabling statute, the *ITA*, itself defines the holder of a deemed trust as holding a “security interest” (see *Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th) 274). The Respondents also rely on the analogy in *First Vancouver* likening the Crown’s deemed trust to a floating charge (which is a security interest). Accordingly, the Respondents argue that ss. 11.2, 11.51 and 11.52 give the court authority to rank priming charges ahead of the Crown’s deemed trust.

[162] The Crown, like the dissent at the Court of Appeal, argues that the Crown is not a “secured creditor” because the definition of “secured creditor” in the *CCAA* does not list the holder of a deemed trust and because ss. 37 to 39 of the *CCAA* clearly draw a distinction between the Crown’s deemed trust for unremitted source deductions, on the one hand, and the Crown’s secured and unsecured claims on the other. Accordingly, the Crown argues that ss. 11.2, 11.51 and 11.52 do *not* give the court authority to rank priming charges ahead of the Crown’s deemed trust.

[163] As I shall detail, I conclude that ss. 11.2, 11.51 and 11.52 do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

[164] First, I agree with the Respondents that the general definition of security interest under the *ITA* includes the holder of a deemed or actual trust (s. 224(1.3)). However the reference to security interest in s. 227(4.1) is not to the Crown's interest but to others' interest in the debtor's property. In my view, any definition of security interest in the *ITA* is not relevant to defining the Crown's interest since it serves an entirely different purpose. What matters is whether the *CCAA* provisions give the court authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This is determined by interpreting the words of the CCAA and how the CCAA defines secured creditor.

[165] I also agree with the Crown that the definition of "secured creditor" in the *CCAA* does not specifically list the holder of a deemed or actual trust. In addition, the Crown's interest cannot simply be called a "charge". As explained above, although the Crown's deemed trust has some parallels with a floating charge, the provision also employs some aspects of beneficial ownership. I would also hesitate to draw analogies with any of the other terms listed in the *CCAA* definition. The holders of several of these instruments are often described as having proprietary rights in their security. It was a legislative choice to define them as secured creditors for the purposes of the *CCAA*. It is difficult to shoehorn the Crown's deemed trust into the definition of

“secured creditor” in the *CCAA*, particularly as the *CCAA* specifically refers to the deemed trust in s. 37(2).

[166] Moreover, I agree with the Crown that ss. 37 to 39 of the *CCAA* treat the Crown’s deemed trust and the Crown’s secured claims as distinct interests. After s. 37 of the *CCAA*, dealing with deemed trusts, s. 38(1) provides a general rule that secured claims of the Crown rank as unsecured claims. Section 38(2) contains an exemption from s. 38(1) for consensual security interests that are granted to the Crown. Section 38(3) contains an exemption for the CRA’s enhanced requirement to pay. Finally, s. 39(1) preserves the Crown’s secured creditor status if it registers before the commencement of a *CCAA* proceeding, and s. 39(2) subordinates a Crown security or charge to prior perfected security interests.

[167] As Wood notes, “These provisions adopt two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor” (Wood (2020), at p. 96). If s. 227(4.1) of the *ITA* gave the Crown the status of a secured creditor, then the CRA would presumably need to comply with ss. 38 and 39 by registering its security interest. No one suggests that the Crown has to register its claim for unremitted source deductions. In my view, ss. 37 to 39 draw a distinction between deemed trusts on the one hand and secured and unsecured claims on the other, and the Crown is not, therefore, a “secured creditor” under the *CCAA* for its right to unremitted source deductions.

[168] This is dispositive for the purposes of ss. 11.2, 11.51 and 11.52 of the CCAA. These sections do not give the court the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions.

D. *Does Section 11 of the CCAA Allow the Court to Rank Priming Charges Ahead of the Crown's Deemed Trust for Unremitted Source Deductions?*

[169] The remaining issue is whether another provision in the CCAA, namely s. 11, confers that jurisdiction. As noted above, s. 11 allows the court to make any order that it considers appropriate in the circumstances, subject to the restrictions set out in the Act:

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.

[170] In 9354-9186 *Québec inc.*, this Court explained that the discretionary authority in s. 11 is broad, but not boundless (para. 49). There are three “baseline considerations”: (1) the order sought must be appropriate; (2) the applicant must be acting in good faith; and (3) the applicant must demonstrate due diligence (*Century Services*, at para. 70; 9354-9186 *Québec inc.*, at para. 49). Appropriateness is assessed by inquiring whether the order sought advances the remedial objectives of the CCAA. The general language of s. 11 should not, however, be “restricted by the availability of more specific orders” (*Century Services*, at para. 70).

[171] In keeping with its broad language, s. 11 of the *CCAA* has been used to make a wide array of orders. Most recently, for example, this Court clarified that it can be used to bar a creditor from voting on a plan where the creditor has acted for an improper purpose (9354-9186 *Québec inc.*, at paras. 56 and 66).

[172] The issue in this case is whether s. 11 can be used to rank an interim lender's loan, or other priming charge, ahead of the Crown's deemed trust for unremitted source deductions. In my view, it can, for two reasons.

[173] First, given my conclusion about the content of the Crown's right under s. 227(4.1) of the *ITA* for the purposes of the *CCAA* (requiring that it at least be paid in full under a plan of compromise), 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. For this reason, it is irrelevant whether a priming charge under ss. 11, 11.2, 11.51 or 11.52 of the *CCAA* is a "security interest" within the meaning of s. 227(4) and (4.1) of the *ITA*. The analysis above does not depend on finding that a priming charge is not captured within the *ITA* definition.

[174] In addition, depending on the circumstances, such an order may further the remedial objectives of the *CCAA*. For example, 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, again depending on the circumstances, further the remedial objectives of the CCAA. 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.

[175] Second, I do not accept the Crown’s argument that s. 11 is unavailable because other CCAA provisions, namely ss. 11.2, 11.51 and 11.52, confer more specific jurisdiction (see 9354-9186 *Québec inc.*, at paras. 67-68).

[176] While I agree that s. 11 is restricted by the provisions set out in the CCAA and cannot be used to violate specific provisions in the Act, s. 11 is not “restricted by the availability of more specific orders”. The fact that specific provisions of the CCAA allow the court to rank priming charges ahead of a secured creditor does not mean that the court can *only* rank priming charges ahead of a secured creditor. Such an interpretation would amount to reading words into ss. 11.2, 11.51 and 11.52 that do not exist. An order that ranks a priming charge ahead of the beneficiary of the deemed trust is different in kind than the orders contemplated by ss. 11.2, 11.51 and 11.52, which contemplate the subordination of secured creditors. There is no provision in the CCAA stipulating what the court can do with trust property and no provision in the CCAA conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust. So long as the order does not conflict with other provisions in the Act, namely ss. 37(2) and 6(3), and so long as it fulfills the “baseline considerations” of appropriateness, good faith, and due diligence, an order ranking a

priming charge ahead of the Crown's deemed trust would fall under the jurisdiction conferred by s. 11 (*Century Services*, at para. 70; *9354-9186 Québec inc.*, at para. 49). As explained above, there would be no conflict with ss. 37(2) and 6(3) of the *CCAA*.

[177] Both parties invoked policy concerns to assist in the interpretative exercise. I do not find it necessary to resort to such arguments. However, it is far from evident that interim lending would simply end if the Crown's deemed trust had super-priority in an appropriate case. It is also far from evident that the Crown would suffer significantly if the priming charges had super-priority in an appropriate case, given the existence of s. 6(3) of the *CCAA* requiring full payment, and the Crown's favourable treatment in the *BIA* liquidation regime in the event the restructuring failed. What is clear is that interim lending is crucial to the restructuring process, and the Crown's deemed trust for unremitted source deductions is crucial to tax collection. It will be up to the *CCAA* judge to weigh and balance the moving pieces.

[178] To that end, s. 11 of the *CCAA* gives the court discretion and flexibility to weigh several considerations in ranking a priming charge ahead of the Crown's deemed trust for unremitted source deductions. It requires the court to take a focused look at the specific facts of a case to determine whether such an order is necessary and appropriate. Where relevant, the court will consider the Crown's interest in the deemed trust as a result of s. 37(2). Courts may no doubt look to the factors already listed in s. 11.2(4) — the likely duration of *CCAA* proceedings, plans for managing the company during those proceedings, views of the company's major creditors and the monitor, and

the company's ability to benefit from interim financing, among others — for guidance.

Section 11.2(4) of the *CCAA* states:

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
 - (g) the monitor's report referred to in paragraph 23(1)(b), if any.

[179] In addition, it seems to me that courts may consider:

- whether the interim lender has indicated, in good faith, that it will not lend to the debtor without ranking ahead of the Crown's deemed trust;
- the relative amounts of the interim loan and the unremitted source deductions (if the amount of the unremitted source deductions is a small fraction of the amount of the interim loan, the interim lender may not be significantly prejudiced without super-priority);

- whether, and for how long, the Crown allowed source deductions to go unremitted without taking action (see, e.g., Hanlon, Tickle and Csiszar); and
- finally, the prospects of success of a restructuring; and whether the CCAA is likely to be used to sell the debtor's assets.

[180] Finally, different considerations will apply if a court is considering ranking a different party's charge, like the Monitor's or Directors' Charge, ahead of the Crown's deemed trust.

VII. Conclusion

[181] I would dismiss the appeal and clarify that the authority to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions is derived from s. 11 of the CCAA rather than ss. 11.2, 11.51 and 11.52. The Crown's interest under s. 227(4.1) of the *ITA* is a deemed trust interest, but beneficial ownership of deemed trust property is a manipulation of private law concepts, without settled meaning. Accordingly, the specific nature of beneficial ownership of deemed trust property must be determined in the relevant context in which it is asserted. Here, the Crown's right to unremitted source deductions in a CCAA restructuring is protected by both ss. 37(2) and 6(3). The former is flexible, requiring the Crown's deemed trust property to be considered when appropriate under the Act; the latter specifically requires 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. The Crown's right differs under

the *BIA*, in keeping with the different goals and schemes of liquidation and restructuring. Given the content of the Crown’s right to unremitted source deductions in a *CCAA* restructuring, there is no conflict between s. 227(4.1) of the *ITA* and s. 11 of the *CCAA*. The schemes of both federal Acts can be harmonized and the objectives of both statutes furthered.

[182] The Respondents will have their costs in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The reasons of Abella, Brown and Rowe JJ. were delivered by

BROWN AND ROWE JJ. —

I. Overview

[183] At issue in this appeal is whether the Crown’s deemed trust claim for unremitted source deductions under s. 227(4) and (4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), s. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (“*CPP*”), and ss. 23(4) and 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23 (“*EIA*”) (collectively, the “Fiscal Statutes”), have priority over court-ordered priming charges under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”).

[184] The present iteration of the deemed trust provision, s. 227(4.1) of the *ITA*, was the result of a 1997 amendment enacted by Parliament directly in response to this Court’s interpretation of the provision’s predecessor in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (Department of Finance Canada, *Unremitted Source Deductions and Unpaid GST* (April 7, 1997)). That provision was itself the result of several amendments, beginning in 1942, with the amendment introducing the deemed trust in s. 92(6) and (7) of the *Income War Tax Act*, R.S.C. 1927, c. 97 (previously S.C. 1917, c. 28) (*An Act to amend the Income War Tax Act*, S.C. 1942-43, c. 28, s. 31). The provision and the historical amendments demonstrate Parliament’s intention to safeguard its ability to collect employee source deductions under the relevant statutes, in priority to all other claims against a debtor’s property.

[185] The Crown appeals from the decision of the Court of Appeal of Alberta which, like the chambers judge, held that the *CCAA* court could subordinate the deemed trust claims under the Fiscal Statutes to the priming charges (2019 ABCA 314, 93 Alta. L.R. 29, aff’g 2017 ABQB 550, 60 Alta. L.R. (6th) 103). Having examined the pertinent provisions of the Fiscal Statutes, and for the reasons that follow, we find ourselves in respectful disagreement with that conclusion, and prefer the view of the dissenting judge, Wakeling J.A. The Crown’s deemed trust claims under the Fiscal Statutes have ultimate priority and cannot be subordinated by priming charges.

[186] In our view, the text of the impugned provisions in the Fiscal Statutes is clear: the Crown’s deemed trust operates “[n]otwithstanding . . . any other enactment

of Canada” (*ITA*, s. 227(4.1)).² Parliament used unequivocal language — indeed, *the very language suggested by this Court in Sparrow Electric* — to give ultimate priority to the Crown’s claim. Further, and again in clear and unequivocal text, Parliament imposed limits on the broad grant of authority by which a court can prioritize priming charges, thereby making plain the superiority of deemed trust claims. Finally, no provision of the *CCAA* is rendered meaningless by this interpretation. Unlike in other contexts such as the legislative scheme governing the GST/HST, Parliament has left no room for subordinating the deemed trusts under the Fiscal Statutes in pursuit of other legislative objectives. We would, therefore, allow the appeal.

II. Analysis

A. *General Comments on the Nature of the Deemed Trusts Under the Fiscal Statutes*

[187] The deemed trust created by the *ITA* is an essential instrument to collect source deductions (*First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, at para. 22). The *ITA* grants special priority to the Crown to collect unremitted source deductions, reflecting its status as an “involuntary creditor” (*First Vancouver*, at para. 23).

[188] Section 227(4) and (4.1) of the *ITA* reads:

² The wording of the deemed trust provisions in the relevant provisions of the Fiscal Statutes is materially identical. This decision focuses on the deemed trusts in s. 227(4) and (4.1) of the *ITA*. The reasoning herein, however, applies with equal force to each of the other statutes.

(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.

[189] These sections describe two relevant events. First, at the time of the deduction, a trust is deemed in favour of the Crown, binding every person (the “tax debtor”) who collects source deductions in the amount withheld until the person remits the source deductions (*ITA*, s. 227(4)). Section 227(4) deems the tax debtor to hold the

source deductions “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”.

[190] The second event occurs where the tax debtor has failed to remit the source deductions in accordance with the manner and time provided by the *ITA*. Section 227(4.1) extends the deemed trust to all “property of the person and property held by any secured creditor . . . equal in value to the amount so deemed to be held in trust”. This is achieved by deeming the source deductions to be held “in trust for Her Majesty” from the moment the amount was “deducted or withheld by the person, separate and apart from the property of the person”. Parliament further provided that the unremitted source deductions under the Fiscal Statutes “form no part of the estate or property of the person” from the time of deduction or withholding, 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”.

[191] This Court has held that the deemed trust is a “creatur[e] of statute” and “is not in truth a real [trust], as the subject matter of the trust cannot be identified from the date of creation of the trust” (*Sparrow Electric*, at para. 31, per Gonthier J., citing D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at p. 117, and adopted in *First Vancouver*, at para. 37). This statement fuelled a debate in this appeal about whether the deemed trust is a security interest or a proprietary interest, with the

respondents arguing that the Crown cannot hold a proprietary interest in the debtor's property because there is a lack of certainty in the subject matter.

[192] We agree with each of our colleagues Justices Karakatsanis and Côté that the deemed trust is not a “true” trust and that it does not confer an ownership interest or the rights of a beneficiary on the Crown as they are understood at common law or within the meaning of the *Civil Code of Québec* (Karakatsanis J.’s reasons, at paras. 119-20; Côté J.’s reasons, at paras. 43 and 49). Respectfully, however, our colleagues miss the point of the *deemed* quality of the trust. The matters of a property interest, certainty of subject matter and autonomous patrimony that arise from attempts to describe the operation of the deemed trust are entirely irrelevant and do not assist in deciding this appeal, nor in understanding Parliament’s intent. The deemed trust is a legal fiction, with *sui generis* characteristics that are described in s. 227(4) and (4.1) of the *ITA*. As noted in *First Vancouver*, at para. 34, “it is open to Parliament to characterize the trust in whatever way it chooses; it is not bound by restraints imposed by ordinary principles of trust law”. While *First Vancouver* considered the contrast between a statutory trust and a common law trust, the same applies to our colleague Côté J.’s reference to the *Civil Code (Canada (Attorney General) v. Caisse populaire d’Amos*, 2004 FCA 92, 324 N.R. 31, at para. 49). What matters here is not *the characterization* of the deemed trust that is at issue, but its *operation*. And as we explain, it *operates* to give the Crown a statutory right of access to the debtor’s property to the extent of its *corpus* and a right to be paid in priority to all security interests.

[193] Further, no concerns regarding certainty of subject matter or autonomous patrimony arise here. It is of course true that, in common law Canada, for a trust to come into existence there must be certainty of intention, certainty of subject matter, and certainty of object (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 140; E. E. Gillese, *The Law of Trusts* (3rd ed. 2014), at p. 41). Similarly, under the Quebec civil law, “[t]hree requirements must . . . be met in order for a trust to be constituted: property must be transferred from an individual’s patrimony to another patrimony by appropriation; the property must be appropriated to a particular purpose; and the trustee must accept the property” (*Bank of Nova Scotia v. Thibault*, 2004 SCC 29, [2004] 1 S.C.R. 758, at para. 31). And, again, it is also true that the subject matter of the deemed trust under s. 227(4.1) cannot be identified from the date of creation of the trust and does not constitute an autonomous patrimony to which specific property is transferred.

[194] But again, none of this remotely matters here. Statutory text, not ordinary principles of trust law, determines the nature of, and rights conferred by, deemed trusts (*First Vancouver*, at para. 34). And this Court has recognized that Parliament, through the trust deemed by s. 227(4.1) of the *ITA*, has “revitaliz[ed] the trust whose subject matter has lost all identity” (*Sparrow Electric*, at para. 31, per Gonthier J., adopted in *First Vancouver*, at para. 37). This is because the subject matter of the deemed trust is ascertained *ex post facto*, corresponding to the property of the tax debtor and property held by any secured creditor equal in value to the amount deemed to be held in trust by s. 227(4) that, but for the security interest, would be property of the tax debtor. In short,

the subject matter is whatever assets the employer then has from which to realize the original trust debt. Hence Iacobucci J.’s description in *First Vancouver* of the operation of s. 227(4.1) as “similar in principle to a floating charge” (para. 4). Parliament also circumvented the traditional requirements of the *Civil Code* for constituting a trust by requiring the amount of the unremitted source deductions to be held “separate and apart from the property of the [debtor]” and to “form no part of the estate [*patrimoine*, in the French version] or property of the [debtor]” (s. 227(4.1)).

[195] In short, the requirements of “true” trusts of civil and common law are irrelevant to ascertaining the operation of a statutorily deemed trust. Parliament did not legislate a “true” trust. Instead, it legislated a deeming provision which “artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used” (*R. v. Verrette*, [1978] 2 S.C.R. 838, at p. 845).

[196] On this point, and contrary to the view of the majority at the Court of Appeal, Iacobucci J. *did not* hold that the deemed trust *is* a floating charge — nor that it was “of the same nature” (Côté J.’s reasons, at para. 51) — but rather that it operated *similarly*, by permitting a debtor in the interim to alienate property in the normal course of business. They are distinct legal concepts; whereas the deemed trust takes “priority over existing and future security interests”, a floating charge would be overridden by a subsequent fixed charge (*Toronto-Dominion Bank v. Canada*, 2020 FCA 80, [2020] 3 F.C.R. 201, at para. 62; see also *First Vancouver*, at para. 28).

