

**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
1001270243 ONTARIO INC.**

**SUPPLEMENTARY BOOK OF AUTHORITIES OF
RICHARD GOLDGLASS AND OTHER TERMINATED EMPLOYEES
(Motion for WEPP Relief, returnable June 10, 2026)**

May 15, 2026

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TAB 1

**SUPERIOR COURT
COMMERCIAL DIVISION**

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-063779-249

DATE : AUGUST 27, 2024

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF:

FORMER GESTION INC.
and
THE OTHER APPLICANTS LISTED IN SCHEDULE A HERETO
Applicants/Debtors

PRICEWATERHOUSECOOPERS INC.
Monitor

EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA
Impleaded Party

JUDGMENT
(APPLICATION FOR DECARATORY RELIEF AND A WAGE EARNER PROTECTION
PROGRAM ORDER)

I. OVERVIEW

[1] The central question raised by this application is whether the *Wage Earner Protection Program Act*¹ (WEPPA) applies to the former employees of insolvent corporations that are restructured under a reverse vesting order issued pursuant to the *Companies' Creditors Arrangement Act*² (CCAA).

[2] WEPPA is federal legislation which provides for the payment of outstanding wages by the government to individuals whose employment is terminated as a result of their employer's insolvency.

[3] Until recently, the *Juste Pour Rire (Just For Laughs)* group of companies (the "JPR Group") were engaged in the production and distribution of comedy festivals, shows and media content.

[4] On March 5, 2024, six entities forming part of the JPR Group filed a Notice of Intention to make a proposal to creditors under the *Bankruptcy and Insolvency Act*³ (BIA). Ten days later, the Court authorized these entities, as well as 11 other entities in the JPR Group, to either continue or commence insolvency proceedings under the CCAA.

[5] Following a sale and solicitation process, in May 2024, certain entities in the JPR Group agreed to sell a substantial part of their assets or their shares to a Québec-based comedy production company, ComediHa! 24 Inc. (ComediHa).

[6] The transaction with ComediHa was approved by the Court on June 7, 2024. Under the terms of the transaction three entities (the "AVO Entities")⁴ sold the bulk of their assets to ComediHa under an asset vesting order and ceased their operations. One of the AVO Entities, Former Gestion Inc., terminated all its employees prior to the transaction. Twelve other entities (the "RVO Entities")⁵ sold their shares to ComediHa and transferred certain of their liabilities to a newly incorporated company ("ResidualCo") pursuant to a reverse vesting order. Five of the RVO Entities⁶ terminated their employees and transferred their employment liabilities to ResidualCo.

¹ S.C. 2005, c. 47, s.1.

² R.S.C. 1985, c. C-36.

³ R.S.C. 1985, c. B-3.

⁴ The AVO Entities are: Former Gestion Inc., Former Groupe Inc. and Former Management SC Inc.

⁵ The RVO Entities (including the "NPO Entities", as applicable, and as described in the amended application dated July 16, 2024) are: Distributions Juste Pour Rire Inc., Juste Pour Rire TV Alberta Inc., Juste Pour Rire Audio Inc., Juste Pour Rire Les Gags Inc., 9135-7988 Québec Inc., Les Productions Juste Pour Rire II Inc., Juste Pour Rire TV Inc., 2789018 Ontario Inc., 277692 Ontario Inc., Just For Laughs Toronto Festival, Festival Zoo-Fest and Festival Juste Pour Rire.

⁶ Festival Juste Pour Rire, Festival Zoo-Fest, Distributions Juste Pour Rire Inc., Les Productions Juste Pour Rire II Inc. and Juste Pour Rire TV Inc.

[7] In all, some 100 employees were terminated on June 4, 2024, just prior to the transaction: 45 by Former Gestion Inc. and 55 by the five RVO Entities. ComediHa did not assume any obligations towards the terminated employees, although it did subsequently hire 13 of them.

[8] When the employees were terminated on June 4, they had been paid all salary and vacation pay owing to them. However, they were given no prior notice of termination and, according to the Monitor, they may have a claim under WEPPA for termination pay (*indemnité de préavis*).⁷

[9] On May 26, 2024, the JPR Group applied to the Court for an order approving the sale to ComediHa and for a declaration that their former employees were covered by WEPPA and would be paid outstanding wages. Their WEPPA application was postponed, however, and in July the Applicants presented an amended application. In the amended proceeding the Applicants express a concern that Employment and Social Development Canada (ESDC), the body that administers WEPPA, may refuse to pay outstanding wages to the former employees of the RVO Entities.

[10] There appears to be no concern that ESDC will consider applications for the payment of wages by the former employees of the AVO Entity, Former Gestion Inc.

[11] Seeking to avoid an unequal treatment of the JPR Group's former employees, the Applicants ask the Court to exercise its discretionary power under s. 11 of the CCAA and to declare, for the purpose of WEPPA, that all JPR Group's former employees were employed by Former Gestion Inc. when they were terminated.

[12] Subsidiarily, the Applicants seek a declaration that, at the date of termination of the JPR Group's former employees, their respective employer was a former employer that met the criteria prescribed by section 3.2 of the WEPP Regulations⁸ and that all their former employees in Canada who were terminated are individuals to whom WEPPA applies.

[13] On behalf of ESDC the Attorney General of Canada (AGC) opposes the amended WEPPA application on three grounds, arguing that: (i) the request for retroactive relief is an unwarranted attempt to rewrite the facts; (ii) the Court cannot render the declaratory relief without infringing upon the Minister's jurisdiction to decide eligibility for payments under WEPPA; and (iii) since the RVO Entities have not wound down their operations, WEPPA does not apply to their former employees.

[14] For the following reasons the Court concludes that Former Gestion Inc. and the RVO Entities meet the prescribed criteria of s. 3.2 of the WEPP Regulations and that WEPPA applies to their former employees. It is therefore unnecessary to rule upon the

⁷ Cinquième rapport du Contrôleur, July 19, 2024, paras. 50, 55.

⁸ Wage Earner Protection Program Regulations, SOR/2008-222.

Applicants' request to have Former Gestion Inc. retroactively declared the employer of the JPR Group's employees.

II. ANALYSIS

i. the ComediHa transaction

[15] Under the purchase and sale agreement approved by the Court on June 7, 2024, ComediHa purchased substantially all the assets, property and business undertaking of the three AVO Entities and the shares and certain assets of the twelve RVO Entities. The transaction provided for the transfer of certain assets and liabilities by the RVO Entities to a newly incorporated entity, 9517-3258 Québec Inc. (ResidualCo).

[16] Through its purchase of shares ComediHa acquired the rights to thousands of distribution agreements between the RVO Entities and third parties, as well as title to thousands of video recordings in the catalogues of the RVO Entities. In authorizing the reverse vesting order, the Court acknowledged that it would have been virtually impossible to transfer all the distribution rights to ComediHa under a traditional asset sale, or to prove the vendors' title to such a vast quantity of intellectual property.

[17] Just as importantly, the reverse vesting order allowed ComediHa to benefit from tax credits and government grants which were important assets of the RVO Entities, but which could not be transferred to ComediHa through an asset sale.

[18] The mixed AVO/RVO transaction structure was approved by the Court because it added significant value to the debtors' assets and maximized the recovery for creditors.

ii. WEPPA

[19] WEPPA's purpose is stated at s. 4 of the statute:

4. The Wage Earner Protection Program is established to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.

[20] "Wages" are broadly defined under the statute to include "salary, commissions, compensation for services rendered, vacation pay, termination pay, severance pay and any other amounts prescribed by regulation."⁹

[21] Broadly speaking, under WEPPA an individual may be entitled to receive the payment of wages for a period up to six months preceding a bankruptcy, a receivership

⁹ WEPPA, s. 2 "wages".

or a proposal under the BIA or the commencement of proceedings under the CCAA.¹⁰ The Court was informed that current payments can amount to \$8,300 per individual.

[22] An individual's eligibility for payment is set out at s. 5 of WEPPA. For present purposes, an individual is eligible to receive the payment of wages if, (i) their employment has terminated,¹¹ (ii) the former employer is the subject of proceedings under the CCAA and a court has determined, upon application, that all the employees of the former employer, other than those required to wind down the employer's business operations, have been terminated,¹² and (iii) the individual is owed wages by the former employer.¹³

[23] An individual applies for payment to the designated Minister, who determines whether the individual is eligible to receive a payment.¹⁴ An individual may request the Minister to review its decision respecting eligibility and the Minister's review decision may be appealed, on a question of law or jurisdiction, to the Canada Industrial Relations Board. The Board's decision is final.¹⁵

iii. does WEPPA apply to the RVO Entities?

[24] To date, no application has been made for WEPPA compensation and the Minister has not considered the eligibility of JPR Group's employees under s. 5 of the Act. Nevertheless, given the AGC's position that the RVO Entities do not meet the criteria prescribed by s. 3.2 of the WEPP Regulations it is not premature to rule upon the applicability of WEPPA to these former employees.

[25] The question of whether WEPPA applies to the former employees of the RVO Entities is also of general interest. Although reverse vesting orders are exceptional restructuring tools,¹⁶ they have become increasingly common features of insolvencies where a debtor cannot easily transfer intangible property or rights under a traditional asset sale.