[197] Significantly, the s. 227(4.1) deemed trust does not encompass the whole of the tax debtor's interest in property, but only the amount deemed to be held in trust by s. 227(4). But this does not mean the Crown cannot have a property interest in the debtor's property. It merely limits that interest to the extent of the unremitted source deductions. This makes sense. The Crown may collect only what it is owed.

B. *The Deemed Trust Under the Fiscal Statutes Have Absolute Priority Over All Other Claims in CCAA Proceedings*

[198] The text, context, and purpose of s. 227(4.1) of the *ITA* support the conclusion that s. 227(4.1) of the *ITA* and the related deemed trust provisions under 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 (4.1) of the *ITA* was clear and unmistakable.

(1) The Deemed Trusts Apply Notwithstanding the Provisions of the CCAA

(a) *Text of the Fiscal Statutes*

[199] The text of s. 227(4.1) of the *ITA* is determinative: the Crown's deemed trust claim enjoys superior priority over all "security interests", including priming charges under the *CCAA*. The amount subject to the deemed trusts is 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”. It is “beneficially owned by Her Majesty”, and the “proceeds of such property shall be paid . . . in priority to all such security interests”. The Crown’s right pursuant to its deemed trust is clear: it is a right to be paid in priority to all security interests.

[200] Parliament granted this unassailable priority by employing the unequivocal language of “[n]otwithstanding any . . . enactment of Canada”. This is a “blanket paramountcy clause”; it prevails over all other statutes (P. Salembier, *Legal and Legislative Drafting* (2nd ed. 2018), at p. 385). No similar “notwithstanding” provision appears in the CCAA, subordinating the claims under the deemed trusts of the Fiscal Statutes to priming charges. 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. This distinguishes the deemed trust at issue here from those discussed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, which were nullified by the operation of what is now s. 37(1). Deschamps J. repeatedly contrasted the different deemed trusts and specified that “the Crown’s deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy” (para. 38). The ITA and CCAA thus operate without conflict.

(b) *Legislative Predecessor Provisions*

[201] The predecessor provisions of a statutory provision form part of the “entire context” in which it must be interpreted (*Merk v. International Association of Bridge,*

Structural, Ornamental and Reinforcing Iron Workers, Local 771, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28). And here, it confirms that, by enacting s. 227(4.1) of the *ITA*, Parliament intended for the deemed trusts arising from the Fiscal Statutes to have absolute priority over all secured creditors, as defined in s. 224(1.3) of the *ITA*.

[202] As already noted, Parliament amended s. 227(4.1) of the *ITA* to its current form in response to this Court’s decision in *Sparrow Electric*. In *Sparrow Electric*, both Royal Bank and the Minister claimed priority to the proceeds from the tax debtor’s property. This Court held that the Bank had priority since the inventory was subject to the Bank’s security before the deemed trust arose. In reaching this conclusion, Iacobucci J. invited Parliament to grant absolute priority to the Crown, and showed how this could be achieved:

I wish to emphasize that it is open to Parliament to step in and assign absolute priority to the deemed trust. A clear illustration of how this might be done is afforded by s. 224(1.2) *ITA*, which vests certain moneys in the Crown “notwithstanding any security interest in those moneys” and provides that they “shall be paid to the Receiver General in priority to any such security interest”. All that is needed to effect the desired result is clear language of that kind. In the absence of such clear language, judicial innovation is undesirable, both because the issue is policy charged and because a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation. [Emphasis added; para. 112.]

[203] Parliament proceeded to do just that. It amended the Fiscal Statutes to reinforce its priority. The press release accompanying the amendments stated that the objective of the amendments was to “assert the absolute priority of the Crown’s claim [for] unremitted source deductions [and to] ensure that tax revenue losses are

minimised and that delinquent taxpayers and their secured creditors do not benefit from failures to remit source deductions and GST at the expense of the Crown” (Department of Finance Canada, at p. 1 (emphasis added)).

[204] The purpose of these amendments was described by Iacobucci J. for this Court in *First Vancouver*. It was, he recognized, to grant priority to the deemed trusts and ensure the Crown’s claim prevails over secured creditors, irrespective of when the security interest arose (paras. 28-29). “It is evident from these changes” he added, “that Parliament has made a concerted effort to broaden and strengthen the deemed trust in order to facilitate the collection efforts of the Minister” (para. 29). Parliament’s intention could not have been clearer.

[205] Indeed, our colleagues’ view to the contrary leaves us wondering: if the all-encompassing scope of the notwithstanding clause of s. 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.

(2) The Priming Charges Are “Security Interests” Within the Meaning of the Fiscal Statutes

[206] The priming charge provisions in ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* allow the supervising court to “make an order declaring that all or part of the

company's property is subject to a security or charge" ("*charge ou sûreté*" in the French version). This does not, however, prevail over the deemed trust created by s. 227(4.1) of the *ITA*, which provides that the unpaid amounts of the deemed trust for source deductions have priority over all "security interests". That term is defined by s. 224(1.3) of the *ITA* 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*)

This makes clear that a "security interest" includes a "charge" (a "*sûreté*" in the French version). Further, ss. 11.2(1), 11.51(1) and 11.52(1) of the *CCAA* describe the priming charges as a "security or charge". There can be no doubt, therefore, that priming charges under the *CCAA* are security interests under the *ITA*.

[207] Even were this insufficient, the definition of "security interest" in s. 224(1.3) of the *ITA* is sufficiently expansive to capture *CCAA* priming charges. The word "includes", and the categorical language of "encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for" could not be any more expansive. As Professor Sullivan explains, "The purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude

something that is meant to be included” (*Sullivan on the Construction of Statutes* (6th ed. 2014), at para. 4.39).

[208] This Court has already recognized, in *Caisse populaire Desjardins de l’Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, that Parliament chose “an expansive definition of ‘security interest’ . . . in order to enable maximum recovery by the Crown” (para. 14), such that it captures any interest in the property of the debtor that secures payment or performance of an obligation:

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” [Emphasis added; para. 15.]

In that case, Rothstein J. held for the Court that a contract providing a right to compensation (or set-off at common law) could constitute a “security interest” under s. 224(1.3) of the *ITA*, *despite that it was not enumerated in the definition* and that it is *not traditionally understood as such* (paras. 37-40).

[209] For all these reasons, the priming charges fall under the definition of “security interest”, because they are “interest[s] in the debtor’s property [that] secur[e] payment or performance of an obligation”, i.e. the payment of the monitor, the interim

lender, and directors. Consequently, the Crown's interest under the trust deemed created by s. 227(4.1) of the *ITA* enjoys priority over the priming charges.

[210] Our colleague Côté J., however, sees the matter differently. In our respectful view, she disregards this Court's authoritative statement of the law in *Caisse populaire Desjardins de l'Est de Drummond*. Specifically, she concludes that priming charges are not "security interests" under the *ITA* because "[c]ourt-ordered charges are unlike conventional consensual and non-consensual security interests in that they are integrally connected to insolvency proceedings that operate for the benefit of the creditors as a group" (Côté J.'s reasons, at para. 62 (emphasis deleted), quoting R. J. Wood, "Irresistible Force Meets Immovable Object: *Canada v. Canada North Group Inc.*" (2020), 63 *Can. Bus. L.J.* 85, at p. 98). With respect, nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors.

[211] Further, and irrespective of the nature of *CCAA* proceedings, our colleague's conclusion is irreconcilable with this Court's holding in *Caisse populaire Desjardins de l'Est de Drummond* and with the "expansive definition" Parliament adopted to maximize recovery (*Caisse populaire Desjardins de l'Est de Drummond*, at para. 14). The fact that the instrument is court-ordered and is for the presumed benefit of all creditors is irrelevant. It does not affect *the nature* of the priming charges — to secure the payment of an obligation — which is the only relevant criterion (para. 15). As for the express inclusion of "priming charges" in the definition and their creation

by court order, we reiterate that “*sûreté*” and “*charge*” are explicitly included “however or whenever arising, created, deemed to arise or provided for” (*ITA*, s. 224(1.3)).

[212] Nor is Professor Wood’s commentary, and by extension, the reasoning in *DaimlerChrysler Financial Services (Debis) Canada Inc. v. Mega Pets Ltd.*, 2002 BCCA 242, 1 B.C.L.R. (4th) 237, and *Minister of National Revenue v. Schwab Construction Ltd.*, 2002 SKCA 6, 213 Sask. R. 278, of any avail to our colleague Karakatsanis J. (para. 102; see also Wood, at p. 98, fns. 51-52). While those judgments held that finance leases and conditional sales agreements did not fall under the definition of s. 224(1.3) of the *ITA* because they were not specifically listed, that reasoning was later squarely rejected in *Caisse populaire de l’Est de Drummond*. And, were that not enough, *Mega Pets* and *Schwab*, unlike the instant case, dealt with situations where property was not transferred to the debtor, which facts were treated as determinatively supporting the conclusion that the instruments in those cases were not “security interests”. For example, under a conditional sales agreement, the seller does not have an interest in the debtor’s property because ownership rests with the seller until performance of the obligation (*Mega Pets*, at para. 32). By contrast, the priming charges secure payment out of property that remains the debtor’s.

[213] Finally, this Court’s interpretation of “security interest” in *Caisse populaire de l’Est de Drummond* is confirmed by the French version of the text. “*Sont en particulier des garanties*” is illustrative, not limitative. *Le Robert* (online) defines “*en particulier*” (in particular) as [TRANSLATION] “particularly, among others,

especially, above all” (emphasis added). Unsurprisingly, the French version of s. 224(1.3) has been described as being [TRANSLATION] “as broadly worded as possible” (R. P. Simard, “Priorités et droits spéciaux de la couronne”, in *JurisClasseur Québec — Collection droit civil — Sûretés* (loose-leaf), vol. 1, by P.-C. Lafond, ed., fasc. 4, at para. 20). There is no discordance between both versions of the text. The French version conforms perfectly to the English text’s use of the verb “includes”, and confirms the plain reading of the English version.

[214] Respectfully, our colleagues Côté and Karakatsanis JJ. frustrate the clear will of Parliament. Clear, all-inclusive language should be treated as such, and not circumvented by straining to draw distinctions of no legal significance whatsoever or by searching for what is not specifically mentioned in order to avoid the otherwise inescapable conclusion that Parliament granted absolute priority to the deemed trusts.

(3) Conclusion

[215] It is this simple:

1. the Fiscal Statutes give absolute priority to the deemed trusts for source deductions over all security interests notwithstanding the CCAA;
2. the priming charges are “security interests” within the meaning of the Fiscal Statutes; and

3. the CCAA does not subordinate the claims under the deemed trusts of the Fiscal Statutes to the priming charges.

[216] This is sufficient to decide the appeal: the deemed trusts of the Fiscal Statutes have priority over the priming charges. However, in view of the respondents' submissions that such a finding leaves the deemed trust provisions in the Fiscal Statutes in conflict with the CCAA, and that recognizing the ultimate priority of the Crown's deemed trust renders certain provisions of the CCAA meaningless, we are compelled to explain why this is not so.

C. *The CCAA and the Fiscal Statutes Operate Harmoniously*

(1) The Broad Grant of Authority Under Section 11 of the CCAA Is Not Unlimited

[217] It is not disputed that s. 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" to give effect to that supervisory role (see J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 18-19). What is in dispute, however, are the limits to this broad power.

[218] A supervising judge's authority to grant priming charges was not always contained in the CCAA. Prior to the 2009 amendments, it was derived from the courts' inherent jurisdiction (*Temple City Housing Inc., Re*, 2007 ABQB 786, 42 C.B.R. (5th)

274, at para. 14; Q.B. reasons, at para. 105). While the amendments in some respects represented a codification of the past practice, they clarified how priming charges operated (CCAA, ss. 11.2, 11.51 and 11.52). Despite being “the engine driving the statutory scheme”, s. 11’s exercise was expressly stated by Parliament to be “subject to the restrictions set out in this Act” (see 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paras. 48-49, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). Three such restrictions are significant here.

(a) *The Continued Operation of the Deemed Trusts for Unremitted Source Deductions (Section 37(2))*

[219] The first restriction on the authority to grant priming charges is found in s. 37(2) of the CCAA. This provides for the continued operation of the deemed trusts under the Fiscal Statutes in a CCAA proceeding — a point this Court *repeatedly* highlighted in *Century Services*, at paras. 78-81. At the hearing of this appeal, the respondents argued that s. 37(1) nullifies the Crown’s priority in respect of all deemed trusts under the CCAA, and that s. 37(2) acts merely to reincorporate the deemed trusts under the Fiscal Statutes into CCAA proceedings without their absolute priority. This tortured interpretation misconceives the effect of s. 37(1).

[220] Section 37(1) provides that, despite any deemed trust provision in federal or provincial legislation, “property of a 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”, but it is expressly made “[s]ubject to subsection (2)”. Through

s. 37(2), Parliament also preserved the operation of the deemed trusts under the Fiscal Statutes within CCAA proceedings by providing that “[s]ubsection (1) does not apply in respect of amounts deemed to be held in trust under [the Fiscal Statutes]”. In the face of Parliament’s clear direction that the deemed trusts operate “notwithstanding” any other enactment, and the express preservation of the deemed trusts in the CCAA, there is simply no basis whatsoever for reading s. 37 as invalidating the deemed trust provisions under the Fiscal Statutes only to revive them with a conveniently lesser priority. Such an interpretation finds no support in the text, context, or purpose of the statutory schemes. Rather, all those considerations support the view that the deemed trusts under the Fiscal Statutes are preserved in CCAA proceedings in both form and substance, along with their absolute priority.

[221] Before turning to the second restriction, we note each of our colleagues Karakatsanis J. and Côté J. fail to give effect to Parliament’s decision, expressed in clear statutory text, to “preserv[ve] deemed trusts and asser[t] Crown priority only in respect of source deductions” under the CCAA (*Century Services*, at para. 45). For the same reason, the reliance they place on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, is misconceived. There, the Court held that the deemed trust created by provincial legislation was not a “true trust” so as to fall outside the debtor’s property under what is now s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”). That is not this case. Unlike the deemed trust in *Henfrey*, the deemed trusts of the Fiscal Statutes receive a particular treatment in bankruptcy and insolvency proceeding because they are preserved by s. 37(2) of the CCAA and s. 67(3)

of the *BIA*. Further, while the Court in *Henfrey* concluded that the deemed trust was ineffective in bankruptcy because the commingling of assets rendered the money subject to the deemed trusts untraceable, this rationale has no application to s. 227(4.1). In *First Vancouver*, this Court noted that “by deeming the trust to be effective ‘at any time’ the debtor is in default, the amendments serve to strengthen the conclusion that the Minister is not required to trace its interest to assets which belonged to the tax debtor at the time the source deductions were made” (para. 37). Again, no conclusions regarding the nature of the deemed trusts flow from the fact that tracing is irrelevant under s. 227(4.1): the deemed trusts are statutory instruments and the question is one of operation, *not* characterization.

(b) *Priming Charges Attach Only to the Property of the Debtor Company*

[222] The second restriction on the *CCAA*’s broad authority to grant priming charges is that the *CCAA* requires priming charges to attach only to “all or part” of the property of the debtor’s company (s. 11.2(1); see also ss. 11.51(1) and 11.52(1)). Here, Parliament evinces a clear intent to preserve the ultimate priority it afforded the deemed trusts under the Fiscal Statutes. This is because, by operation of s. 227(4.1) of the *ITA* and s. 37(2) of the *CCAA*, the unremitted source deductions are deemed *not* to form part of the property of the debtor’s company.

[223] Parliament could not have been more explicit: the source deductions are deemed never to form part of the company’s property and, 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. Whether this is a true ownership interest is irrelevant to this appeal as the legislation *deems* the Crown to obtain beneficial ownership for these purposes. It follows that the priming charges cannot supersede the Crown’s deemed trust claim because they may attach *only to the property of the debtor’s company*, of which Parliament took great care to ensure the source deductions were deemed to form no part. As Michael J. Hanlon explains:

While it has been held that an interim financing charge may rank ahead of the deemed trusts existing in favour of the Canada Revenue Agency with respect to amounts owing on account of unremitted source deductions, this appears to be incorrect. Property deemed to be held in trust pursuant to the provisions creating the deemed trust are deemed not to form part of the debtor’s estate, and given that those deemed trusts with respect to source deductions, are preserved in a CCAA context, the interim financing charge would not attach to those assets. [Emphasis added; footnotes omitted.]

(*Halsbury’s Laws of Canada — Bankruptcy and Insolvency* (2017 Reissue), at HBI-376)

(c) *The Definition of “Secured Creditor” (Section 2)*

[224] The third restriction on the CCAA’s broad authority to grant priming charges is that the court “may order that the security or charge rank in priority over the claim of any secured creditor of the company” (ss. 11.2(2), 11.51(2) and 11.52(2)). Also, the definition of “secured creditor” in s. 2(1) of the CCAA makes it manifestly clear that the Crown is not a “secured creditor” in respect of its deemed trust claims under the Fiscal Statutes:

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds

This definition highlights two relevant considerations. First, the definition should be read as encompassing two classes of creditors. And second, the use of the word “trust” must be given legal significance.

[225] As to the first consideration, we accept the Crown's submission that the proper reading of the definition of secured creditor references only two classes of secured creditors: (i) holders of direct security, and (ii) holders of secured bonds. So understood, a secured creditor means either

a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company,

or

a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, **or a trust in respect of, all or any property of the debtor company**

The reference to “trust” appears only in relation to an instrument securing a bond of the debtor company. The definition must be read as “secured creditor means . . . a holder of any bond of a debtor company secured by . . . a trust in respect of, all or any property of the debtor company”. Accordingly, holders of an interest under a deemed trust are not a third class of creditors (A. Prévost, “Que reste-t-il de la fiducie réputée en matière de régimes de retraite?” (2016), 75 *R. du B.* 23, at p. 58).

[226] While finding this interpretation “initially attractive”, the majority of the Court of Appeal ultimately rejected this reading. It did so because, irrespective of whether the definition needs a third reference to a “holder of a trust” drafted in parallel to the first two classes of creditors, the Crown’s interest could be classified as a “charge” and is therefore captured by the first class of secured creditors (C.A. reasons, at paras. 42-43). Respectfully, this is incorrect. Deemed trusts are not covered by the word “charge”. To conclude that the word “charge” encompasses “deemed trusts” under the first class of secured creditors when “charge” and “trust” are listed distinctly under the second class of secured creditors (holders of secured bonds) would be incoherent and run contrary to legislative presumptions in statutory interpretation. Why would Parliament include a specific reference to *trusts* if they are already covered by *charge*? Parliament is presumed to avoid “superfluous or meaningless words, [and] phrases” (*Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 178). The deliberate and distinct text of “trust” and “charge” shows that it was not Parliament’s intention to have holders of deemed trusts

subsumed under “charge” such that the Crown in this circumstance would become a secured creditor.

[227] In any case, if there were only one class of creditor, the Crown would not be a secured creditor with respect to the deemed trust claim under the Fiscal Statutes. While Parliament distinguished between “deemed or actual trust[s]” in s. 224(1.3) of the *ITA*, it made no such distinction in the definition of secured creditor. Parliament is presumed to legislate with intent and chose its words carefully. Our role as a court with respect to legislation is interpretation, not drafting. We must ascribe legal significance to Parliament’s choice of text — that is, to the words Parliament chose and *did not* choose.

(d) “*Restrictions*” Under Section 11 of the *CCAA*

[228] Our colleague Karakatsanis J. agrees with our analysis of the priming charge provisions, but she does not seem to view them as “restrictions” within the meaning of s. 11 because “[t]he general language of s. 11 should not . . . be ‘restricted by the availability of more specific orders’” (Karakatsanis J.’s reasons, at para. 170, citing *Century Services*, at para. 70). With respect, as a matter of law and statutory interpretation this view is simply unavailable to our colleague. Neither s. 11 nor the court’s inherent jurisdiction can “empower a judge . . . to make an order negating the unambiguous expression of the legislative will” (*Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480; see also *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32). Parliament has imposed clear

restrictions on the courts' power to give priority to priming charges. It is one thing to rely on s. 11 as a source of general authority even when other specific orders are available; it is another to misconstrue s. 11 as a source of unfettered authority to circumvent such unambiguous restrictions. While courts may use their general s. 11 power to create priming charges for purposes other than those that are specifically enumerated (see Wood, at pp. 90-91), Parliament has clearly expressed its intention to restrict any such charge in a critical way — it cannot take priority over the Crown's deemed trust.

[229] For the same reason, we respectfully find untenable our colleague Justice Moldaver's suggestion that it is unclear whether there are restrictions *internal* to the CCAA itself that would prevent a court from using its power under s. 11 to order a priming charge in priority to the Crown's deemed trust claim. This statement does not account for Parliament's clear intention, recorded in s. 37(2), to preserve the Crown's right to be paid in absolute priority over all secured creditors in CCAA proceedings. It also renders superfluous the restrictions on the court's authority to prioritize priming charges under ss. 11.2(2), 11.51(2) and 11.52(2) of the CCAA.

[230] Further, our colleague Moldaver J. says it is unnecessary to "define the particular nature or operation of the" deemed trust under the *ITA* (para. 255), and relies on the "notwithstanding" language of s. 227(4.1) of the *ITA* to determine whether the Crown's claim can have priority over priming charges. This interpretation effectively reads in a conflict in the statutory schemes, despite this Court's clear direction that "an

interpretation which results in conflict should be eschewed unless it is unavoidable” (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47). In any event, this is not an *unavoidable* conflict: there is simply *no* conflict. Parliament *avoided* any conflict between the CCAA and the ITA by imposing restrictions upon the court’s authority under s. 11 of the CCAA.

(e) *Structure of Crown Claims Under the CCAA*

[231] Finally, while not a “restrictio[n] set out in [the CCAA]”, as specified in s. 11, the cogency of the statutory scheme as a whole depends on an interpretation where the Crown cannot be a secured creditor. This is so because classifying the Crown as “secured creditor” would disrupt the structure of Crown claims that the CCAA clearly defines at ss. 37 to 39 (Wood, at p. 98). Section 37 applies to deemed trust claims, with s. 37(1) providing that deemed trusts in favour of the Crown are ineffective under the CCAA, as a general rule, and s. 37(2) providing an exemption for the deemed trust for source deductions. Section 38(1) sets out the general rule that the Crown’s secured claims rank as unsecured claims, with specific exemptions at s. 38(2) and (3). Finally, s. 39(1) preserves the Crown’s secured creditor status if it registers before the commencement of the CCAA proceedings but, under s. 39(2), that security is subordinate to prior perfected security interests.

[232] This leads us to question why Parliament would expressly “preserve” the deemed trusts of the Fiscal Statutes by operation of s. 37(2), only then to rank the Crown as an unsecured creditor by the operation of s. 38(1). Unlike the interpretation

that affords the deemed trusts ultimate priority, allowing the Crown to be reduced to an unsecured creditor in respect of its deemed trust claims would render s. 37(2) almost meaningless. Further, this interpretation would require the Crown to register its claim under s. 39(1) to preserve its status because the deemed trust is not afforded the exemption under s. 38. It would be illogical for Parliament to confer greater protection on secured claims afforded an exemption under s. 38(2) or (3) than it conferred on deemed trusts for source deductions, when the clear objective was to confer “absolute priority” on the latter (*First Vancouver*, at paras. 26-28).

[233] We note that Professor Wood is not alone in recognizing that “sections 38 and 39 of the CCAA govern the conditions upon which a Crown claim can be viewed as ‘secured’ for the purposes of the CCAA” (F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §79.2). Since the deemed trusts for unremitted source deductions under the Fiscal Statutes do not meet the conditions of these sections, it follows that the Crown’s claim is not “secured”.

[234] In our view, a plain reading of the definition of secured creditor within the context of the broader statutory scheme results in a single inescapable conclusion. That is, there are three classes of Crown claims under the CCAA: (1) claims pursuant to deemed trusts continued under the CCAA; (2) secured claims; and (3) unsecured claims. The claims for unremitted source deductions fall under the first type: claims pursuant to deemed trusts continued under the CCAA.

(2) Recognizing the Ultimate Priority of the Crown's Deemed Trust Does Not Defeat the Purpose of any Provision of the CCAA

[235] For two further and related reasons, the majority at the Court of Appeal and the respondents resist the conclusion that the Crown's deemed trust enjoys absolute priority.

(a) *Protection of Crown Claims Under Section 6(3)*

[236] First, the majority held that granting ultimate priority to the deemed trusts would render s. 6(3) of the CCAA meaningless. This provision prohibits the court from sanctioning a compromise or arrangement unless it provides for payment in full to the Crown, within six months of the sanction of the plan, of all amounts due to the Crown. The majority reasoned that if the Crown is always paid first for its deemed trust claims under the Fiscal Statutes, there would be no need to protect the Crown claims under s. 6(3).

[237] Respectfully, this conclusion is erroneous. A review of the purpose and scope of s. 6(3) of the CCAA is clear: it operates only where there is an arrangement or compromise put to the court, and it protects the entirety of the Crown claim pursuant to s. 224(1.2) of the ITA and similar provisions of the Fiscal Statutes. This includes claims *not* subject to the deemed trusts under the Fiscal Statutes, such as income tax withholdings, employer contributions to employment insurance and CPP, interest and penalties. In contrast, the deemed trusts arise immediately and operate continuously

“from the time the amount was deducted or withheld” from the employee’s remuneration, and apply to *only those* deductions. It follows, then, that, 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*. This is because most of the Crown’s claims rank as unsecured under s. 38 of the *CCAA*.

[238] It bears emphasizing that s. 6(3) does *not* apply where no arrangement is proposed or to *CCAA* proceedings which involve the liquidation of the debtor’s assets. Such “liquidating *CCAAs*” are “now commonplace in the *CCAA* landscape” (*Callidus Capital Corp.*, at para. 42). The absolute priority of the deemed trusts under the Fiscal Statutes, continued by s. 37(2) of the *CCAA*, provides protection to the Crown’s claim for unremitted source deductions in liquidating *CCAAs*. Each of our colleagues Côté and Karakatsanis JJ. deprive the Crown of its guaranteed entitlements in such cases, despite Parliament having unambiguously granted “absolute priority” to claims for unremitted source deductions (Department of Finance Canada).

[239] We note that our colleague Karakatsanis J. does not conclude that s. 6(3) is rendered nugatory by our interpretation; rather, she says that, since the term “beneficial ownership” as it is used in the deemed trusts does not have the same meaning at common law, we must look to the *CCAA* to ascertain the Crown’s rights. This “manipulation of private law concepts, without settled meaning”, she further says,

raises the question of *how* the deemed trust survives under the CCAA (para. 181). And the answer, she finds, is furnished by s. 6(3).

[240] This is wrong for three reasons. First, there is no question as to how the deemed trust survives. Section 37(2) operates to exempt the deemed trusts under the Fiscal Statutes from any change in form or substance under the CCAA; this continues the operation of s. 227(4.1), which confers absolute priority on the Crown’s claim to the deemed trusts under the Fiscal Statutes. In other words, the deemed trust survives as it was under the Fiscal Statutes. It is unsurprising, therefore, that this Court did not opine on *how* the trust “survives” in CCAA proceedings in *Century Services*: it is, with respect, plain and obvious.

[241] Secondly, our colleague Karakatsanis J.’s suggestion that the understanding of the rights conferred on the Crown under the deemed trust must arise from reading s. 6(3) of the CCAA entirely bypasses the text of the *ITA* which specifically sets out those rights. After providing that the Crown has “beneficial ownership” of the value of the unremitted source deduction, the *ITA* continues: “the proceeds of such property shall be paid to the Receiver General in priority to all such security interests” (s. 227(4.1)). This is the right of the Crown under the deemed trust, and our colleague fails to give effect to this right.

[242] Finally, as we have discussed, s. 6(3) protects different interests than those captured by the deemed trusts. If s. 6(3) were to exhaust the Crown’s rights under the CCAA, our colleague Karakatsanis J. correctly observes that “there may be some risk

to the Crown that the plan [under s. 6(3)] may fail, and the Crown may not be paid in full if the restructuring dissolves into liquidation and the estate is depleted in the interim” (para. 155 (emphasis added)). This, however, only supports our interpretation. The right “not to have to compromise” under s. 6(3) is a right independent of the Crown’s right under deemed trusts (para. 155 (emphasis deleted)).

(b) *Power to Stay the Crown’s Garnishment Right (Section 11.09)*

[243] Secondly, the majority at the Court of Appeal and the respondents say that giving effect to the clear statutory wording would be contrary to the purpose of s. 11.09 of the CCAA, which grants courts the power to stay the Crown’s garnishment right under the ITA (C.A. reasons, at para. 54). This demonstrates, the argument goes, Parliament’s intent to have the court exercise control over the Crown’s interests while monitoring the restructuring proceedings. On this view, granting absolute priority to the deemed trusts under the Fiscal Statutes necessarily implies that s. 11.09 of the CCAA does not apply to the deemed trust claim.

[244] Again respectfully, this is not so. A court-ordered stay of garnishments under s. 11.09 of the CCAA *can* apply to the Crown’s deemed trust claims under the Fiscal Statutes because the deemed trust provisions and s. 11.09 each serve different purposes: the deemed trusts grant a priority to the Crown, while s. 11.09 imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the ITA. In other words, s. 11.09 permits the Court to stay the Crown’s ability to enforce its claims under the deemed trusts, but it does not remove its priority.

[245] The critical point is this: 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 meaningless. To the contrary, s. 6(3) and s. 11.09 respect the ultimate priority of the deemed trusts under the Fiscal Statutes by allowing for the ultimate priority of the Crown claim to persist, while not frustrating the remedial purpose of the *CCAA*.

(3) Conclusion

[246] As with our discussion of the deemed trust's absolute priority, the harmonious operation of the *CCAA* and the Fiscal Statutes can be summarized as follows:

1. the *CCAA* preserves the Crown's right to be paid in priority to all security interests for its claims for source deductions under the Fiscal Statutes;
2. under the *CCAA*, the Crown is not a "secured creditor" in respect of its deemed trust claims under the Fiscal Statutes;
3. as priming charges can attach only to the debtor's property, and as Parliament has made it clear that unremitted source deductions form no part of the debtor's property, the Crown's interest under the deemed trust is not subject to the priming charges;

4. section 6(3) of the *CCAA*, which operates only where there is an arrangement or compromise put to the court, protects the entirety of the Crown claim under s. 224(1.2) of the *ITA* and similar provisions of the Fiscal Statutes; and
5. the deemed trust's grant of priority to the Crown is unaffected by s. 11.09, which instead imposes conditions on when and how the Crown can enforce its garnishment rights under s. 224(1.2) of the *ITA*.

D. *Policy Reasons Do Not Support a Different Interpretation*

[247] The majority of the Court of Appeal and the respondents place significant weight on what they view as the potentially “absurd consequences” that would result from concluding that the deemed trusts under the Fiscal Statutes have priority over the priming charges. The same point implicitly underlies our colleague Côté J.’s reasons. Indeed, the majority at the Court of Appeal went as far as to warn that, under this interpretation, interim financing would “simply end”, an assertion that “almost certainly goes too far” (C.A. reasons, at para. 50; Wood, at p. 99). It added that it would lead to more business failures and, in turn, undermine tax collection (paras. 48 and 50). We disagree.

[248] The “absurd consequences” identified by the majority at the Court of Appeal rest on faulty premises. The conclusion that interim financing would “simply end” was not supported by the record. The majority extrapolated from admittedly

incomplete and dated data about interim financing drawn from a textbook which does not indicate the presence of a deemed trust claim. This sweeping statement elides cases where there is no interim lending and cases, such as this one, where the debtor's assets are sufficient to satisfy both the interim lending and the Crown's deemed trust claim. This is an omission that cannot be readily ignored as there are usually enough funds available to satisfy both the Crown claim *and* the court-ordered priming charges (Wood, at p. 100). Equally unfounded is the majority's claim that confirming the priority of the deemed trusts of the Fiscal Statutes would "inject an unacceptable level of uncertainty into the insolvency process" (C.A. reasons, at para. 51). A company applying under the CCAA is required to provide its financial statements (s. 10(2)(c)), which include the source deductions owed to the Crown. Interim lenders can rely on this information to evaluate the risk of providing financing.

[249] Moreover, the majority at the Court of Appeal did not consider that Parliament can, and did, choose to prioritize the integrity of the tax system over the interests of secured creditors. Indeed, and with respect, the majority's own interpretation arguably itself produces absurd results, whereby employees' gross remuneration are conscripted as a subsidy to secure interim financing and the services of insolvency professionals.

[250] We therefore do not remotely see the consequences of our interpretation as rising to the level of absurdity. And Parliament has unambiguously struck the balance it considered appropriate in pursuit of the dual objectives of collecting unremitted

source deductions, which are not the property of the debtor, and avoiding the “devastating social and economic effects of bankruptcy” (*Century Services*, at para. 59, quoting *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 (C.A.), at p. 306, per Doherty J.A., dissenting). Whether s. 227(4.1) of the *ITA* is an effective means to protect the fiscal base or whether “the Crown is biting off the hand that feeds it” are not questions that this Court has the competence or legitimacy to answer (C.A. reasons, at para. 48).

[251] In any event, even were there evidence that giving priority to the deemed trusts under the Fiscal Statutes over the priming charges produced absurd results, our conclusion would be no different. The presumption against absurdity is exactly that: a presumption. Nothing more. Illogical consequences flowing from the application of a statute do not give rein to courts to disregard clear legislative intent. As Lamer C.J. noted in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 41, “Parliament . . . has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly.”

[252] Here, Parliament’s intention to give absolute priority to the deemed trust of the Fiscal Statutes is unequivocal. Our role is to give effect to this intention.

III. Disposition

[253] We would allow the appeal. The respondents should be entitled to costs in accordance with “Schedule B” to the regulations (*Rules of the Supreme Court of*

Canada, SOR/2002-156). There are no exceptional circumstances that would justify enhanced costs. Despite the appeal being moot, it was not improper for the Crown to seek the correct interpretation of the Fiscal Statutes.

The following are the reasons delivered by

MOLDAVER J. —

[254] I have had the benefit of reading the reasons of my colleagues, Justice Côté, Justice Karakatsanis, and Justices Brown and Rowe. While I substantially agree with the analysis and conclusions of Brown and Rowe JJ., there are two points that I wish to address.

[255] First, unlike Brown and Rowe JJ., I see no reason to define the particular nature or operation of the Crown’s interest under s. 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), in the context of proceedings under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”). While a future appeal may require this Court to determine exactly how the Crown’s interest under s. 227(4.1) “survives”, and whether it amounts to some form of ownership interest in the debtor’s property, as Brown and Rowe JJ. maintain, some form of security interest in that property, or something else entirely (e.g., a right not to have to compromise, as Karakatsanis J. maintains), such an inquiry is not necessary in this case. Properly interpreted, the relevant provisions of the *CCAA* and *ITA* work in harmony to

direct that the Crown's interest — in whatever form it takes — must be given priority over court-ordered priming charges. This conclusion is sufficient to dispose of the appeal.

[256] In my view, to the extent that Brown and Rowe JJ. conclude that the Crown's interest under s. 227(4.1) affords the Crown beneficial ownership over the source deductions such that "the source deductions are deemed never to form part of the company's property", they have effectively decided the appeal by two paths — first, by way of the Crown's absolute priority under s. 227(4.1), and second, by way of the Crown's beneficial ownership over any unremitted source deductions (para. 223). As they note, if the Crown's interest amounts to an ownership interest and unremitted source deductions do not form part of the debtor company's property, priming charges could never attach to those source deductions, whether ordered under the specific priming charge provisions or the court's broad power under s. 11 of the *CCAA* (paras. 222-23). If this is indeed the case, it is not clear that the issue of competing priority between the Crown's interest and court-ordered priming charges ever arises, as the source deductions would be simply inaccessible to anyone other than the Crown. As I am not necessarily convinced that the Crown's interest under s. 227(4.1) amounts to an ownership interest, and as the Crown's absolute priority does not depend on this conclusion, I would leave the question of the nature of the Crown's interest to another day.

[257] Second, while I agree with Brown and Rowe JJ. that s. 37(2) of the CCAA can be interpreted as an internal restriction on s. 11, I hesitate to accept this conclusion, as it strikes me that in order to give proper effect to Parliament’s intention for s. 11 to serve as “the engine” that drives the CCAA and empowers supervising judges to further its remedial objectives, any restrictions on that discretionary power should be explicit and unambiguous (*9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 48, citing *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 36). With respect, s. 37(2) does not amount to such an explicit and unambiguous restriction. Rather, s. 37(2) is a simple exception to s. 37(1), which serves to nullify the effect of any statutory provision that deems property to be held in favour of the Crown:

37(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a 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.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*

[258] In effect, then, the function of s. 37(2) is merely to preserve the Crown’s deemed trust under s. 227(4.1) from extinguishment under s. 37(1). In preserving the Crown’s interest, however, “s. 37(2) does not explain what to do with that right for the purposes of a CCAA proceeding”, nor does it say anything that would limit the court’s power under s. 11 to order priming charges in priority to the Crown’s deemed trust claim (Karakatsanis J.’s reasons, at para. 153). Indeed, as Karakatsanis J. notes, “There is no provision in the CCAA stipulating what the court can do with trust property and

no provision in the *CCAA* conferring more specific jurisdiction on whether a priming charge can rank ahead of the beneficiary of a deemed trust” (para. 176). Rather, it is only when one looks to s. 227(4.1) that the absolute priority of the Crown’s interest — and the resulting limitations on s. 11 — become apparent. It is thus not entirely clear that interpreting s. 37(2) as an internal restriction accords with the function of s. 37(2) or the leeway that Parliament intended for the scope of powers under s. 11. In other words, the relationship between ss. 11 and 37(2) may not be as clear-cut as my colleagues seem to suggest. Accordingly, while I ultimately agree with Brown and Rowe JJ. that s. 37(2) can be interpreted as an internal restriction so as to avoid a conflict between the *CCAA* and *ITA*, I feel it important to explain that, if this interpretation is mistaken, s. 11 is nonetheless restricted by the external text of s. 227(4.1).