[26] The question of whether WEPPA applies in the case of reverse vesting orders is one of statutory interpretation and is not simply a question of eligibility reserved to the Minister under s. 9 of WEPPA. The Minister's power to decide whether an individual is eligible to receive a payment does not prevent the Court, in the face of a judicial dispute, from determining the proper scope and meaning of the Act.

¹⁰ WEPPA, s. 2 "eligible wages".

¹¹ WEPPA, s. 5(1)(a); WEPP Regulations, s. 3(b).

¹² WEPPA, ss. 5(1)(b)(iv) and 5(5); WEPP Regulations, s. 3.2.

¹³ WEPPA, s. 5(1)(c).

¹⁴ WEPPA, ss. 8, 9.

¹⁵ WEPPA, ss. 11 to 20.

¹⁶ *Harte Gold Corp. (Re)*, 2022 ONSC 653 (CanLII).

[27] WEPPA is clearly remedial legislation intended to provide protection to workers who suffer lost wages as a result of a bankruptcy or restructuring.¹⁷ As such, the Act should “be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives”.¹⁸

[28] According to the modern principle of statutory interpretation the meaning of the Act is to be resolved through an analysis that has regard to its text, context and purpose.¹⁹

[29] The AGC cites section 3.2 of the WEPP Regulations to argue that WEPPA only applies when an employer is liquidating or winding down its activities.²⁰ The AGC argues that since the RVO Entities have not wound down their operations WEPPA does not apply to them or their former employees.

[30] Section 3.2 reads as follows:

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

[31] In the Court’s opinion, the AGC’s argument is based on an incorrect reading of section 3.2. The section does not require an employer to be winding down its operations for its former employees to apply for compensation. Rather, the provision is permissive. It allows terminated employees to apply for back wages notwithstanding that some individuals may still be engaged in winding down the employer’s operations. In this manner, WEPPA provides compensation to employees as soon as it becomes clear that all of them have been or will be terminated due to a bankruptcy or restructuring. Section 3.2 of the WEPP Regulations favours the attainment of WEPPA’s objective to provide timely compensation and does not limit the Act’s protection for workers, as the AGC contends.

[32] The problem or “mischief” sought to be cured by WEPPA is the absence of a solvent employer who can pay wages owing to former employees. Seen in this context, the cessation of the employer’s business operations, or the transfer of its liabilities to an insolvent third party, are irrelevant to the application of the Act. In the case of both an asset sale and a reverse vesting order, employees who have lost their jobs have no solvent employer from whom they can claim lost wages.

¹⁷ WEPPA, s. 4; House of Commons Debates, Volume 140, Number 128, 1st Session, 38th Parliament, Thursday, September 29, 2005, Hansard, p. 8186.

¹⁸ *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12.

¹⁹ Ruth Sullivan, *The Construction of Statutes*, 7th ed., Toronto, 2022, LexisNexis Canada Inc.; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 6, paras. 118-120, cited in Sullivan at § 2.01[1].

²⁰ Impleaded Party’s Plan of Argument, paras. 18 and 33.

[33] In this regard one should note that WEPPA applies to receiverships and proposals under the BIA – instances where an insolvent company may not necessarily cease to operate despite that all its employees have been terminated.

[34] The Court agrees with the Applicants that the relevant time for determining when WEPPA applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant. Consequently, in the event an employee is owed eligible wages by a former employer at the moment the former employer terminates all its employees, s. 5(1)(c) of WEPPA ("the individual is owed eligible wages by the former employer") is satisfied.

[35] It would be contrary to the object of the Act to deny compensation to a terminated employee simply because the former employer transfers its liability to a third party under a reverse vesting order. If the assignee is insolvent, as is most often the case, such an assignment does not improve the employee's prospect of being paid. If the assignee has assets, however, the government is subrogated in the rights of the former employee up to the amount of the WEPPA payment. The government's right of subrogation indicates that the assignment of the employer's liability post termination is irrelevant to the operation of the Act.

FOR THESE REASONS, THE COURT :

[36] **GRANTS** the amended application for a WEPPA Order;

[37] **DECLARES** that pursuant to section 5(5) of WEPPA, Former Gestion Inc. and the RVO Entities as defined herein are former employers that meet the criteria prescribed by section 3.2 of the WEPP Regulations, and all their former employees in Canada who have been terminated are individuals to whom WEPPA applies;

[38] **DECLARES** that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada;

[39] **THE WHOLE**, without costs.

DAVID R. COLLIER, J.S.C.