[259] If s. 37(2) does not amount to an internal restriction on s. 11, using s. 11 to prioritize priming charges over the Crown’s deemed trust claim would put the provision in direct conflict with s. 227(4.1) which, as my colleagues Brown and Rowe JJ. have explained, requires that the Crown’s claim be ranked in priority to all security interests, including priming charges. The direct conflict would trigger the “[n]otwithstanding” language in s. 227(4.1), which states that “[n]otwithstanding . . . any other enactment of Canada”, the Crown’s claim is to have priority. This language thus imposes an external restriction on the court’s power under s. 11. Indeed, the supremacy of s. 227(4.1) is implicitly acknowledged by the text of s. 11 as, unlike s. 227(4.1), which operates despite “any other enactment of Canada”, s. 11 only operates “[d]espite

anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*”, but not despite anything in the *ITA*. Accordingly, while the court’s discretionary authority under s. 11 could, in theory, empower a court to subordinate the Crown’s interest in unremitted source deductions, that power is ultimately stopped short by the express language of s. 227(4.1).

[260] In outlining this position, I consider it important to contextualize this Court’s statement in *Callidus* that “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’” (para. 67). The focus in *Callidus* was on the discretionary authority of supervising *CCAA* judges within the confines of the *CCAA* itself; it was not on addressing the question of the authority of *CCAA* judges to apply s. 11 in the face of overriding federal legislation. Respectfully, where, as here, Parliament has expressly indicated the supremacy of a statute over the provisions of the *CCAA*, the court’s power under s. 11 is correspondingly restricted.

[261] 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.

[262] A necessary consequence of the absolute supremacy of the Crown’s deemed trust claim over court-ordered priming charges is that the Crown’s interest under s. 227(4.1) cannot be given effect by s. 6(3) of the *CCAA*. Section 6(3) of the *CCAA* provides that

[u]nless 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*

[263] In my view, there are two reasons why s. 6(3) cannot represent the Crown's interest under s. 227(4.1). First, the focus of s. 6(3) is to establish a timeframe for payment to the Crown of certain outstanding debts in the event that the debtor company succeeds in staying viable as a going concern. By contrast, s. 227(4.1) is focused on ensuring the *priority* of the Crown's claim. The key point of distinction here is that, under s. 6(3), 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, as established by the *CCAA* and *ITA*. Second, as s. 6(3) applies only where a compromise or plan of arrangement is reached, the Crown's deemed trust claim would not operate in the event that a liquidation occurred under the *CCAA*, thereby depriving the Crown of its priority over security interests in such circumstances. Again, this potential consequence would be at odds with the clear intention of the *CCAA* and *ITA*.

[264] Before concluding, I would note that 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.

[265] I would, therefore, allow the appeal. The respondents are entitled to costs in this Court in accordance with Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

Appeal dismissed with costs, ABELLA, MOLDAVER, BROWN and ROWE JJ. dissenting.

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors 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: Duncan Craig, Edmonton.

Solicitors for the respondent the Business Development Bank of Canada: Cassels Brock & Blackwell, Calgary.

Solicitors for the intervener the Insolvency Institute of Canada: Blake, Cassels & Graydon, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: Osler, Hoskin & Harcourt, Calgary.

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 23, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"
Petitioners

And

ERNST & YOUNG INC.
Monitor

**CORRECTED JUDGMENT
ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING
AND FOR DISTRIBUTION OF CERTAIN PROCEEDS
OF THE MPCo SALE TRANSACTION TO THE TRUSTEE
FOR THE SENIOR SECURED NOTES (#312)**

[1] **WHEREAS** the Abitibi Petitioners and the Term Lenders have requested the Court to issue this Corrected Judgment so as to clarify that it does not apply to Abitibi-Consolidated (U.K.) Inc., a Petitioner that was added to the schedule of Abitibi Petitioners by Order of this Court rendered on November 10, 2009, namely after the

ULC DIP Motion was argued but before the related Judgment of the Court was rendered on November 16, 2009;

[2] **WHEREAS** the request is justified to avoid any misunderstanding as to the exact scope of this Court's Judgment;

[3] **WHEREAS** a small correction to paragraph [17] of the conclusions and the addition of a new paragraph [21.1] are necessary to that end;

FOR THESE REASONS, THE COURT:

ULC DIP Financing

[1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[2] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- a) a first draw of \$130 million to be advanced at closing;
- b) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- c) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[3] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[4] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[5] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[6] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[7] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[8] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[9] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[10] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[11] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[12] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[13] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and

manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[14] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[15] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[16] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[17] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC

DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[18] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[19] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[20] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[21] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this

purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

[22] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[23] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

Me Sean Dunphy and Me Joseph Reynaud
STIKEMAN, ELLIOTT
Attorneys for Petitioners

Me Robert Thornton

THORNTON GROUT FINNIGAN
Attorneys for the Monitor

Me Jason Dolman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Me Alain Riendeau
FASKEN MARTINEAU DuMOULIN
Attorneys for Wells Fargo Bank, N.A., Administrative Agent under the Credit and
Guarantee Agreement Dated April 1, 2008

Me Marc Duchesne
BORDEN, LADNER, GERVAIS
Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank
National Association, Indenture Trustee for the Senior Secured Noteholders

Me Frederick L. Myers
GOODMANS LLP
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc.
and certain of its Affiliates

Me Jean-Yves Simard
LAVERY, DE BILLY
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc.
and certain of its Affiliates

Me Patrice Benoît
GOWLING LAFLEUR HENDERSON LLP
Attorneys for Investissement Québec

Me S. Richard Orzy
BENNETT JONES
Attorneys for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.

Me Frédéric Desmarais
McMILLAN LLP
Attorneys for Bank of Montreal

Me Anastasia Flouris
KUGLER, KANDESTIN, LLP
Attorneys for Alcoa

Date of hearing: November 23, 2009

SCHEDULE "A"
ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: NOVEMBER 16, 2009

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"

Petitioners

And

ERNST & YOUNG INC.

Monitor

JUDGMENT

**ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING
AND FOR DISTRIBUTION OF CERTAIN PROCEEDS
OF THE MPCo SALE TRANSACTION TO THE TRUSTEE
FOR THE SENIOR SECURED NOTES (#312)**

INTRODUCTION

[1] In the context of their CCAA¹ restructuring, the Abitibi Petitioners² present a Motion³ for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("**MPCo**") sale transaction to the Senior Secured Noteholders ("**SSNs**").

[2] More particularly, the Abitibi Petitioners seek:

- 1) Orders authorizing Abitibi Consolidated Inc. ("**ACI**") and Abitibi Consolidated Company of Canada Inc. ("**ACCC**") to enter into a Loan Agreement (the "**ULC DIP Agreement**") with 3239432 Nova Scotia Company ("**ULC**"), as lender, providing for a CDN\$230 million super-priority secured debtor in possession credit facility (the "**ULC DIP Facility**").

The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN\$282.3 million (the "**ULC Reserve**"), with terms that will be substantially in the form of the term sheet (the "**ULC DIP Term Sheet**") attached to the ULC DIP Motion;

- 2) Orders authorizing the distribution to the SSNs of up to CDN\$200 million upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

- 3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "**ACI DIP Charge**") in respect of the ACI DIP Facility by an amount of CDN\$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

² In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "**Distribution Motion**") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Committee**" and "**Trustee**", collectively the "**SSNs**") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "**ULC DIP Motion**") dated November 9, 2009.

³ *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "**ULC DIP Motion**").

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "**Term Lenders**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "**Lien Holders**") arising under paragraph 61.10 of the Second Amended Initial Order.

[3] The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

[4] Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee (the "**Bondholders**") opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

[5] In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN\$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

[6] Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

THE MPCo SALE TRANSACTION

[7] The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

[8] Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec ("**HQ**") agreed to pay ACCC CDN\$615 million (the "**Purchase Price**") for ACCC's 60% interest in MPCo.

[9] Of this amount, it is expected that (i) CDN\$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN\$31 million will be held by HQ for two years to secure various indemnifications (the "**HQ Holdback**"); (iii) certain inter-party accounts will be settled; (iv) the CDN\$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

[10] That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been

contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable⁴.

[11] Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

[12] To that end, the SSNs' claim of US\$477,545,769.53 (US\$413 million in principal and US\$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

[13] In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

- a) Approved the terms and conditions of the Implementation Agreement;
- b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;
- c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the **"MPCo Share Proceeds"**);
- d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;
- e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the **"MPCo Noteholder Charge"**) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;
- f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the **"ULC Reserve Charge"**); and
- g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

[14] The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension

⁴ See Monitor's 19th Report dated October 27, 2009.

from Investissement Quebec (“IQ”) to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

[15] Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN\$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN\$173.9 million.

THE ULC DIP FACILITY

[16] Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN\$282.3 million.

[17] This amount may be used for a limited number of purposes (the “**Permitted Investments**”) that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

[18] Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN\$230 million from the ULC Reserve as a Permitted Investment.

[19] According to the Monitor⁵, the significant terms of the ULC DIP Term Sheet are as follows:

- i) **Manner of Borrowing** – Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN\$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN\$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN\$50 million in increments of up to CDN\$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN\$50 million shall become available upon further order of the Court.
- ii) **Interest Payments** – No interest will be payable on the ULC DIP Facility;
- iii) **Fees** – No fees are payable in respect of the ULC DIP Facility;
- iv) **Expenses** – The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;
- v) **Reporting** – Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

⁵ See Monitor's 19th Report dated October 27, 2009.

- vi) **Use of Proceeds** – The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the “**Budget**”);
- vii) **Events of Default** – The events of default include the following:
 - (a) Substantial non-compliance with the Budget;
 - (b) Termination of the CCAA Stay of Proceedings;
 - (c) Failure to file a CCAA Plan with the Court by September 30, 2010; and
 - (d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;
- viii) **Rights of Alcoa** – Alcoa will receive all reporting noted above and notices of events of default. Alcoa’s consent is required for any amendments or waivers;
- ix) **Rights of Senior Secured Noteholders** – The Senior Secured Noteholders’ rights consist of:
 - (a) Receiving all reporting noted above and any notice of an Event of Default;
 - (b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;
 - (c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;
 - (d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa’s sole discretion; and
 - (e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;
- x) **Security** – Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

[20] The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN\$167 million.

THE QUESTIONS AT ISSUE

[21] In light of this background, the Court must answer the following questions:

- 1) Should the ULC DIP Facility of CDN\$230 million be approved?
- 2) Should the proposed distribution of CDN\$200 million to the SSNs be authorized?
- 3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

ANALYSIS AND DISCUSSION

1) THE APPROVAL OF THE DIP FINANCING

[22] In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN\$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

[23] In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

[24] On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US\$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US\$100 million loan to the Abitibi Petitioners by Bank of Montreal ("**BMO**"), guaranteed by IQ.

[25] The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

[26] There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

[27] The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

[28] At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

[29] On the one hand, as highlighted notably by the Monitor⁶, the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

- a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);
- b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);
- c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US\$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US\$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners' cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);
- d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;
- e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and
- f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

[30] In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

⁶ See Monitor's 19th Report dated October 27, 2009.

[31] On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

- a) Only about CDN\$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN\$335 million of liquidity (Monitor's 19th Report at paragraph 68);
- b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US\$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US\$200 million;
- c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;
- d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and
- e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US\$100 million.

[32] In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

[33] In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

[34] Finally, the provisions of section 11.2 of the amended CCAA, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

[35] Pursuant to subsection 11.2(4) of the amended CCAA, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

- a) The period during which the company is expected to be subject to CCAA proceedings;
- b) How the company's business and financial affairs are to be managed during the proceedings;

- c) Whether the company's management has the confidence of its major creditors;
- d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;
- e) The nature and value of the company's property;
- f) Whether any creditor would be materially prejudiced as a result of the security or charge; and
- g) The Monitor's report.

[36] Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the CCAA.

[37] The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

[38] In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

[39] Second, even if the ULC DIP Facility of CDN\$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

[40] Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN\$130 million. Subsequent additional draws up to CDN\$50 million will be in maximum increments of CDN\$25 million and subject to prior notice. The final CDN\$50 million will only be available with the Court's approval.

[41] As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

- a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;
- b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

- c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and
- d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

[42] Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

- a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;
- b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;
- c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;
- d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and
- e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

[43] The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

[44] Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

[45] By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

[46] In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

[47] Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

[48] Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

[49] On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) THE DISTRIBUTION TO THE SSNs

[50] The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN\$200 million.

[51] The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

[52] They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN\$27.4 million per year in accruing interest costs on the CDN\$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

[53] Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

[54] The Bondholders oppose the CDN\$200 million distribution to the SSNs.

[55] In their view, given the Abitibi Petitioners' need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the CCAA process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

[56] The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor

group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

[57] By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

[58] Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[59] In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

[60] With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

[61] To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN\$230 million ULC DIP Facility, they still contest the CDN\$200 million proposed distribution that is directly linked to the latter.

[62] The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

[63] The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

[64] To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

[65] It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better

arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

[66] The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

[67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN\$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN\$230M for the ULC DIP Facility funding.

[68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

[69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN\$173.9 million. Accordingly, out of a CDN\$200 million distribution to the SSNs, only CDN\$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN\$200 million at issue.

[70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN\$200 million to the SSNs will create at the same time interest savings of approximately CDN\$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

[71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada⁷.

[72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present CCAA reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

⁷ See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

[73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN\$200 million.

[74] In *Windsor Machine & Stamping Ltd. (Re)*⁸, Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

- a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;
- b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;
- c) The proposed distribution entails an economy of CDN\$27 million per year in interest savings; and
- d) Even taking into consideration the CDN\$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

[76] All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the CCAA. For some, it may only be a small step. However, it is a definite step in the right direction.

[77] Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

[78] This benefits a large community of interests that goes beyond the sole SSNs.

[79] From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the CCAA ultimate goals.

⁸ *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

[80] Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) THE ORDERS SOUGHT

[81] In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

[82] Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

[83] The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in CCAA proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

[84] Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this CCAA process to continue to move forward efficiently.

[85] Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

[86] For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

ULC DIP Financing

[87] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova

Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[88] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- d) a first draw of \$130 million to be advanced at closing;
- e) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- f) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[89] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[90] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[91] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the

approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[92] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[93] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[94] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[95] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[96] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[97] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[98] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[99] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[100] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[101] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior

Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[102] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[103] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate

of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[104] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[105] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[106] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[107] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First

Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[108] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[109] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

Me Sean Dunphy and Me Joseph Reynaud
STIKEMAN, ELLIOTT
Attorneys for Petitioners

Me Robert Thornton
THORNTON GROUT FINNIGAN
Attorneys for the Monitor

Me Jason Dolman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Me Alain Riendeau
FASKEN MARTINEAU DuMOULIN
Attorneys for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008

Me Marc Duchesne
BORDEN, LADNER, GERVAIS
Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Me Frederick L. Myers
GOODMANS LLP
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates

Me Jean-Yves Simard
LAVERY, DE BILLY
Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc.
and certain of its Affiliates

Me Patrice Benoît
GOWLING LAFLEUR HENDERSON LLP
Attorneys for Investissement Québec

Me S. Richard Orzy
BENNETT JONES
Attorneys for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.

Me Frédéric Desmarais
McMILLAN LLP
Attorneys for Bank of Montreal

Me Anastasia Flouris
KUGLER, KANDESTIN, LLP
Attorneys for Alcoa

Date of hearing: November 9, 2009

SCHEDULE "A"
ABITIBI PETITIONERS

21. ABITIBI-CONSOLIDATED INC.
22. ABITIBI-CONSOLIDATED COMPANY OF CANADA
23. 3224112 NOVA SCOTIA LIMITED
24. MARKETING DONOHUE INC.
25. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
26. 3834328 CANADA INC.
27. 6169678 CANADA INC.
28. 4042140 CANADA INC.
29. DONOHUE RECYCLING INC.
30. 1508756 ONTARIO INC.
31. 3217925 NOVA SCOTIA COMPANY
32. LA TUQUE FOREST PRODUCTS INC.
33. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
34. SAGUENAY FOREST PRODUCTS INC.
35. TERRA NOVA EXPLORATIONS LTD.
36. THE JONQUIERE PULP COMPANY
37. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
38. SCRAMBLE MINING LTD.
39. 9150-3383 QUÉBEC INC.
40. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

20. BOWATER CANADIAN HOLDINGS INC.
21. BOWATER CANADA FINANCE CORPORATION
22. BOWATER CANADIAN LIMITED
23. 3231378 NOVA SCOTIA COMPANY
24. ABITIBIBOWATER CANADA INC.
25. BOWATER CANADA TREASURY CORPORATION
26. BOWATER CANADIAN FOREST PRODUCTS INC.
27. BOWATER SHELBURNE CORPORATION
28. BOWATER LAHAVE CORPORATION
29. ST-MAURICE RIVER DRIVE COMPANY LIMITED
30. BOWATER TREATED WOOD INC.
31. CANEXEL HARDBOARD INC.
32. 9068-9050 QUÉBEC INC.
33. ALLIANCE FOREST PRODUCTS (2001) INC.
34. BOWATER BELLEDUNE SAWMILL INC.
35. BOWATER MARITIMES INC.
36. BOWATER MITIS INC.
37. BOWATER GUÉRETTE INC.
38. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

17. ABITIBIBOWATER INC.
18. ABITIBIBOWATER US HOLDING 1 CORP.
19. BOWATER VENTURES INC.
20. BOWATER INCORPORATED
21. BOWATER NUWAY INC.
22. BOWATER NUWAY MID-STATES INC.
23. CATAWBA PROPERTY HOLDINGS LLC
24. BOWATER FINANCE COMPANY INC.
25. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
26. BOWATER AMERICA INC.
27. LAKE SUPERIOR FOREST PRODUCTS INC.
28. BOWATER NEWSPRINT SOUTH LLC
29. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
30. BOWATER FINANCE II, LLC
31. BOWATER ALABAMA LLC
32. COOSA PINES GOLF CLUB HOLDINGS LLC

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior
Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior
Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting
Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

*Companies' Creditors Arrangement Act*¹ ("CCAA") proceeding on October 6, 2009.² Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

¹ R.S.C. 1985, c. C. 36, as amended.

² On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately \$10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the “Hedging Secured Creditors”) demanded payment of \$68.9 million. These unpaid amounts rank pari passu with amounts owing under the LP Secured Lenders’ credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately \$953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary “breathing space” to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately \$644.9 million. This included consolidated current assets of \$182.7 million and consolidated non-current assets of approximately \$462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately \$1.719 billion (increased from \$1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of \$1.612 billion and consolidated non-current liabilities of \$107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership’s consolidated revenues decreased by \$181.7 million or 15% to \$1.021 billion as compared to \$1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of \$66 million compared to consolidated net earnings of \$143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

- (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.³ As at August 31, 2009, the amounts owing by the LP Entities totaled \$953.4 million exclusive of interest.⁴
- (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling \$68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
- (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to \$75

³ Subject to certain assumptions and qualifications.

⁴ Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently \$382,889,000 in principal in Canadian dollars is outstanding along with \$458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

- (d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US \$400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the “Cash Management Creditor”).

(iii) LP Entities’ Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities’ debt totals approximately \$1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the “Special Committee”) with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the “CRA”). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the “Ad Hoc Committee”) was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee’s legal fees up to a maximum of \$250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities’ virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors’ Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the “Secured Creditors”) are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors’ plan (the “Plan”), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities’ existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities’ secured claims and would not affect or compromise any other claims against any of the LP Entities (“unaffected claims”). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities’ obligations under the LP secured claims calculated as of the date of closing less \$25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of \$25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to \$250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*⁵. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately \$1.45 billion and would be unable to continue operating their businesses.

⁵ 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed \$5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*⁶ and *Re Lehndorff General Partners Ltd*⁷.

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

⁶ 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

⁷ (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*⁸ : " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

⁸ 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."⁹ Similarly, in *Re Anvil Range Mining Corp.*¹⁰, the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."¹¹

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

⁹ Ibid at para. 16.

¹⁰ (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6, 2003).

¹¹ Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of \$25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*¹², I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the \$25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

¹² Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

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

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of \$3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.¹³ The LP Entities also request a \$10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

¹³ This exception also applies to the other charges granted.

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

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge 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.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge (“D & O charge”) in the amount of \$35 million as security for their indemnification obligations for liabilities imposed upon the Applicants’ directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank *pari passu* with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*¹⁴ as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors’ and officers’ liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

¹⁴ Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the “MIPs”). They seek a charge in the amount of \$3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans (“KERPs”) but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*¹⁵, I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*¹⁶ and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

¹⁵ Supra note 7.

¹⁶ [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*¹⁷ to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access in an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*¹⁸. In that case, Iacobucci J. stated that an

¹⁷ R.S.O. 1990, c. C.43, as amended.

¹⁸ [2002] 2 S.C.R. 522.

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

[65] In *Re Canwest*¹⁹ I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

¹⁹ Supra, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR
ARRANGEMENT OF CANWEST GLOBAL
COMMUNICATIONS CORP. AND THE OTHER
APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONCA 851
DATE: 20141201
DOCKET: C58381

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

The Bank of Nova Scotia

Plaintiff (Respondent)

and

Daniel A. Diemer o/a Cornacre Cattle Co.

Defendant (Respondent)

Peter H. Griffin, for the appellant PricewaterhouseCoopers Inc.

James H. Cooke, for the respondent Daniel A. Diemer

No one appearing for the respondent The Bank of Nova Scotia

Heard: June 10, 2014

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated January 22, 2014, with reasons reported at 2014 ONSC 365.

Pepall J.A.:

[1] The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

[2] This appeal involves a motion judge's refusal to approve legal fees of \$255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

[3] For the reasons that follow, I would dismiss the appeal.

Facts

(a) Appointment of Receiver

[4] The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately \$4.9 million (approximately \$2 million and \$2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

[5] On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in

materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

[6] Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

[7] Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable

insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

[8] The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

[9] The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.
- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of \$8.3 million. The purchase price included 170 milking cows.
- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and

sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.
- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.
- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

[10] After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

(c) Application to Approve Fees

[11] The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

[12] The Receiver's fees amounted to \$138,297 plus \$9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of \$338.38. The highest hourly rate charged by the Receiver was \$525 per hour. Fees estimated to complete were \$20,000.

[13] The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to \$255,955, plus \$4,434.92 in disbursements and \$33,821.69 in taxes for a total account of \$294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of \$643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of \$750.00. The rates of the other 10 people on the account ranged from \$950 per hour for a senior lawyer to \$195 for a student and \$330 for a law clerk.

[14] Fees estimated to complete were \$20,000.

[15] In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

[16] As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

[17] In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

[18] On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- \$100,000 of BLG's fees be approved; and

- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

[19] Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was \$500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to \$30,000.

Motion Judge's Decision

[20] On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

[21] In his reasons, the motion judge considered and applied the principles set out in *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (S.C.); and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.). The motion judge considered the nature, extent and

value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

[22] The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

[23] He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension – the hours) submitted for reimbursement."

[24] The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately \$8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

[25] The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

[26] He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of \$475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

[27] The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at \$157,500 from which the \$100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of \$4,434.92 and applicable HST.

Grounds of Appeal

[28] The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

[29] The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721, at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

[30] Under s. 243(1) of the *BIA*, the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's

accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

[31] The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

[32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para.

51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[34] In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit

Analysis: Examining Professional Fees in CCAA Proceedings” in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

[35] Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

[36] There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer’s financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

[37] For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

[38] The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association (“ABA”)’s Special Commission on the Economics of Law Practice published a study entitled “The 1958 Lawyer and his 1938 Dollar”. The study noted that lawyers’ incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers’ profits: see Stuart L. Pardau, *“Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated”* (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

[39] Typically, a lawyer’s record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

[40] This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the

hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

[41] The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

[42] Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

[43] In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed

to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

[44] In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

[45] In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair

and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[46] It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

[47] Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

[48] The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

[49] As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its

counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

[50] I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

[51] In this regard, the appellant makes numerous complaints.

[52] The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

[53] While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

[54] In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

[55] As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have

viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

[56] Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

[57] In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

[58] Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

[59] I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

[60] While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

[61] For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of \$5,500, together with disbursements and all applicable taxes.

Released:

"DEC -1 2014"
"EAC"

"Sarah E. Pepall J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree E.A. Cronk J.A."

CITATION: Re Nortel Networks Corporation et al, 2017 ONSC 673
COURT FILE NO.: 09-CL-7950
DATE: 20170127

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL
NETWORKS LIMITED, NORTEL NETWORKS GLOBAL
CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION and NORTEL NETWORKS TECHNOLOGY
CORPORATION**

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

BEFORE: Newbould J.

COUNSEL: *Jessica A. Kimmel*, for the Monitor

Susan Philpott, for the Representative Counsel of former Nortel employees

Lily Harmer, for the Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund

Byron Shaw, for the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan

Thomas McRae, for the Representative Counsel for the Nortel Canadian continuing employees

Michael E. Barrack and D.J. Miller, for the Nortel Networks UK Pension Trust Limited and the Board of the Pension Protection Fund

Adam Slavens, for Nortel Networks Inc.

Michael Wunder, for the Unsecured Creditors Committee

Gavin H. Finlayson and Amanda C. McLachlan, for the Ad Hoc Group of Bondholders

Matthew-Milne Smith, for the EMEA Debtors

John Salmas, for Wilmington Trust, N.A. as indenture trustee

HEARD: January 12, 2017

ENDORSEMENT

Introduction

[1] Ernst & Young Inc. in its capacity as Monitor of Nortel Networks Corporation (“NNC”), Nortel Networks Limited (“NNL”), Nortel Networks Technology Corporation, Nortel Networks International Corporation, Nortel Networks Global Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the “Canadian Debtors”), moves for an order passing the accounts of the Monitor and of its counsel incurred during the period January 14, 2009, the date these CCAA proceedings were commenced, through to and including May 31, 2016.

[2] The background to this sorry saga has been described in a number of decisions.¹

[3] At the time of the filing under the CCAA, Nortel consisted of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA² region, as well as the Caribbean and Latin America and Asia. NNC, the

¹ See the decision regarding the allocation of the \$7.3 billion escrowed sales proceeds: *Nortel Networks Corp. (Re)* (2015), 27 C.B.R. (6th) 175.

² EMEA is an acronym for 19 Nortel subsidiaries in Europe, the Middle East and Africa

Nortel Group's ultimate parent holding company, was publicly listed and traded on both the Toronto Stock Exchange and the New York Stock Exchange.

[4] On January 14, 2009 NNC, NNL, the wholly owned subsidiary of NNC which was its operating subsidiary and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary of NNL, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code and Nortel Networks UK Limited ("NNUK"), the principal UK subsidiary of NNL, and certain of their subsidiaries (the "EMEA Debtors") save the French subsidiary Nortel Networks S.A. ("NNSA") were granted administration orders under the UK Insolvency Act, 1986. On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

[5] The Monitor was appointed in the Initial Order of January 14, 2009 which directed that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice." It is normal in CCAA proceedings for the Monitor to pass its accounts periodically. This was no normal CCAA proceeding and the Monitor chose not to pass its accounts periodically but rather wait until the end of the proceedings. One advantage in having all of the accounts passed at this stage is that up to date information as to the level of success achieved by the Monitor, one of the key factors to be considered, is now available as a result of the settlement recently achieved in the allocation dispute.

[6] Normally a Monitor performs a neutral role as a court officer in a CCAA proceeding. However in this case there were two orders giving the Monitor extraordinary powers. On August 10, 2009, Nortel announced the departure of its then CEO, Mike Zafirovski, and on the same day five members of NNC's and NNL's boards of directors resigned. As a result of this change in

circumstances, on August 14, 2009, this Court granted an Order that expanded the Monitor's role and powers to include, *inter alia*, the ability:

- (a) to conduct, supervise and direct the sales processes for the Canadian Debtors' property or business and any procedure regarding the allocation and/or distribution of proceeds of any sales;
- (b) to cause the Canadian Debtors to exercise the various restructuring powers authorized under paragraph 11 of the Initial Order and to cause the Canadian Debtors to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Canadian Debtors in dealing with their property, operations, restructuring, wind-down, liquidation or other activities; and
- (c) to administer the claims process established pursuant to the Claims Procedure Order dated July 30, 2009 and any other claims bar and/or claims resolution process or protocol approved by the Court.

[7] Following the resignation of the Canadian Debtors' remaining directors and officers in October 2012, the Monitor's role and powers were further expanded by order dated October 3, 2012, to authorize and empower the Monitor to, amongst other things, exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors.

[8] The changing circumstances of the CCAA proceedings and the resulting expansion of the Monitor's powers have resulted in the Monitor and its counsel undertaking a scope of work that is beyond the typical role of a monitor in a CCAA proceeding. Indeed, since October 2012 substantially all activities undertaken by or on behalf of the Canadian Estate, including the massive litigation, have been undertaken by the Monitor's professionals with the assistance of the Monitor's counsel. It has been the Monitor that has been the effective defendant in the claims made against the Canadian Debtors and the effective plaintiff in the allocation trial seeking a portion of the \$7.3 billion of the escrowed sale proceeds.

[9] The provision in the Initial Order that the Monitor pass its accounts from time to time was not changed with these orders enhancing the Monitor's powers and so what is included in the accounts to be passed is far more and different than what would ordinarily be included in a Monitor's accounts to be passed.

[10] Most of the core parties in the insolvency proceedings do not object to the accounts as proposed by the Monitor being passed. This is due to the final settlement reached by them. The Canadian allocation decision became final after the Court of Appeal refused leave to appeal the decision of this Court. However appeals were brought in the U.S. from the allocation decision of Judge Gross. These appeals and the allocation of the \$7.3 billion sale escrow proceeds were finally settled after mediation by a Settlement Agreement on October 12, 2016. It was a term of the Settlement Agreement that no party to it could contest the fees and disbursements of any other party to it.

[11] The UKPC at one point in a pre-hearing conference took the position that the Monitor's motion to approve its fees and disbursements should be adjourned until after January 24, 2017, the date on which motions seeking an order sanctioning the Plan of Compromise and Arrangement proposed by the Canadian Debtors and seeking confirmation of the First Amended Joint Chapter 11 Plan of Arrangement proposed by the US Debtors would be heard in a joint hearing by this Court and by Judge Gross of the US Bankruptcy Court. The UKPC said that if the Plans were sanctioned and the Settlement Agreement became effective, it would take no position on the Monitor's fee approval motion. I declined to adjourn the Monitor's motion. At the hearing of the motion, counsel for the UKPC said that no adjournment request was now being made. Thus there is no opposition to the Monitor's motion by the UKPC.

[12] The only opposition to the passing of the accounts of the Monitor was by The Bank of New York Mellon, as Indenture Trustee to some of the bonds issued by Nortel.³ It took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts and offered a suggestion that a practical solution is to refer the matter to a Master, to an Assessment Officer or to an outside expert. Such person could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court. Counsel for the Indenture Trustee later advised that it was not taking a position on the substance of the motion and did not appear at the hearing of the motion. For reasons that will follow, I do not think such a reference is necessary, nor would it be a practical solution.

Considerations on a passing of a Monitor's accounts

[13] There are few cases dealing with the factors to consider on a passing of the accounts of a monitor. Most deal with a receiver's accounts. However I agree with Justice Topolniski in *Winalta Inc., Re* (2011), 84 C.B.R. (5th) 157 that there should be no difference in dealing with a monitor's accounts and that the onus is on a monitor to make out its case. She stated:

30 In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is

³ A majority but not all of the bondholders under the particular Indenture Trust are a party to the Settlement Agreement.

reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

[14] So far as the test for reviewing a receiver's fees is concerned, the New Brunswick Court of Appeal in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (C.A.) referred to a number of factors to be considered. These factors have been accepted in Ontario as being a useful guideline but not an exhaustive list as other factors may be material in any particular case. See *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 at para. 51 (Ont. C.A.) ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 at para. 5 (S.C. J.), aff'd (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[15] Justice Pepall further stated:

45 ... That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[16] As stated, The Bank of New York Mellon, as Indenture Trustee took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts. It offered a suggestion that a practical solution is to refer the matter to a Master, an Assessment Officer or an outside expert. I do not agree with this suggestion. In my view there is sufficient evidence to undertake a proper consideration of the accounts of the Monitor taking into account the factors to be considered in arriving at a fair and reasonable result.

[17] The time and expense of referring the accounts to someone else would be very time consuming, create further expense and delay completion of this matter that has gone on far too long. The Initial Order directed the accounts to be passed by this Court. That makes sense, particularly as no other person has the familiarity of what has gone on in the Nortel insolvency as the Court has. These considerations have led other courts to decline to send the accounts out for review by others. See *Tepper Holdings Inc., Re* (2011), 381 N.B.R. (2d) 1 (Q.B.) at para. 3; *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Comm. List]) at para. 83.

[18] The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund has been involved in these proceedings from the outset in January, 2009 and has been a member of the Canadian Only Creditors Committee (the “CCC”). The Superintendent supports the motion for an order passing the accounts of the Monitor and opposes the appointment of a special fee examiner to review the Monitor’s accounts. It takes the position that this would create unnecessary and unwarranted additional expense and potential delay by virtue of the need to educate the examiner with respect to these hugely complex proceedings, particularly if the examiner was independent of the court with additional professional costs. The Superintendent further states that it is satisfied with a high level assessment of the Monitor’s accounts in this case by this Court, given this Court’s familiarity with many of the complexities of the proceedings, and by reference to the significantly higher costs incurred by the other Estates.

[19] Morneau Shepell Ltd., was appointed the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan in October 2010 and has been actively involved in the CCAA restructuring process. It is one of the largest creditors of the Canadian Debtors. It takes the same position as the Superintendent regarding any attempt to have the accounts of the Monitor examined by some other party. It states that more litigation or court process in relation to the Monitor’s accounts should be strongly discouraged and avoided. Far too much time and too much of the Canadian estate’s resources have been consumed with seemingly endless litigation. More court process only delays, and may diminish, the distribution of assets available to creditors.

[20] Michel E. Campbell is a former engineer employed by Nortel. Since the January 2009 CCAA filing, he has been heavily involved in the proceedings as a court-appointed representative of approximately 21,000 Nortel former employees, as an active member of the Nortel Retirees and Former Employees Protection Canada (“NRPC”), and as a claimant against the Nortel estate for the loss of severance and termination pay. He estimates that he has spent over 4,000 hours on issues in the proceedings relating to employee issues. As one of the former employees and as a court-appointed Representative, he has a financial stake in these proceedings.

He too supports the passing of the Monitor's accounts and does not think a referral of the accounts to some third party is desirable. He states in his affidavit:

44. Moreover, given the volume and nature of the information provided in the Monitor's materials filed for this motion, and the fact that the fees as disclosed are subject to this Court's approval, I see no reason for another third party review or assessment. In any event, such a third party review would create more expense and delay in these proceedings, and would likely further postpone approval of the Plan of Arrangement and distributions on claims, which is far from desirable. The Former Employees have been waiting now for almost eight years to receive some payment for their losses. Further, it would be difficult for a third party who lacks background knowledge of this case to conduct a reliable, meaningful or accurate assessment of the Monitor's fees without the expenditure of considerable additional time and resources of the Monitor to provide information to the third party reviewer. This Court is by far the more appropriate arbiter of the Monitor's fees.

[21] This case requires an overall assessment of the work done and a consideration of the results achieved. A line by line particularization of each particular job and each particular invoice would involve no doubt hundreds of thousands of dollars, taken the amount of activity and time involved in various matters. As well, in this case it is by no means the case that each task was discrete and could easily be separated out. As was stated by Justice Pepall, the value provided should pre-dominate the consideration of what a fair and reasonable amount is appropriate. A detailed assessment in this case would not be practical or serve that purpose.

Consideration of the Monitor's accounts

[22] The Monitor engaged Goodmans LLP ("Goodmans") as its Canadian legal counsel, Allen & Overy LLP ("A&O") as its U.S. legal counsel and Buchanan Ingersoll & Rooney PC ("BIR") as its Delaware local legal counsel. A large number of professionals from the Monitor's firm E & Y, from Goodmans and from A&O were involved throughout these proceedings. The accounts from each of those firms are included in the passing of accounts with affidavits supporting the accounts.

[23] The Monitor seeks approval of its accounts in the amount of CA\$122,972,821.96, inclusive of applicable taxes. This amount includes billings for 200,065.4 professional hours at an average hourly rate of CA\$540.

[24] The Monitor also seeks to pass the accounts of Goodmans in the amount of CA\$99,994,744.85, inclusive of applicable taxes. This amount includes billings for 134,562.4 professional hours at an average hourly rate of CA\$643.

[25] The Monitor also seeks to pass the accounts of A&O in the amount of \$31,352,136.73, inclusive of applicable taxes. This amount includes billings for 46,448.4 professional hours at an average hourly rate of \$639.

[26] These amounts are enormous by any measure, even taking into account that they cover eight years of work. However, when one understands the enormity of the work that had to be done by the Monitor and its counsel to regularize the insolvency proceedings, to gather in the assets and to protect the interests of the Canadian creditors against the relentless attacks made by the other estates, these amounts become more understandable. It is unquestionable that the work of the Monitor added value to the assets.

[27] In this case, the Monitor has delivered its 132nd Report in which the services performed over the last 8 years have been extensively discussed in some 113 pages plus a number of attachments. Throughout the entire matter what has taken place has been described in the Monitor's previous 131 Reports.

[28] I do not intend to discuss at length what all the Monitor has done. Suffice it to say, the job the Monitor has performed has been massive in a case that knows no equal.