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ATTORNEY GENERAL OF CANADA
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Mtre Daniel Cantin
Counsel for Revenu Quebec

Hearing date : July 22, 2024²¹

²¹ Vu la nature urgente de l'affaire, le Tribunal estime que de retarder la signature du présent jugement dans l'attente de la version traduite entraînerait un retard préjudiciable à l'intérêt public ou causerait une injustice ou un inconvénient grave à une des parties au litige. Une traduction suivra.

SCHEDULE A – LIST OF APPLICANT ENTITIES

1. **9379-3834 QUÉBEC INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.
2. **FORMER GROUPE INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.
3. **FORMER MANAGEMENT SC INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.
4. **BOUFFONS MONTRÉAL INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.
5. **BOUFFONS MTL ARTS DE LA TABLE** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.
6. **9517-3258 QUÉBEC INC.** a legal person having its registered office at 2101 Saint-Laurent boulevard, Montreal, Québec, H2X 2T5, Canada.

TAB 2

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-064718-246

DATE : FEBRUARY 24, 2025

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

VALEO PHARMA INC.

and

VPI PHARMACEUTICALS INC. / VPI PHARMACEUTIQUES INC.

and

VALEO PHARMA CORP.

Debtors

and

ERNST & YOUNG INC.

Monitor

and

XEDITON PHARMACEUTICALS INC.

Purchaser

and

**THE DIRECTOR APPOINTED PURSUANT TO THE CANADA BUSINESS
CORPORATIONS ACT**

**THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL
RIGHTS OF QUÉBEC, represented by the QUÉBEC MINISTRY OF JUSTICE**

HEALTH CANADA

RETRAITE QUEBEC

Mis-en-cause

**REASONS FOR ORDERS ISSUED ON FEBRUARY 4, 2025
PURSUANT TO THE COMPANIES' CREDITORS ARRANGEMENT ACT**

[1] On February 4, 2025, this Court issued three Orders which i) approved the sale to Xediton Pharmaceuticals Inc. (Xediton) of the shares and certain assets of Valeo Pharma Inc., ii) discharged certain hypothecs registered against the debtors' property, and iii) granted additional powers to the Court-appointed Monitor and extended the Amended and Restated Initial Order until April 30, 2025. These are the reasons for those Orders.

[2] The debtors are related pharmaceutical companies engaged in the sale in Canada of branded pharmaceutical and hospital specialty products. The parent company, Valeo Pharma Inc., is a publicly traded Canadian company listed on the Toronto Stock Exchange.

[3] Faced with operating losses and a liquidity crisis, the debtors (collectively "Valeo"), commenced proceedings under the *Companies' Creditors Arrangement Act*¹ (CCAA) on September 27, 2024. An initial ten-day protective order was issued by the Court appointing Ernst & Young as Monitor, staying proceedings against Valeo and granting interim financing to the debtors.

[4] On October 11, 2024, the Court issued an Amended and Restated Initial Order extending additional interim financing to Valeo and authorizing it to initiate a sale and investment solicitation process (SISP) for the sale of all or part of its business. The additional interim financing allowed Valeo to maintain its business operations during the sales process.

[5] The SISP was conducted over three months by the Monitor, in consultation with Valeo and Sagard Healthcare Partners, Valeo's interim lender and a secured creditor. In a report dated January 23, 2025, the Monitor recommended that the Court approve a transaction concluded with Xediton for the purchase of Valeo Pharma's shares and selected assets under the terms of a reverse vesting order.

[6] The transaction with Xediton was subsequently amended to eliminate balance of sale payments by the purchaser. The Court approved the amended transaction on February 4, 2025.

[7] Under the terms of the amended transaction, Xediton acquires the issued and outstanding shares of Valeo Pharma, and indirectly the shares of the other debtors, in consideration of a payment of 20 million dollars. Under the reverse vesting structure, Valeo transfers some of its unwanted liabilities and asserts to a newly incorporated entity, ResidualCo, prior to Xediton's share purchase.

¹ R.S.C., 1985, c.C-36.

[8] Under the transaction a pension plan administered by Valeo will be transferred to ResidualCo and eventually wound down. Furthermore, Xediton will terminate Valeo's lease for warehouse and office space.

[9] Xediton will retain 36 of Valeo's 60 employees, although within 30 days after closing Xediton may elect not to retain some of the 36 employees who are no longer required to transfer the business. All employees not retained by Valeo will be paid their salary and vacation benefits before being transferred to ResidualCo, who will then terminate the employees' contracts and assume the employer's liabilities.

[10] The Court accepts the Monitor's recommendation that the Xediton transaction results in the most advantageous outcome for stakeholders. In the Court's view, the transaction best fulfils the objectives of the CCAA.

[11] Xediton's offer was obtained following a robust two-stage solicitation process. The Monitor initially contacted 93 prospective purchasers/investors. In November 2024, the Monitor received 10 non-binding letters of intent. Following an analysis of these LOI's, six persons were deemed to qualify under the SISF procedures to submit phase 2 binding offers. Two binding offers were received in December 2024. Only Xediton's offer was for substantially all of Valeo's business, and the price offered by Xediton was substantially higher than that of the competing bid.

[12] Given the thorough SISF process the Court accepts the Monitor's opinion that Xediton's offer is the most advantageous one for stakeholders. A sale or liquidation of Valeo's assets, either thorough a receivership or bankruptcy, would generate a considerably smaller return for creditors and other stakeholders. Under the Xediton transaction, not all secured creditors will be fully repaid and there is no amount for unsecured creditors, however a bankruptcy or liquidation would not have generated a better result.

[13] The pension plan administered by Valeo is in a deficit position and under no scenario is it likely that the five remaining beneficiaries would have continued to receive pension payments.

[14] Much of the value provided by the Xediton transaction is generated through the reverse vesting structure. Through the share purchase, Xediton acquires many of Valeo's existing supply and distribution contracts. Xediton also acquires Valeo's licenses, permits and authorizations that are necessary to operate in a highly regulated pharmaceutical industry. Finally, Xediton may benefit from Valeo's carry-forward tax losses and tax attributes. None of these assets could have been transferred under a traditional asset sale.

[15] There is also a social and economic benefit to maintaining Valeo's business as a supplier of pharmaceutical products in Canada.

[16] There is also a benefit to Valeo's employees who will keep their jobs in the restructured company.

[17] For those employees who will not be retained in the new Valeo, the Court expects they will receive compensation under the *Wage Earner Protection Program Act* (WEPPA), since the structure of the transaction appears to meet the statutory requirements.

[18] In this regard, the Court's Approval and Reverse Vesting Order (ARVO) gives effect to the Xediton transaction with regards to employees. Paragraphs 32 and 34 of the ARVO stipulate that any unretained employee is transferred from Valeo to ResidualCo, who then terminates the employee's contract and assumes all employment liabilities. Given the transfer of Valeo's employees to ResidualCo, paragraph 35 of the ARVO declares that ResidualCo is the former employer of the employees who have been terminated and that ResidualCo meets the prescribed criteria of section 3.2 of the *Wage Earner Protection Program Regulations*.

[19] Section 5(5) of WEPPA requires the Court to determine whether a former employer meets the criteria prescribed by s. 3.2 of the *Regulations*. In this case, the criteria are met, because ResidualCo "is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations."

[20] In issuing the ARVO the Court has determined one criterion of eligibility for payment under WEPPA (s. 5(1)(b)(iv)). It is for the Minister to decide under s. 9 of the statute whether individual applicants meet the other criteria found at subsections 5(1)(a), 5(1)(b)(iv) and 5(1)(c) WEPPA.

[21] Since the Xediton transaction maximizes recovery for creditors, maintains Valeo's business operations, and does not unfairly prejudice any group of stakeholders, the Court is of the opinion that the transaction should be approved.

[22] To allow for the transition of Valeo's business to Xediton it is appropriate to extend the terms of the Amended and Restated Initial Order to April 30, 2025, and to grant additional powers to the Monitor to, *inter alia*, distribute sales proceeds, deal with employee issues and manage ResidualCo's affairs.

[23] It is for these reasons that the Orders were issued on February 4, 2025.

[24] La traduction française de ce jugement sera déposée ce jour au greffe de la Cour supérieure.

DAVID R. COLLIER, J.S.C.

Mtre Éric Vallières
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Counsel to the Purchaser

Hearing dates: February 3 and 4, 2025

TAB 3

CITATION: Atlas Global Brands Inc., 2024 ONSC 5570
COURT FILE NO.: CV-24-00722386-00CL
DATE: 20241007

**SUPERIOR COURT OF JUSTICE – ONTARIO
(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 ATLAS GLOBAL BRANDS INC.,
GREENSEAL CANNABIS COMPANY, LTD., GREENSEAL
NURSERY, LTD., AGMEDICA BIOSCIENCE INC.,
WELLWORTH HEALTH CORP., 5047346 ONTARIO INC.,
8050678 CANADA INC. AND TAVIVAT NATURALS INC.**

BEFORE: W.D. Black J.