[29] The normal things required of a Monitor in any CCAA case, such as cash flow forecasting, were far more complex than normal in light of the matrix way in which the business was operated by Nortel. Prior to the CCAA filing, Nortel had no cash flow forecasting model or

cash flow reporting process that allowed for weekly cash flow forecasting and reporting on an entity level. One of the earliest activities (and focuses) of the Monitor was assisting the Canadian Debtors in preparing both a consolidated and unconsolidated global weekly cash flow forecasting and reporting process for Nortel's global operations so Nortel could understand its entity-level cash position in "real time". These and subsequent cash flow forecasting efforts by the Monitor have included: creating cash flow templates for approximately 60 Nortel entities (including joint venture entities) in North America, APAC, CALA and EMEA; creating a global process to retrieve cash flow data on a weekly basis, reviewing and analyzing variances, discussion with management from all regions, preparing consolidated, regional and entity cash flows, and reporting on cash flows and related analysis to stakeholders on a weekly basis from January 14, 2009, until Estate separation in 2011; after the Estate separations until the end of 2012, preparing and reporting on the Canadian Debtors and APAC entities cash flows to stakeholders, initially on a weekly basis and subsequently on a bi-weekly basis; continuing to prepare cash flow forecasts for the Canadian Debtors on a bi-weekly basis and reporting thereon to stakeholders; and preparing and filing cash flow forecasts and reconciliations in connection with stay extension motions in the CCAA proceedings.

[30] One issue that was central to the CCAA proceedings in the first six months was a means of addressing the significant cash burn being experienced by NNL as a result of it continuing to incur significant corporate overhead and R&D costs to preserve the enterprise value of the LOBs and coordinate global restructuring efforts notwithstanding the post-filing cessation of ordinary course payments to NNL under Nortel's transfer pricing system. The Monitor recognized these issues, in particular NNL's funding crisis and the risk it posed to both stabilizing Nortel's business and achieving either a successful restructuring or a coordinated going-concern sale of the Nortel LOBs. Accordingly, the Monitor engaged with representatives of the other Estates and key stakeholders in an attempt to address these matters.

[31] On June 9, 2009, NNL, NNI, NNUK and the Joint Administrators (among other parties) entered into an Interim Funding and Settlement Agreement (the "IFSA") that assisted in addressing these issues. First, pursuant to the IFSA, NNI agreed to pay \$157 million to the

Canadian Debtors which, together with a \$30 million payment made in January 2009, was in satisfaction of any claims of NNL for corporate overhead and research and development costs incurred by NNL for the benefit of the U.S. Debtors for the period from the Filing Date to September 30, 2009. Second, NNL agreed to pay NNUK \$20 million on a deferred basis (secured by a Court-ordered charge) and the EMEA Debtors, on the one hand, and the Canadian Debtors and U.S. Debtors, on the other, agreed to the settlement of any transfer pricing obligations between them for the period from the Filing Date to December 31, 2009. Third, pursuant to the IFSA, the Estates reached certain agreements that facilitated the LOB transactions that would be entered into in the coming months, including an agreement that the execution of sale documentation or closing of a transaction of material assets would not be conditioned upon reaching agreement on either allocation of the sale proceeds of such sale or a binding procedure for the allocation of such sale proceeds and that all sale proceeds would be deposited in escrow pending resolution of their allocation.

[32] On December 23, 2009, the Canadian Debtors, the Monitor and the U.S. Debtors entered into a Final Canadian Funding and Settlement Agreement (the “CFSA”) pursuant to which NNI agreed to make a payment of approximately \$190 million to NNL in full satisfaction of its reimbursement obligations in respect of corporate overhead, R&D, and other costs incurred by any of the Canadian Debtors for the benefit of the U.S. Debtors for the period October 1, 2009, through the end of the CCAA proceedings. In addition, pursuant to the CFSA NNL agreed to admit a \$2.0627 billion claim by NNI (the “NNI Claim”) in settlement of, among other things, any transfer pricing overpayments made by NNI to NNL for the period 2001 through 2005 and an outstanding revolving loan.

[33] Over the period March 2009 through March 2011, Nortel entered into and closed nine Lines of Business transactions involving businesses carried out by Nortel entities around the world. They were as follows:

LOB	Sale Process Approval Date	Initial (Stalking Horse) Sale Price	Final Sale Price	% Increase in Sale Price	Closing Date
Layer 4-7	2/27/2009	\$17,650,000	\$17,650,000	-	3/31/2009
CDMA/LTE	6/29/2009	\$650,000,000	\$1,130,000,000	74%	11/13/2009
NGPC	9/29/2009	n/a	\$10,000,000	n/a	12/8/2009
Enterprise	8/4/2009	\$475,000,000	\$900,000,000	89%	12/19/2009
MEN	10/15/2009	\$390,000,000	\$769,000,000	97%	3/19/2010
GSM/GSM-R	10/15/2009	n/a	\$103,000,000	n/a	3/31/2010
CVAS	1/6/2010	\$282,000,000	\$282,000,000	-	5/28/2010
GSM Retained Contracts	n/a	n/a	\$2,000,000	n/a	6/4/2010
MSS	9/1/2010	\$39,000,000	\$65,000,000	67%	3/11/2011
TOTAL			\$3,278,650,000		

[34] To be noted, the final sale price for these LOB sales was far in excess of the initial stalking horse sale prices.

[35] During that period the Monitor also oversaw the sale of significant Canadian assets, including various businesses and real estate assets.

[36] Once the LOB sales had been completed a process in conjunction with the other Estates was undertaken to sell the Residual IP used by various Nortel entities around the world. This was preceded by a consideration of the potential ways to monetize NNL's portfolio of approximately 7,000 patents and patent applications that remained following the conclusion of the LOB sales including considering both a potential sale of the Residual IP and the possibility of establishing an "IP Co." Eventually it was decided after much work to sell the Residual IP.

[37] The sale of the Residual IP was by way of an auction after a stalking-horse bid from Google of \$900 million was approved. The auction brought in \$4.5 billion. During the auction the Monitor and its counsel vigorously negotiated with representatives of the other Estates and their stakeholders to ensure the auction continued when certain Estate representatives indicated

they were satisfied with the bid price achieved at that point and wanted to terminate the auction. The continuation of the auction resulted in numerous additional rounds of bidding and a further \$1.3 billion being paid for the Residual IP.

[38] The claims process in this case was enormous. A total of 1,146 claims have been filed in the CCAA Claims Process totalling approximately CA\$39.9 billion. Of the 1,146 claims filed in the CCAA Claims Process, 1,012 claims with a claim value of approximately CA\$2.9 billion (original filed claim amount of approximately CA\$12.5 billion) were classified by the Monitor as “Accepted or Reviewed and unadjusted” as at May 31, 2016. Accordingly, with respect to claims resolved through the Period, the Monitor reduced the value of those claims by approximately CA\$9.6 billion, or approximately 77%.

[39] The development of the compensation claims process was complicated by a number of factors:

- (a) Nortel’s employment records were incomplete, out of date and resided in various physical locations. This required that the Monitor spend considerable time and resources to consolidate the information, validate the data and organize it a manner that would allow for the automation of the compensation claims process. In addition, given the uncertainty over the accuracy of the data, the process had to provide employees with the opportunity to review the information and allow for the correction of data that may have been inaccurate.
- (b) The process identified approximately 20 different claim types that could be held by any particular employee. The potential combinations of such claims complicated the creation of a single claim form and necessitated extensive consultations between the representatives and the Monitor.
- (c) Each of the approximately 20 different types of claims included a number of variables and formulas that were negotiated between the Monitor and the representatives. These variables and formulas had to be explained to the claimants

in a manner that could be understood. The Monitor worked closely with the representatives to develop a user guide and glossary of terms that simplified this process.

[40] Two significant claims were made against the Canadian Debtors by the EMEA estates and by the UKPC. They were eventually litigated at enormous expense. At the outset, both EMEA and UKPC took the position that their claims should be arbitrated because of the terms of the IFSA. This issue was litigated in both this Court and in the Delaware Bankruptcy Court. Both Courts held that there was no binding agreement to arbitrate and that EMEA and UKPC had attorned to the jurisdiction of the courts. Appeals by EMEA and UKPC to the Ontario Court of Appeal and to the U.S. Third Circuit Court of Appeals were dismissed. There followed very expensive litigation of these claims.

[41] With respect to the claims made against the Canadian Debtors by the EMEA estates, although they were not capable of precise quantification, the total amount of quantified claims against NNL alone exceeded CA\$9.8 billion. In addition to unsecured claims, EMEA also asserted trust and/or proprietary claims against the Canadian Debtors' assets that could have resulted in effective priority treatment for such claims. Certain of the EMEA claims were also asserted against the Nortel directors and officers. Following completion of a lengthy and costly discovery process and several months of negotiation between the Monitor and the Joint Administrators, the EMEA Claims were settled on the eve of the commencement of the EMEA and UKPC Claims trial for a maximum admitted general unsecured claim against NNL of \$125 million. This represented very little to EMEA because Nortel's books and records indicated that the consolidated intercompany book debt payable from the Canadian Debtors to the EMEA debtors as at January 14, 2009, was approximately \$203 million. When netted against pre-filing intercompany amounts shown in Nortel's books and records to be payable by the EMEA debtors to the Canadian Debtors, there was a net \$101 million payable to the EMEA Debtors. Accordingly, the EMEA claims were settled for an amount only slightly in excess of the net consolidated pre-filing debt shown as being payable by the Canadian Debtors to the EMEA debtors in Nortel's books and records.

[42] With respect to the claim against the Canadian Debtors made by the Board of Trustees of NNUK's U.K. Pension Plan and the Pension Protection Fund (the "UKPC"), although a total liquidated claim amount was not specified, the UKPC Proofs of Claim filed by the Trustee against NNL included: (i) £495.25 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee dated November 21, 2006; (ii) \$150 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee; and (iii) an unspecified claim in respect of liability owing pursuant to the FSD regime under the *U.K. Pensions Act 2004*. Although no liquidated claim amount was specified with respect to the alleged FSD liability, the claim noted that the section 75 debt of NNUK had been estimated to be £2.1 billion as at January 13, 2009, and that the Joint Administrators had stated that an informal estimate of the section 75 debt of NNUK was \$3.055 billion. Accordingly, the FSD claim raised the possibility of a claim in excess of \$3 billion against NNL. The same FSD liability was claimed against each of the other Canadian Debtors. Accordingly, the UKPC claims contemplated aggregate claims against the Canadian Debtors of nearly \$20 billion. The FSD claims before the U.K. regulatory body were contrary to the stay imposed in the Initial Order and appropriate orders were made in this Court and upheld by the Ontario Court of Appeal. An amended UKPC claim in this CCAA proceeding asserted an FSD related claim of up to £2.1 billion against each of NNC and NNL.

[43] The UKPC claim went to trial. The issues were extremely complex and the trial lasted 15 days based on a shortened trial procedure ordered by the Court. The reasons for decision of this Court were 127 pages. All of the claims against Nortel were dismissed except for a claim for of £339.75 million, which was approximately £152 million less than the amount sought by the UKPC on account of such claim.⁴

⁴ See *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171.

[44] The allocation dispute was a heavily contested matter involving the issue of which Nortel Estates were entitled to the \$7.3 billion proceeds from the asset sales being held in escrow. A joint trial was held by this Court with Judge Gross of the U.S. Bankruptcy Court in Delaware that lasted for 24 days. It was a very complicated matter. The trial decision in this Court numbered some 115 pages. Reconsideration motions were brought in each Court, largely unsuccessful. Leave to appeal to the Ontario Court of Appeal was refused. The matter was appealed in the U.S. to the District Court. A lengthy mediation process took place with retired Judge Farnan in the U.S. and a settlement was reached in October 2016.

[45] Relative to the claims asserted by the other estates, the Canadian Estates were successful. The position of the U.S. interests at the trial of the allocation dispute was that the Canadian Debtors were entitled to only approximately \$770 million of the \$7.3 billion, or approximately 10.6% of the total sale proceeds. The position of the EMEA debtors at trial was that the Canadian Debtors were entitled to receive either \$836 million or \$2.3 billion, depending on the theory the Courts adopted. Based on the settlement of the allocation dispute reflected in the settlement, the Canadian estates will receive an allocation in excess of \$4.1 billion, or approximately 57.1% of the total sale proceeds.

[46] One other large issue that had to be dealt with was a claim by the bondholders to post-filing interest on their bonds which had the covenants of both the Canadian Debtor NNC or>NNL and the U.S. Debtor>NNI. At the time the matter was litigated, this claim for interest was in excess of \$1.6 billion. The Monitor successfully took the position that the bondholders were not entitled to any post-filing interest. A decision of this Court denying the bondholders any post-filing interest was upheld by the Ontario Court of Appeal and leave to the Supreme Court of Canada was denied. In the U.S. the matter was settled but in the end, no post-filing interest was obtained by the bondholders because the U.S. Estate was not solvent as a result of the allocation of the \$7.3 billion.

[47] Given the overlap between the \$7.3 billion allocation dispute and the EMEA and UKPC claims, an Allocation Protocol proposed by the Canadian Debtors and the Monitor (and

ultimately approved by the Courts) contemplated a joint discovery and litigation process to resolve the three claims. Unfortunately the discovery process got out of hand.

[48] The Monitor proposed certain proportionate limitations on discovery, including that each core party be restricted to identifying 10 fact witnesses and that documentary discovery be restricted to electronic documents and indices of boxes of hard copy documents. Various core parties opposed the Monitor's proposal and advocated for a discovery plan that imposed no restrictions on the number of depositions or discovery generally. Ultimately because of the need to accommodate the U.S. parties' broader discovery rights, the litigation timetable and discovery plan proposed by the U.S. debtors that imposed no restrictions on the number of depositions or on discovery generally had to be adopted.

[49] Ultimately, more than 3 million documents were produced and approximately 140 fact and expert witness depositions were conducted in, among other cities, Toronto, Montreal, Ottawa, New York, Boston, Chicago, Washington, London, Paris, Brussels and Hong Kong. In addition, the start date for the hearings contemplated by the Allocation Protocol was extended from January 6, 2014, to March 31, 2014, and subsequently to May 12, 2014, to allow for further time for the litigation and discovery process to be completed.

[50] As the custodian of the largest number of documents, the Canadian Debtors (and, by extension, the Monitor and its counsel) bore a substantially higher burden than other parties in the document review and production process. The scope of the document requests and interrogatories received by the Canadian Debtors was wide ranging and related to documents going back to the 1980s, and in some cases earlier. Given the scope and overlap of the document requests and interrogatories served by the core parties, they worked together to develop an agreed set of consolidated document requests and interrogatories, itself a significant undertaking. The consolidated document requests contained 140 total document requests grouped into 26 broad categories with more than 85 sub-categories of documents identified. Similarly, the consolidated interrogatories contained 54 individual requests spanning some 25 pages.

[51] Before the broad discovery that took place, there were several mediations. One was with a mediator in New York in which the parties tried to come to some agreement on a protocol for resolving disputes concerning the allocation of sale proceeds from sale transactions governed by the IFSA. The mediation took place in November 2010 and April 2011. The work involved on behalf of the Monitor was extensive, including having to review 43,000 documents posted in the mediation data room and other information exchanged by the Estates in advance of the mediation.

[52] There were two unsuccessful mediations in the U.S. with a retired judge to try to settle the allocation dispute. There was later a mediation with then Chief Justice Winkler in an attempt to settle the allocation dispute. The mediation was ordered in June 2011. Mediation briefs were eventually filed and mediation took place from April, 2012 until discontinued on January, 2013. There was then the final mediation in New York with retired U.S. Judge Farnan that took several months and was eventually successful.

[53] Overall, the Monitor and its Canadian counsel estimate that approximately 40% of their total fees in these proceedings relate to work done in connection with the allocation dispute, the EMEA claims and the UKPC claims, including the allocation and claims litigation and the various mediation and settlement efforts directed at resolving those disputes. The extensive discovery process, which was not the fault of the Monitor, played a large role in the costs getting out of hand.

[54] In his affidavit, Mr. Campbell described his view of the efforts of the Monitor regarding the litigation. I view his evidence as being particularly relevant and helpful. Mr. Campbell is independent of the Monitor and the Monitor's counsel and has been involved throughout the process. Mr. Campbell stated:

40. The Canadian Estate was the main target of claims globally because Nortel's head office and parent corporation were located in Canada. From early in the CCAA proceedings, the Monitor was forced to deal with massive claims and persistent attacks on Canadian assets. Even then, the Monitor was consistently the

voice of reason in what were often fractious and unnecessarily litigious cross-border proceedings. The Monitor advocated for limits on the scope of the allocation litigation process, which was rejected in favour of the more expansive American style with the hugely expensive document and deposition discovery process. The Monitor spearheaded a coordinated approach with the Canadian creditors in the mediations and Allocation Litigation which had the effect of consolidating and rationalizing resources and containing costs.

[55] Morneau Shepell Ltd., the Administrator of the Nortel pension plans has also commented positively on the actions of the Monitor and its counsel. It stated in its brief:

The Canadian estate has faced a multitude of claims asserted by the other estates and by creditors more closely aligned with the other estates. In addition, the Nortel estates and the key creditors worldwide have been engaged in a long-running allocation dispute that included a series of intense mediation efforts and a complex and hard fought cross-border trial, with subsequent appeals. On behalf of the Canadian estate, the Monitor has had to respond to and participate in all of these matters for the benefit of Canadian stakeholders. Without the extensive effort, dedication and leadership of the Monitor and its counsel, the Canadian estate would not have achieved the favourable outcomes accomplished in the claims litigation and allocation trial, nor would it have achieved the favourable resolution of the outstanding litigation by way of the settlement.

Because of its active involvement in the case and firsthand dealings with the Monitor, the Administrator observed directly the efforts of the Monitor to be mindful of costs and to seek efficiency wherever possible. As one of many examples, the Monitor was instrumental in organizing and coordinating the trial effort with creditors (where coordination was feasible) to avoid duplication of effort. Even though different positions were advanced, the Monitor did not allow that to preclude coordination to achieve efficiency. In addition, in respect of the design of the very complex trial process, the Monitor took positions directed at reducing complexity throughout the trial process.

[56] The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund spoke of the claims by the U.S. and UK/EMEA estates and bondholders to enhance their recoveries at the expense of the Canadian creditors. The Superintendent stated:

The amount of the Monitor's time and effort required to protect the Canadian Estate and its creditors by resisting all these attacks was an enormous

undertaking. Because the Monitor worked cooperatively with the CCC on these issues, duplication of many costs was avoided.

The cost savings to the Canadian Estate and the Superintendent regarding the allocation trial are significant. The Superintendent's costs and that of the CCC could have been significantly (possibly as much as 50%) higher, or more, if we did not work cooperatively with the Monitor.

[57] These comments by interested, knowledgeable but independent parties are strong evidence that the Monitor and its counsel tried to be as efficient as possible in very difficult circumstances and that overall they achieved very favourable outcomes for the Canadian creditors.

[58] There were a number of other matters that the Monitor and its counsel had to deal with during the 8 years from the time of the CCAA filing. Some included (i) dealing with and settling a large dispute with Flextronics, Nortel's largest contract manufacturer, including a \$7 billion claim; (ii) developing an employee hardship process which has provided for interim relief for employees; (iii) restructuring eleven Nortel entities in the APAC region; (iv) negotiating an employee settlement agreement covering a number of issues; (v) developing a Health & Welfare Trust allocation methodology and distribution to those entitled; (vi) estate separation and wind-down activities to enable them to become stand-alone entities; (vii) dealing with French employee claims brought by NNSA employees in the Versailles Employment Tribunal in France; (viii) selling residual IP owned by the Canadian Estate, consisting of 17 million internet protocol; (ix) dealing with environmental issues arising from several Nortel properties in Ontario and claims by the MOE; (x) settling a number of transfer pricing issues amongst the various estates; (xi) dealing with a claim by the French liquidator of NNSA brought in the Versailles Commercial Court; (xii) financial reporting and tax issues; (xiii) dealing with claims by Frank Dunn, a former CEO of Nortel, and by 110 Calgary employees; (xiv) dealing with a class action brought in New York against a number of former officers and directors of NNC under the Securities and Exchange Act; (xv) dealing with a claim brought by SNMPRI in this Court and in the U.S. In most of these issues, court proceedings were taken, often with appeals to the Ontario Court of Appeal and to the Supreme Court of Canada.

[59] SNMPRI asserted claims against the Canadian Debtors alleging unauthorized use and transfer of SNMPRI's software and claimed damages of \$200 million. It unsuccessfully sought to lift the stay to permit the case to be tried in the U.S. before a jury. In April, 2016 this Court on a summary judgment motion dismissed the bulk of the claim. Leave to appeal to the Ontario Court of Appeal was dismissed.

[60] The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund strongly supports the efforts made by the Monitor. It states:

The Monitor's motion materials reflect an enormous amount of work over many years, all ultimately in aid of maximizing recoveries in the Canadian estate. The stakes being so high; the huge number of interested and well funded parties and the lengths to which they have been prepared to go given the amounts at issue, and the global nature of Nortel, are unprecedented.

The Monitor's fee, absent context, is quite large. However, in context, from the perspective of the Superintendent, who paid its way and did not receive funding from the Estate, the fee appears fair and reasonable. The Monitor's strong, fair, balanced and practical approach to this file, from the perspective of the Superintendent, likely saved the Estate millions to tens of millions of dollars.

[61] I will deal briefly with the *Belyea* factors to be taken into account.

1. Nature, extent and value of the assets being handled

[62] There can be no question about the significant nature, extent and value of the assets that were realized upon so that they could be available to creditors.

2. Complications and difficulties encountered

[63] These proceedings are unprecedented in terms of their size, complexity, international aspects and the vast number of competing interests. It was in part due to these unprecedented

complications and difficulties that the Monitor's role and powers had to be twice expanded, first in August 2009 and again in October 2012.

[64] The Monitor, with the involvement of its counsel, has delivered 132 reports, participated in more than 200 motions and hearings before this Court and 23 leave to appeal applications and appeals before the Ontario Court of Appeal or Supreme Court of Canada, and been integrally involved in the 10 cross-border sales processes and transactions for the LOBs and residual intellectual property as well as a further 18 transactions through the relevant period in respect of other assets of the Canadian Debtors. The allocation dispute and the EMEA and UKPC Claims were hotly contested and complex.

3. Degree of assistance provided by the company, its officers or its employees

[65] The Monitor was granted enhanced powers in mid-2009 and authorized to exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors since October 2012. This has resulted from the liquidating nature of this case, including the transfer or termination of most employees by early 2010 and the ultimate resignation of the few remaining officers and directors of the Canadian Debtors in October 2012. Substantially all activities undertaken by or on behalf of the Canadian Estate have been undertaken by the Monitor's professionals with the assistance of Monitor's counsel. This expanded role has resulted in the Monitor and its counsel undertaking a significantly greater scope of work than in a typical CCAA case.

4. Time spent

[66] The billings over the relevant period comprise a combined 384,652.6 professional hours by the Monitor and its counsel. Throughout, the professional fees and disbursements of the Monitor, its counsel and other professionals being funded by the Canadian Debtors have been disclosed in Monitor's reports along with forecasts of expected fees and disbursements which were part of the restructuring costs. Starting in April 2013, the Monitor provided in its relevant reports detailed breakdowns of the Canadian Debtors' restructuring costs, including total fees for

advisors as well as an aggregate total of the fees and disbursements of the Monitor, Goodmans and A&O. In sum, there has been full disclosure throughout the period of the activities of the Monitor and its counsel, including the estimated and resulting fees and disbursements.

5. Knowledge, experience and skill

[67] To ask the question is to answer it. The professionals in this case from the Monitor and its counsel are the cream of the crop.

6 Diligence and thoroughness displayed

[68] The same applies to this question. The 132 reports of the Monitor make clear that these qualities were brought to bear.

7. Responsibilities assumed

[69] In this case, particularly with the two orders granting the Monitor extraordinary powers, the responsibilities assumed were enormous.

8. Results Achieved

[70] I have dealt with this at some length. The results achieved were commendable.

9. The cost of comparable services when performed in a prudent and economical manner

[71] I am quite satisfied that the Monitor's professional rates and disbursements, as well as those of its counsel, are comparable to the rates charged by other professional firms in the Toronto, New York or Wilmington market for the provision of similar services regarding significant complex commercial restructuring matters.

[72] Indeed, the professional fees and disbursements of the Monitor and its counsel, together with the fees and disbursements of the Canadian Debtors' main advisors, are less, and in some cases significantly less, than the fees and disbursements of the main advisors to the other Estates. The fees and disbursements of the main advisors to the Canadian Estate for the period January 14, 2009, through December 31, 2015, are approximately 76% of the fees and disbursements of the main advisors to the U.S. Estate, and approximately 51% of the fees and disbursements of the EMEA Estate advisors, as detailed in the following chart⁵:

⁵ It is apparently unclear from the information available to the Monitor whether the expenses of the EMEA Debtors include disbursements for experts. If they do, a comparison would require those expert fees to be deducted. The Canadian and US Debtors' experts' fees are not included in the chart. The chart goes to the end of December, 2015, which does not include work done since then, and so should be taken as a guide rather than as amounts fixed in stone.

Nortel Estate Main Advisors Professional Fees For the period January 14, 2009 - December 31, 2015 (in USD millions)			
	Fees	Disbursements	Total Fees & Disbursements
Ernst & Young Inc. ^{1,2}	100.1	2.9	103.0
Goodmans LLP ^{1,2}	77.8	2.4	80.2
Norton Rose Fulbright Canada LLP ^{1,2}	63.3	1.6	64.9
Gowling Lafleur Henderson LLP ²	9.0	0.2	9.2
Freshfields Bruckhaus Deringer LLP ³	7.3	1.7	9.0
Total	257.5	8.8	266.3
Allen & Overy LLP	28.5	1.6	30.1
Buchanan Ingersoll & Rooney PC	1.1	0.4	1.5
Total Professional Fees	287.1	10.8	297.9
Fees and Expenses of Main Advisors of:			
US Debtors ⁴			389.9
EMEA Debtors ⁵			581.9
1. Fees exclude undrawn retainer 2. Foreign exchange rates used based on Bank of Canada Monthly Average Noon-Exchange Rates 3. Foreign exchange rates used based on Federal Reserve Monthly Average Noon-Exchange Rates 4. US Debtors professionals included are Cleary Gottlieb Steen & Hamilton LLP, Ernst & Young LLP (US), Huron Consulting Group, John Ray, Torys LLP, Chillmark Partners, LLC and Morris, Nichols, Arsht & Tunnell LLP, based on monthly fee applications filed in the United States Bankruptcy Court for the District of Delaware 5. Based on Joint Administrators' Abstract of Receipts and Payments from January 14, 2009 to January 13, 2016			

[73] The comparison is all the remarkable when one considers the extra work that the Monitor had to do because the head office of Nortel was in Canada and the fact that the Monitor had to respond to the many issues raised in the foreign proceedings as those issues had the potential to affect the recovery by the Canadian creditors.

[74] I could be somewhat critical regarding the number of counsel in the courtroom during the allocation trial. At the outset, there were four or five lawyers in court for the Monitor. When a witness was giving evidence in Delaware, counsel for the Monitor doing the cross-examination attended in the Delaware courtroom with fewer lawyers in the Toronto courtroom. However, it was quite obvious that the Monitor risked being outmatched. The U.S. debtors had five lawyers

in the courtroom throughout the trial, as well as many in the Delaware courtroom, the EMEA debtors had two or three each day, the UKPC had usually two lawyers each day, the UCC had two and the bondholders usually had two. All of these other parties were lined up against the Monitor. After a while, the Monitor began sending fewer lawyers to court. In a case of this size and complexity, I am not in a position to know exactly what role each of the Monitor's lawyers had played in preparation for the trial or to say that they should not have been there.

[75] My general impression was that there were far too many lawyers in the courtrooms in Toronto and in Delaware, some of whom (not the Monitor's counsel) spent much time on their blackberries. The accounts of all of these other parties are not before this Court for approval.

[76] It is fair to say that each of the *Belyea* factors supports the accounts of the Monitor and its counsel being passed and I approve them.

Insolvency culture

[77] I cannot leave this passing of accounts without some discussion of what is becoming prevalent in insolvency cases in Toronto.

[78] My comments are restricted to the trial procedures. Prior to the litigation becoming the focus of the work, the parties worked very cooperatively to achieve an asset realization that was remarkable and much more than forecasted.

[79] Justice Pepall dealt recently with a receiver's costs in *Diemer*. The concerns she raised are no different than in a CCAA or BIA case. One concern is the extent of "over lawyering" a file.

[80] In my early days in this Nortel matter, Judge Gross and I faced shortly before trial a large number of "pre-trial" motions, consisting largely of motions to strike various parts of expert reports as being outside the expertise of the particular expert. There were very thick briefs,

responding briefs and reply briefs with lengthy facta. Motions of this kind are routinely made during the course of a trial without all of the briefs and facta. The motions were dismissed and the parties were left free to make such arguments during the trial. Needless to say, the issues evaporated.

[81] We were also faced with arguments over the length of affidavits that could be filed and the time available to the various parties during the trial. The debate seemed endless and Judge Gross and I had to settle the issues. In the end, the time allotted was more than necessary and it too never became an issue during the trial

[82] These sorts of things should not have occurred. The Nortel case was unique in that there were no significant secured creditors who had an interest in controlling costs. That is, there was no typical client whose own money was at stake, such as a bank, which normally would put a brake on excess lawyering taking place.

[83] There are too many occasions when a large number of lawyers will attend at court on a matter that is on consent or knowingly without opposition, usually conducted in chambers because of those circumstances. Usually there is no need for most of the lawyers to attend and no need for senior lawyers at all. Courts must be mindful when this occurs to register a concern and, if costs are in the discretion of the court, to refuse to provide costs to those who need not have attended.

[84] In Nortel, during the allocation trial, there were far too many lawyers in Court in both Toronto and Delaware. Five lawyers for a party, such as was the case invariably with the U.S. debtors, were likely not needed. That situation breeds disrespect for the legal system in general and particularly so in a case in which thousands of pensioners and disability claimants have had to wait far too long for this proceeding to end. I realize that a judge does not know what all goes on in terms of preparation, and it may be that there is a need for several counsel during a particular witness, but in the Nortel case there had been extensive discovery and all of the

evidence of the witnesses was known before the trial began and contained in affidavits or expert reports that were used as their evidence in chief.

[85] Some have criticized the Courts in this case for letting things get out of hand. It may be that the criticism is merited, but in my view there is not so much in the point. What got out of hand was the extensive discovery process that ensued once the size of the value of the residual patents at \$4.5 billion was known. The U.S. Debtors and the EMEA Debtors changed their initial position from the Canadian Debtors owning the residual patents to the U.S. Debtors taking the position that they owned all of the interests in the patents in their market and the EMEA debtors saying that the patents were jointly owned. In the allocation decision I referred to this and said:

In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation.

[86] Professor Janis Serra wrote an article in the Globe & Mail shortly after the allocation decision was made. The headline was "The Nortel judgments were fair. Uncontrolled legal costs are not". In her article, Professor Serra said:

While parties should be able to assert their claims, the disproportionate negative effects of protracted litigation on smaller creditors are tremendous.

Few people dispute that professionals need to be paid for their services and that parties need lawyers and financial professionals to help guide them through complex insolvency cases. However, the Nortel case represents the extreme in the amount of fees directed away from creditors to professionals, with more than \$1-billion already paid to the experts, illustrating the problem of uncontrolled costs.

[87] Against the wishes of the Monitor, a broader discovery process was permitted because of the rights under U.S. law permitting wide-ranging depositions. To have ignored those rights in this innovative cross-border proceeding would likely have led to reversible error of any decision made contrary to those parties who had such rights. However, what should have happened is that

the parties should have engaged in meaningful negotiations far sooner and settled the matter for the benefit of those who have lost so much in the Nortel insolvency.

[88] While there are some who would like to see the Court “punish” the lawyers in this case, it should be recognized that the only party that is subject to the Court’s jurisdiction over its costs is the Monitor. For the reasons already given, it would be unjust to center out the Monitor or its counsel for the blame.

[89] What Nortel teaches us is that the gatekeepers of expenses in insolvency cases must exercise as much vigilance as possible to see that costs are maintained at a proper level. Nortel was unusually complex, to be sure, but lessons learned can be useful for less complex insolvencies.

Conclusion

[90] The Monitor’s accounts and those of its counsel including the respective fees and disbursements incurred during the period January 14, 2009, through to and including May 31, 2016, are approved, being:

- (a) for the Monitor, CA\$122,972,821.96, inclusive of applicable taxes;
- (b) for Goodmans, CA\$99,994,744.85, inclusive of applicable taxes;
- (c) for A&O, US\$31,352,136.73, inclusive of applicable taxes; and
- (d) for BIR, US\$1,476,489.87.

Newbould J.

Date: January 27, 2017

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TARGET CANADA CO., TARGET CANADA HEALTH CO.,
TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY
(BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP.,
TARGET CANADA PHARMACY CORP., TARGET CANADA
PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz and Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and Alan Mark, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the “Monitor”) seeks approval of Monitor’s Reports 3-18, together with the Monitor’s activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies’ Creditors Arrangement Act (“CCAA”) whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. (“Rio Can”) and KingSett Capital Inc. (“KingSett”), two landlords of the Applicants (the “Target Canada Estates”). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solomon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

“provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.”

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

(2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person’s reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

- (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
- (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
- (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
- (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
- (e) provides protection for the monitor, not otherwise provided by the CCAA; and
- (f) protects creditors from the delay in distribution that would be caused by:
 - a. re-litigation of steps taken to date; and
 - b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest v. Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

25. “TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that “... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.”: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This “... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.”: *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

...

30. It is salutary to keep in mind Mr. Justice Cromwell’s caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that “could” have been raised does not fully reflect the present law.

....

30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

...

37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on “new” evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor’s Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of *res judicata* and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval is limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015



Court File No. CV-16-11527-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE

JUSTICE CONWAY

)
)
)

THURSDAY, THE 29TH

DAY OF MARCH, 2018

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
GOLF TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND
GOLF TOWN GP II INC.**

Applicants

CCAA TERMINATION ORDER

THIS MOTION made by Golf Town Canada Holdings Inc., Golf Town Canada Inc. ("GT Canada"), Golf Town GP II Inc., Golfsmith International Holdings LP and Golf Town Operating Limited Partnership (collectively, the "**Golf Town Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Brian Cejka (the "**CRO**") sworn March 22, 2018, the Eighth Report of FTI Consulting Canada Inc. ("**FTI**") as the Court-appointed Monitor of the Golf Town Entities (the "**Monitor**") dated March 22, 2018 (the "**Eighth Report**") and the affidavits sworn in support of the approval of the fees and disbursements of the Monitor and its counsel, and on hearing the submissions of counsel for each of the Golf Town Entities, the Monitor and such other counsel as were present and wished to be heard, and on reading the affidavit of service, filed:

DEFINED TERMS

1. **THIS COURT ORDERS** that capitalized terms used and not otherwise defined herein shall have the meanings given to them in the Initial Order of this Court dated September 14, 2016 (as amended, the “**Initial Order**”).

DISTRIBUTION OF FUNDS

2. **THIS COURT ORDERS** that the Monitor is authorized and directed to hold a reserve of funds from proceeds of the Golf Town Entities (the “**Reserve**”) from time to time in an amount determined by the Monitor, in consultation with counsel to the Golf Town Entities, which Reserve shall be sufficient for the payment of:

- (a) any claim secured by the Charges granted by this Court pursuant to the Initial Order;
- (b) any expense or obligation incurred by the Golf Town Entities that relates to the period from and after the date of the Initial Order or is otherwise payable pursuant to the Initial Order; and
- (c) any other amounts appropriate in the circumstances to ensure the availability of sufficient funds to undertake and complete the orderly wind-down of the Golf Town Entities and these proceedings and all ancillary activities in connection therewith, including any assignments in bankruptcy in respect of the Golf Town Entities pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”).

3. **THIS COURT ORDERS** that, notwithstanding anything to the contrary in any other Order of this Court, the Monitor is hereby authorized and directed, subject to the prior written consent of the CRO, to distribute to BNY Trust Company of Canada, in its capacity as Canadian co-trustee (the “**Trustee**”) under the Secured Notes Indenture (as defined below), in one or more distributions (each a “**Distribution**” and, collectively, the “**Distributions**”), all funds or proceeds in respect of the Golf Town Entities held by the Monitor in excess of the amount of the Reserve determined at the time of such Distribution, provided that, for greater certainty, the aggregate amount of all Distributions made to the Trustee on behalf of the Golf Town Entities shall not

exceed the aggregate obligations owing by the Golf Town Entities pursuant to the indenture dated as of July 24, 2012, as amended (the “**Secured Notes Indenture**”), pursuant to which GT Canada and Golfsmith International Holdings, Inc. (collectively with their affiliates, the “**Company**”) issued the 10.50% senior second lien notes due 2018 (the “**Secured Notes**”). For greater certainty, this paragraph shall apply to all funds or proceeds in respect of the Golf Town Entities that are held by or come into the possession of the Monitor following the CCAA Termination Date (as defined below) (the “**Post-Termination Proceeds**”).

4. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) the assignment in bankruptcy or any petition for a bankruptcy order now or hereafter issued pursuant to the BIA and any order issued pursuant to such petition; or
- (c) any provisions of any federal or provincial legislation,

the Distributions shall be binding on any trustee in bankruptcy or receiver that may be appointed and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

APPROVAL OF MONITOR’S ACTIVITIES

5. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to or on the date hereof in relation to the Golf Town Entities and these proceedings are hereby ratified and approved.

6. **THIS COURT ORDERS** that the reports of the Monitor filed to date in these proceedings (including the Eighth Report), and the activities and conduct of the Monitor described in each of such reports, are hereby approved.

APPROVAL OF FEES AND DISBURSEMENTS OF THE MONITOR

7. **THIS COURT ORDERS** that the fees and disbursements of the Monitor for the period from September 14, 2016 to February 28, 2018, and its fees and disbursements, estimated not to exceed \$60,000, for the completion of remaining activities in connection with these proceedings, all as set out in the affidavit of Paul Bishop sworn March 21, 2018, are hereby approved.

8. **THIS COURT ORDERS** that the fees and disbursements of Osler, Hoskin & Harcourt LLP, in its capacity as counsel to the Monitor, for the period from September 1, 2016 to February 28, 2018, and its fees and disbursements, estimated not to exceed \$50,000, for the completion of remaining activities in connection with these proceedings, all as set out in the affidavit of Tracy Sandler sworn March 22, 2018, are hereby approved.