COUNSEL: *Mary Paterson*, for Atlas Global Brands Inc.
Patrick Corney and Larry Ellis, for the DIP Lender
Leanne Williams, for Your Neighborhood Credit Union
Sharon Kour and Caitlin Fell, for Stoke Canada Finance Corp.
Edward Park and Kevin Dias, for Canada Revenue Agency
Trevor Courtis, for the Monitor, McCarthy Tétrault LLP
Karen Fung and Greg Adams, Court-appointed Monitor, Ernst & Young Inc.

HEARD: October 4, 2024

ENDORSEMENT

Overview

[1] There were two main matters before me today, relating to the two distinct aspects of the business of the applicants (the “Applicants” or the “Atlas Group”). In this endorsement I will from time-to-time use terms as defined in the materials.

[2] While the business activity of the Atlas Group generally is the production, distribution, and sale of cannabis internationally and in Canada, it owns companies operating in two different business lines.

[3] First, AgMedica Bioscience Inc. (“AgMedica”) is a licensed producer of cannabis and owns a production and distribution facility in Chatham-Kent, Ontario. It operates primarily in the international market.

[4] Greenseal Cannabis Company Ltd. (“GreenSeal”) is also a licensed producer of cannabis. It operates out of a facility in Stratford, Ontario, and principally operates in the domestic market.

[5] Like many participants in the cannabis industry, the Atlas Group companies have experienced financial setbacks and related problems in recent years. Atlas Global Brands Inc., the “flagship” publicly traded company of the Atlas Group, has been subject to a “Cease Trade” order for well over a year.

Initial CCAA Order

[6] In the face of growing pressure from its secured creditors, Atlas brought this application for a stay and an initial protective order under the CCAA. That initial order was granted on June 20, 2024.

[7] While the CCAA order and stay encompassed all entities within the Atlas Group, it is instructive to note that the two different business lines, and the entities involved in those parallel pursuits, respectively, not only had distinct operations in largely different realms, but relied on different sets of creditors and arrangements to finance those operations. Counsel advised that GreenSeal was a fairly recent addition to the Atlas Group, by acquisition, and it appears that the GreenSeal business has not been (if it ever could be) fully integrated into the Applicants’ operations.

[8] The existence of different sets of creditors, with different and at times divergent interests, has complicated the progress of these proceedings.

Justice Penny’s July 9, 2024 Endorsement

[9] Justice Penny’s endorsement of July 9, 2024 (His Honour has to this point overseen the steps within these CCAA proceedings) exemplifies the nature and consequences of the competing interests at play.

[10] At that time, Penny J. granted GreenSeal’s motion for a third amended and restated order relative to the GreenSeal business. His Honour adjourned the application of GreenSeal’s secured creditors, Stoke Canada Finance Corp. (“Stoke”) and Your Neighborhood Credit Union (“YNCU”) for the appointment of a receiver over the GreenSeal business.

[11] In his endorsement for that hearing, Penny J. reiterated the differing circumstances of the two businesses within the Atlas Group, saying that: “...the circumstances of AgMedica and GreenSeal are distinct in material ways: they own different assets, they carry on somewhat different businesses operating in different markets, and, importantly, they have distinct creditor pools.”

[12] Justice Penny noted that his second amended and restated initial order of July 5, 2024 (the “SARIO”) had approved the appointment of the Monitor over the AgMedica business and granted related orders including super-priority Administration, Directors, and DIP Lending Charges.

[13] His Honour confirmed that the expectation was for the Applicants “under the AgMedica branch of these proceedings,” to “come forward with a SISP proposal later in July, with a view to concluding a transaction by the end of September 2024.”

[14] In addition, Penny J. noted that “The Applicants and the Monitor indicate that the SISP proposal, depending on the outcome of the July 9 dispute over the GreenSeal branch of these proceedings, would preserve the option of marketing AgMedica as opportunities to be considered both separately or en banc.”

[15] His Honour explained that at the time he granted the SARIO, he had adjourned both the application under the CCAA in respect of GreenSeal, as well as the competing receivership applications of Stoke and YNCU (i.e. competing with the CCAA application, as opposed to competing inter se). The adjournment, Penny J. said, was “to allow those parties and the Applicants more time to engage in negotiations over the GreenSeal business and how it should be managed (and financed) going forward.”

[16] Unfortunately, by the time of the attendance on July 9, those negotiations had broken down. Stoke and YNCU opposed any further order under the CCAA and revived their request to appoint PWC as Receiver of the GreenSeal business.

[17] In response to this renewed request to appoint a receiver, GreenSeal had in turn significantly revised its proposal and draft order (a third amended and restated initial order “(TARIO”), with a view to mitigating risks that the CCAA proceedings might pose for GreenSeal’s secured creditors (i.e. Stoke and YNCU) pending the SISP process.