TERMINATION OF CCAA PROCEEDINGS

9. **THIS COURT ORDERS** that upon the filing of a certificate of the Monitor in substantially the form attached hereto as Schedule "A" (the "**Monitor's Certificate**") confirming that all matters to be attended to in connection with the Golf Town Entities and proceedings in respect of the Company have been completed, the proceedings shall be terminated without any further act or formality (the "**CCAA Termination Date**"). For greater certainty, the Monitor's Certificate may be filed and the CCAA Termination Date may occur notwithstanding one or more Distributions are expected to occur following the CCAA Termination Date.

10. **THIS COURT ORDERS** that the Charges shall be and are hereby terminated, released and discharged as of the CCAA Termination Date. Notwithstanding the foregoing, where the Monitor continues to hold a Reserve at the CCAA Termination Date with respect to a Charge, such Charge, in an amount equal to the corresponding Reserve amount held by the Monitor, shall not be terminated, released or discharged until such time as the corresponding Reserve amount is distributed or released pursuant to the terms of this Order.

11. **THIS COURT ORDERS** that each of the Golf Town Entities shall be authorized, in its discretion or at the discretion of the Monitor, to make an assignment in bankruptcy pursuant to the BIA on or after the CCAA Termination Date, and the Monitor is hereby authorized to file any such assignment in bankruptcy for and on behalf of any Golf Town Entity and to take any

steps reasonably incidental thereto. FTI is hereby authorized to act as trustee in bankruptcy in respect of any Golf Town Entity that makes an assignment in bankruptcy pursuant to the BIA.

DISCHARGE OF THE MONITOR

12. **THIS COURT ORDERS AND DECLARES** that effective on the CCAA Termination Date, the Monitor shall be and is hereby discharged as Monitor and shall have no further duties, obligations or responsibilities as Monitor from and after the CCAA Termination Date, provided that, notwithstanding its discharge herein, the Monitor shall remain Monitor for the performance of such incidental or ancillary duties as may be required to complete the administration of the Golf Town Entities' estate or these proceedings following the CCAA Termination Date, including the duty to effect a Distribution of any Post-Termination Proceeds pursuant to the terms of this Order and the discretion to authorize an assignment in bankruptcy pursuant to paragraph 11 hereof.

13. **THIS COURT ORDERS** that, notwithstanding any provision of this Order, the termination of these proceedings or the discharge of the Monitor, nothing herein shall affect, vary, derogate from, limit or amend, and the Monitor shall continue to have the benefit of, any of the rights, approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, any other Order of this Court in these proceedings or otherwise, all of which are expressly continued and confirmed following the CCAA Termination Date, including in connection with any actions taken by FTI following the CCAA Termination Date with respect to the Golf Town Entities or these proceedings.

RELEASE

14. **THIS COURT ORDERS** that (i) the present and former direct and indirect shareholders, directors, officers, employees, legal counsel and advisors of the Golf Town Entities (or any of them) or Golfsmith International Holdings GP Inc., and (ii) the Monitor and its legal counsel (the persons listed in clauses (i) and (ii) being collectively, the "**Released Parties**") are hereby forever irrevocably released and discharged from any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, recoveries, and obligations of

whatever nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statute or otherwise) based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the CCAA Termination Date or completed pursuant to the terms of this Order in respect of the Company, the business, operations, assets, property and affairs of the Company wherever or however conducted or governed, the administration and/or management of the Company, the Secured Notes Indenture, the Secured Notes and these proceedings (collectively, the “**Released Claims**”), which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties, provided that nothing in this paragraph 14 shall waive, discharge, release, cancel or bar any claim against the Directors and Officers that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

EXTENSION OF THE STAY OF PROCEEDINGS

15. **THIS COURT ORDERS** that the Stay Period (as defined in and used throughout the Initial Order) be and is hereby extended to and including the earlier of (i) the CCAA Termination Date, and (ii) May 31, 2018.

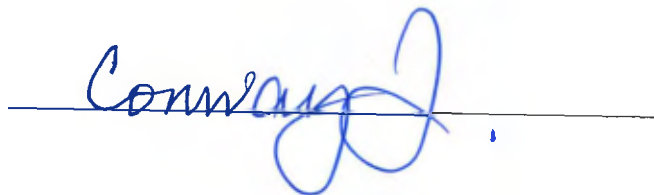
GENERAL

16. **THIS COURT ORDERS** that the Golf Town Entities or the Monitor may apply to the Court as necessary to seek further orders and directions to give effect to this Order.

17. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order and to assist the Golf Town Entities and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Golf Town Entities and the Monitor and their respective agents

as may be necessary or desirable to give effect to this Order, or to assist the Golf Town Entities and the Monitor and their respective agents in carrying out the terms of this Order.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAR 29 2018

PER / PAR:



Schedule A – Form of Monitor’s Certificate

Court File No. CV-16-11527-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
GOLF TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND
GOLF TOWN GP II INC.**

Applicants

MONITOR’S CERTIFICATE

RECITALS

A. FTI Consulting Canada Inc. was appointed as the Monitor of the Golf Town Entities in the within proceedings pursuant to an Initial Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated September 14, 2016.

C. Pursuant to the Order of this Court dated March 29, 2018 (the “**CCAA Termination Order**”), the Monitor shall be discharged and these proceedings shall be terminated upon the filing of this Monitor’s Certificate with the Court.

D. Unless otherwise indicated herein, capitalized terms used in this Monitor’s Certificate shall have the meanings given to them in the CCAA Termination Order.

THE MONITOR CONFIRMS the following:

1. All matters to be attended to in connection with the Golf Town Entities and proceedings in respect of the Company have been completed.

ACCORDINGLY, the CCAA Termination Date as defined in the CCAA Termination Order has occurred on the date set forth below.

DATED at Toronto, Ontario this _____ day of _____, 2018.

**FTI Consulting Canada Inc., in its capacity as
Monitor of the Golf Town Entities, and not in
its personal capacity**

Per: _____

Name:

Title:

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
GOLF TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND GOLF
TOWN GP II INC.**

Court File No. CV-16-11527-00CL

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

CCAA TERMINATION ORDER

GOODMANS LLP

Barristers & Solicitors

Bay Adelaide Centre

333 Bay Street, Suite 3400

Toronto, Canada M5H 2S7

Robert J. Chadwick LSO# 35165K

rchadwick@goodmans.ca

Melaney Wagner LSO# 44063B

mwagner@goodmans.ca

Bradley Wiffen LSO# 64279L

bwiffen@goodmans.ca

Tel: 416.979.2211

Fax: 416.979.1234

Lawyers for the Applicants

- 1996). The authors also found that the frequency of use of the Internet was positively related to the frequency of use of the telephone and the frequency of use of the television. The authors concluded that the Internet was a new medium for social interaction, and that it was likely to become a more important part of social interaction in the future.
20. Roberts, J. A., & Smith, P. (1997). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 2(1), 1-14.
21. Roberts, J. A., & Smith, P. (1998). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 3(1), 1-14.
22. Roberts, J. A., & Smith, P. (1999). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 4(1), 1-14.
23. Roberts, J. A., & Smith, P. (2000). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 5(1), 1-14.
24. Roberts, J. A., & Smith, P. (2001). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 6(1), 1-14.
25. Roberts, J. A., & Smith, P. (2002). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 7(1), 1-14.
26. Roberts, J. A., & Smith, P. (2003). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 8(1), 1-14.
27. Roberts, J. A., & Smith, P. (2004). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 9(1), 1-14.
28. Roberts, J. A., & Smith, P. (2005). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 10(1), 1-14.
29. Roberts, J. A., & Smith, P. (2006). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 11(1), 1-14.
30. Roberts, J. A., & Smith, P. (2007). The use of the Internet for social interaction: A study of young people. *Journal of Computer-Mediated Communication*, 12(1), 1-14.

Manuscript accepted 15 May 2008

Correspondence: J. A. Roberts, School of Psychology, University of Birmingham, Birmingham, B15 2TT, UK. E-mail: j.a.roberts@bham.ac.uk

© 2008 The Authors. Journal compilation © 2008 Association for Child and Adolescent Mental Health.

This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

Published by Blackwell Publishing, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.

)

TUESDAY, THE 15TH

JUSTICE PENNY

)

DAY OF FEBRUARY, 2022

)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF HARTE GOLD CORP., 13699404
CANADA INC. AND 13699447 CANADA INC.

Applicants

CCAA DISTRIBUTION AND TERMINATION ORDER

THIS MOTION, made by FTI Consulting Canada Inc. ("**FTI**"), in its capacity as monitor (the "**Monitor**") of Harte Gold Corp. ("**Harte**"), 13699404 Canada Inc. ("**ResidualCo. 1**") and 13699447 Canada Inc. ("**ResidualCo. 2**" and, collectively with Harte and ResidualCo. 1, the "**Applicants**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order (this "**Order**"), among other things, (i) approving the Distributions specified herein, (ii) approving the activities, conduct and reports of FTI in its capacity as Monitor, (iii) approving the fees and disbursements of the Monitor and the Monitor's legal counsel, as described in the Third Report of the Monitor dated February 8, 2022 (the "**Third Report**") and the affidavits attached thereto sworn in support thereof, (iv) terminating these CCAA proceedings and discharging the Monitor at the CCAA Termination Time (as defined below), and (v) granting certain related relief, was heard this day via videoconference due to the ongoing COVID-19 pandemic.

ON READING the Notice of Motion of the Monitor, the Third Report and the affidavits attached thereto sworn in support of the approval of the fees and disbursements of the Monitor and its counsel, and on hearing the submissions of counsel for the Applicants, the Monitor, and



such other counsel as were present and wished to be heard, and on reading the affidavit of service, filed:

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Monitor's Notice of Motion, the Motion Record and the Third Report is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined have the meanings given to them in the Amended and Restated Initial Order of this Court made in the within proceedings dated December 20, 2021 (the "**Initial Order**"), the Approval and Reverse Vesting Order of this Court made in the within proceedings dated January 28, 2022, or the Second Amended and Restated Subscription Agreement entered into by and between the Applicant, as issuer, 1000025833 Ontario Inc., as investor, and Silver Lake Resources Limited, as guarantor, dated January 19, 2022, as applicable.

DISTRIBUTIONS

3. **THIS COURT ORDERS** that the Monitor and/or any of the Applicants, from and after the Effective Time, are hereby authorized, without further order of this Court, to make distributions from the Cash Consideration in payment of the following:

- (a) the secured obligations owing in respect of the conveyance to Harte of the land legally known as PIN 31082-0234 (LT) PCL 11183 SEC AWS; PT FARM LOCATION CK77 HUNT PT 1 1R6484; WHITE RIVER (the "**White River Property Secured Claim**"), the distribution in respect of which shall constitute the full and final satisfaction of the White River Property Secured Claim and the Applicants shall have no further liability in respect of the White River Property Secured Claim upon the payment of such distribution; and
- (b) the Appian Indebtedness, the distribution in respect of which shall constitute the full and final satisfaction of the Appian Indebtedness and the Applicants shall have no further liability in respect of the Appian Indebtedness upon the payment of such distribution ((a) and (b), collectively, the "**Distributions**").

4. **THIS COURT ORDERS** that the Monitor and/or any of the Applicants are hereby authorized to take all necessary steps and actions to effect the Distributions in accordance with the provisions of this Order, and shall not incur any liability as a result of making the Distributions.

5. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these CCAA proceedings;
- (b) any application for a bankruptcy or receivership order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the “BIA”) or other applicable legislation in respect of the Applicants and any bankruptcy or receivership order issued pursuant to any such applications;
- (c) any assignment in bankruptcy made in respect of the Applicants; and
- (d) any provisions of any federal or provincial legislation,

the Distributions shall be made free and clear of all Encumbrances (including the Charges) and shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the Applicants and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

6. **THIS COURT ORDERS** that the Monitor and/or any of the Applicants shall be entitled to deduct and withhold from any Distribution such amounts as may be required to be deducted or withheld with respect to such Distribution under the Tax Act or other Applicable Laws and to remit such amounts to the appropriate Governmental Authority or other Person entitled thereto. To the extent that amounts are so withheld or deducted and remitted to the appropriate Governmental Authority or other Person, such withheld or deducted amounts shall be treated for all purposes as having been paid pursuant to this Order to such Person as the remainder of the Distribution in respect of which such withholding or deduction was made.

7. **THIS COURT ORDERS AND DECLARES** that the Distributions shall not constitute a “distribution” for the purposes of section 107 of the *Corporations Tax Act* (Ontario), section 22 of the *Retail Sales Tax Act* (Ontario), section 117 of the *Taxation Act*, 2007 (Ontario), section 159 of the *Tax Act*, section 270 of the *Excise Tax Act* (Canada), section 86 of the *Employment Insurance Act* (Canada), or any other similar applicable federal, provincial or territorial tax legislation (collectively, the “**Tax Statutes**”), and the Monitor, in making the Distributions, is merely a disbursing agent and is not exercising any discretion in making the Distributions, and no Person is “distributing” such funds for the purpose of the Tax Statutes, and the Applicants and the Monitor shall not incur any liability under the Tax Statutes in respect of the Distributions and the Monitor is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of the Distributions made by it in accordance with this Order and any claims of this nature are hereby forever barred.

APPROVAL OF MONITOR’S REPORTS AND ACTIVITIES

8. **THIS COURT ORDERS** that the First Report of the Monitor dated December 15, 2021, the Second Report of the Monitor dated January 24, 2022 and the Third Report are hereby approved, and the activities and conduct of the Monitor prior to or on the date hereof in relation to the Applicants and these CCAA proceedings (including as described in the foregoing reports) are hereby ratified and approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approvals.

APPROVAL OF FEES AND DISBURSEMENTS OF THE MONITOR

9. **THIS COURT ORDERS** that the fees and disbursements of the Monitor for the period from December 7, 2021 to February 6, 2022, all as set out in the affidavit of Nigel Meakin sworn February 8, 2022, are hereby approved.

10. **THIS COURT ORDERS** that the fees and disbursements of Goodmans LLP as legal counsel to the Monitor, for the period from December 7, 2021 to February 6, 2022 as set out in the affidavit of Joseph Pasquariello sworn February 8, 2022, are hereby approved.

11. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and Goodmans LLP, estimated not to exceed \$400,000 in aggregate (excluding HST), for the completion of remaining activities in connection with these CCAA proceedings, are hereby approved.

TERMINATION OF CCAA PROCEEDINGS

12. **THIS COURT ORDERS** that, upon service by the Monitor of an executed certificate in substantially the form attached hereto as Schedule “A” (the “**Termination Certificate**”) on the service list in these CCAA proceedings certifying that, to the knowledge of the Monitor, all matters to be attended to in connection with these CCAA proceedings have been completed, these CCAA proceedings shall be terminated without any further act or formality (the “**CCAA Termination Time**”), save and except as provided in this Order, and provided that nothing herein impacts the validity of any Orders made in these CCAA proceedings or any action or steps taken by any Person pursuant thereto.

13. **THIS COURT ORDERS** that the Monitor is hereby directed to file a copy of the Termination Certificate with the Court as soon as is practicable following the service thereof on the service list in these CCAA proceedings.

14. **THIS COURT ORDERS** that the Charges shall be terminated, released and discharged as of the CCAA Termination Time without any further act or formality.

DISCHARGE OF THE MONITOR

15. **THIS COURT ORDERS** that effective at the CCAA Termination Time, FTI shall be and is hereby discharged from its duties as the Monitor and shall have no further duties, obligations or responsibilities as Monitor from and after the CCAA Termination Time, provided that, notwithstanding its discharge as Monitor, FTI shall have the authority to carry out, complete or address any matters in its role as Monitor that are ancillary or incidental to these CCAA proceedings following the CCAA Termination Time, as may be required, including, without limitation, as contemplated by Monitor’s Enhanced Powers Order dated January 28, 2022 (“**Monitor Incidental Matters**”).

16. **THIS COURT ORDERS** that, notwithstanding any provision of this Order, the Monitor's discharge or the termination of these CCAA proceedings, nothing herein shall affect, vary, derogate from, limit or amend, and the Monitor shall continue to have the benefit of, all of the rights, approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, the Monitor's Enhanced Powers Order, any other Order of this Court in these CCAA proceedings or otherwise, all of which are expressly continued and confirmed following the CCAA Termination Time, including in connection with any Monitor Incidental Matters and other actions taken by the Monitor following the CCAA Termination Time with respect to the Applicants or these CCAA proceedings.

17. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court on not less than fifteen (15) days prior written notice to the Monitor.

EXTENSION OF THE STAY PERIOD

18. **THIS COURT ORDERS** that, in the event that the Termination Certificate is not served by the Monitor in accordance with paragraph 10 of this Order on or before March 29, 2022, the Stay Period be and is hereby extended to and including the earlier of (i) the CCAA Termination Time, and (ii) such other date as this Court may order.

GENERAL

19. **THIS COURT ORDERS** that the Applicants or the Monitor may apply to the Court as necessary to seek further orders and directions to give effect to this Order.

20. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

21. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary

or desirable to give effect to this Order, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.



A handwritten signature in blue ink, appearing to read "Peng J.", is written over a horizontal line.

**SCHEDULE “A”
FORM OF TERMINATION CERTIFICATE**

Court File No. CV-21-00673304-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF 13699404 CANADA INC. and 13699447
CANADA INC.**

Applicants

TERMINATION CERTIFICATE

RECITALS

1. FTI Consulting Canada Inc. (“**FTI**”) was appointed as the Monitor of the Applicants in the within proceedings commenced under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) pursuant to an Initial Order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated December 7, 2021 (as amended, the “**Initial Order**”).
2. Pursuant to an Order of this Court dated February 15, 2022 (the “**CCAA Distribution and Termination Order**”), among other things, FTI shall be discharged as the Monitor and the Applicants’ CCAA proceedings shall be terminated upon the service of this Termination Certificate on the service list in these CCAA proceedings, all in accordance with the terms of the CCAA Distribution and Termination Order.
3. Unless otherwise indicated herein, capitalized terms used in this Termination Certificate shall have the meaning given to them in the Initial Order or the CCAA Distribution and Termination Order, as applicable.

THE MONITOR CERTIFIES the following:

1. To the knowledge of the Monitor, all matters to be attended to in connection with the Applicants' CCAA proceedings (Court File No. 21-00673304-00CL) have been completed.

ACCORDINGLY, the CCAA Termination Time as defined in the CCAA Distribution and Termination Order has occurred.

DATED at Toronto, Ontario this _____ day of _____, 2022.

FTI CONSULTING CANADA INC. in its capacity as Court-appointed Monitor of the Applicants and not in its personal or corporate capacity

Per: _____

Name:

Title:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
HARTE GOLD CORP., 13699404 CANADA INC. AND 13699447 CANADA INC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

CCAA DISTRIBUTION AND
TERMINATION ORDER

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Joe Pasquariello LSO#: 38390C
jpasquariello@goodmans.ca

Christopher G. Armstrong LSO#: 55148B
carmstrong@goodmans.ca

Andrew Harmes LSO#: 73221A
aharmes@goodmans.ca

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Monitor