[18] Justice Penny undertook an analysis of the competing considerations driving a choice between CCAA and receivership applications, identifying significant factors emerging from caselaw and literature as important touchstones in the determination.

[19] I will not repeat Penny J.’s analysis here. Suffice to say that His Honour carefully weighed competing considerations, and came to a conclusion that was clearly, and was clearly stated to be, a result arising from the specific contextual and temporal factors at hand at that time. Justice Penny gave significant weight to GreenSeal’s creditors’ concerns, but was persuaded that GreenSeal should be given, in effect, one last chance to develop an acceptable proposal.

[20] To this end, in his discussion of the important factor weighing “The competing proposals and their effect on stakeholders” Penny J. wrote:

“[32] Stoke complains that it is being deprived of its proprietary ownership rights in the accounts receivable which secure GreenSeal’s indebtedness to it. It further complains that the GreenSeal proposal effectively forces Stoke to be a DIP lender

without the protection of a super-priority. As well, Stoke and YNCU object to their security and financial position being put at risk, while operations remain in the control of GreenSeal management during the time it will take to implement the GreenSeal proposal.

...

[35] Para. 46 of the proposed TARIO provides for payments to be made to Stoke, up to a maximum of over \$500,000, from accounts receivable payments received between now and the end of September. Further, para. 47 of the draft order would allow GreenSeal to use remaining accounts receivable to fund working capital, but only if the remaining accounts receivable balance stays at a level 1.25 times the amount of the recoveries sought to be utilized as working capital.

[36] In addition, at para. 49 of the draft order, GreenSeal proposes that Stoke's consultant, Steinberg Advisory Corp., would be appointed to act as information liaison of the GreenSeal accounts receivable with the ability to: (i) monitor the accounts receivable; (ii) monitor GreenSeal's inventory including its quality; and (iii) make recommendations to GreenSeal regarding profitably monetizing GreenSeal's inventory...this would provide transparency to the secured creditors during the next two and a half months. If, during that time, it becomes apparent that the GreenSeal projections referred to in these Reasons are materially off, to the prejudice of the secured creditors, they would have the ability to return to court to renew their applications for the appointment of a receiver.

[37] Looking at this factor as a whole, I start with the observation that there is much to be said for Stoke's objection that their property is being used to finance ongoing operations and that GreenSeal's proposal is, in effect, forcing it to be a DIP lender against its will and without the protection of a super-priority charge."

[21] However, Penny J. observed that the way in which GreenSeal proposed to treat the accounts receivable until the end of September was precisely how they had been utilized for months in practice prior to the proceedings being instituted.

[22] Justice Penny hastened to add that this fact did not constitute a "waiver or estoppel" argument.

"However", he concluded,

"when I look at: past practices together with the Monitor-supported, conservative cash flow projections and weigh the balance of outcomes reflected in those projections; the immediate and ongoing payments until September; the limitations on the use of additional accounts receivables working capital; the additional transparency afforded by the appointment of an information liaison; and the ongoing payments to service the YNCU debt and to reduce property and excise tax arrears, I

conclude that the relative impact on the parties of the GreenSeal CCAA proposal does not weigh in favour of a receivership in the circumstances.”

[23] Finally, Penny J. made it clear that his conclusion was not necessarily final, and that the outcome would depend on GreenSeal’s ability to develop a proposal that would alleviate its secured creditors’ concerns. He said:

“As will be apparent from the analysis set out above, I am, in effect, concluding that it is reasonable for GreenSeal to have one shot at its proposal under the CCAA, while being kept on a short leash and with the ability of the secured creditors to renew their receivership applications if the CCAA proposal starts to go materially off the rails....For the forgoing reasons, I approve the GreenSeal proposal under the CCAA and adjourn the receivership applications sine die.”

July 26, 2024 Approval of SISP and Related Relief

[24] On July 26, 2024, the Applicants came back before Penny J., seeking approval of a SISP, a KERF, payment of a prefiling debt necessary to maintain the Applicants’ ability to carry on business and an extension of the stay until September 30, 2024.

[25] The proposed SISP encompassed both the AgMedica and GreenSeal aspects of the Atlas Group business, although, as will be seen, the distinct attributes and operations of the respective business lines led to variations within the process and different responses from the market.

[26] The relief sought by the Applicants on July 26 was largely unopposed, with the exception that Stoke, in particular, sought a term requiring the Applicants and the Monitor to accept a credit bid if one was made (in certain prescribed circumstances). Justice Penny resolved this “imbroglio” by adding certain conditions which, if met, would allow, prima facie, for acceptance of such credit bid.

The Matters Before Me

[27] In the result, when the parties came before me on October 4 the SISP had resulted in a successful bid and proposed transaction on the AgMedica side of the business for which the Applicants sought an approval and reverse vesting order (the “AgMedica ARVO”).

[28] At the time the Applicants submitted their materials for the hearing on October 4, the SISP had not resulted in a successful bid for GreenSeal. There were two non-binding term sheets, delivered fairly late in the SISP process (on September 20, 2024), which did not provide for full payment of GreenSeal’s liability to Stoke.

[29] One of the term sheets was essentially rejected out of hand, as it was not capable of paying out either of GreenSeal’s secured creditors. Discussions with the party that submitted the other term sheet continued, and indeed yielded a “Binding Letter of Intent” (“LOI”) delivered on the eve of the hearing before me. While it is evident that the terms of the LOI reflected some

improvement from the earlier term sheet, and might yet lead to an acceptable transaction, it is also clear that the current terms are not yet capable of comprising an executable agreement.

[30] I now turn to discuss the two aspects of the hearing. While there is some overlap between these two aspects, they are, in keeping with the ongoing duality of this matter, largely distinct from one another, and give rise to different and separate issues.

The Proposed AgMedica Transaction and the ARVO

[31] The AgMedica Transaction for which the ARVO is sought, is based on a bid from Shalcor (the DIP Lender) on behalf of the LP Purchaser, and 2596690 Ontario Inc. (AgriRoots, the first mortgagee) on behalf of the Facility Purchaser (together, the “AgMedica Purchasers”) to acquire AgMedica, Greenseal Nursery, Ltd. (“Nursery”), a licensed cannabis nursery in Stratford that owns and manages over 1000 cannabis plants’ genetics, and 5047346 Ontario Inc. (“504”), which owns the Chatham Facility (together the “AgMedica Purchased Entities”).

[32] In keeping with the proposed RVO structure, the Applicants also seek to add 2650751 Alberta Ltd. (the “AgMedica ResidualCo”) as an applicant (to function as the residual entity to house unwanted aspects of the AgMedica business and liabilities).

[33] The Applicants also seek a further extension of the stay (to permit the Transaction), approval of a sealing order for a confidential affidavit, and certain releases (the “Releases”) some of which attracted controversy, discussed below.

[34] With one significant exception, there is no opposition to the ARVO and AgMedica Transaction.

RVO as Extraordinary Relief

[35] It is important, in my view, always to start, when a reverse vesting order is sought, with a reminder that, despite its increasing proliferation in the last couple of years, a reverse vesting order is to be regarded as extraordinary relief, to be granted sparingly and only in limited and exceptional circumstances.

[36] It is fair to observe that the setbacks besetting the cannabis industry have in fact in large measure provided the impetus for the recently increased use of the reverse vesting structure. That is because in a highly regulated industry, like the cannabis industry, there are significant implications, for the transfer of a business, if a purchaser would have to start “from scratch” to obtain regulatory approval to operate the business in question rather than assuming the relevant licenses as part of the transaction.

[37] These and related considerations have led to more frequent resort to RVOs, but it is important to keep in mind that the RVO, unlike an asset sale or a share sale, is not a pre-existing structure to be taken off the shelf and applied to a proposed transaction.

[38] Rather, it is a creature of the court which, in its exceptional deployment, obviates the need for choices and consequences traditionally faced by purchasers.

[39] That is, under a share deal, a purchaser acquires a corporation as it is, with all attendant assets and liabilities. Under an asset deal, a purchaser can pick and choose those assets of a corporation it wished to acquire and which it does not, avoiding liabilities but also forgoing benefits attached to owning the company.

[40] Typically and traditionally, a purchaser has had to choose (and negotiate) its preferred transaction structure, based on the advantages and disadvantages of either approach.

[41] The RVO, however, permits a purchaser to vest out the target's liabilities and unwanted assets and to acquire shares of the new entity created for the transaction. As such, the RVO structure is not simply a share deal, but a unique blend of a share deal and an asset deal through which, by court order, the purchaser enjoys some of the benefits of a share deal and some of the benefits of an asset deal. It is a structure not available without the court's discretionary imprimatur and, unlike a share deal or an asset deal, cannot be done without the court's blessing.

Applicants' Rationale for RVO Here

[42] The Applicants posit a series of reasons why the ARVO should be approved.

[43] First, they emphasize the robust process engaged in the SISP, which thoroughly canvassed the market, and which resulted in the proposed AgMedica Transaction which "was the only binding offer received for AgMedica, Nursery and 504" and is "the only chance for a going-concern outcome for the benefit of employees, vendors, suppliers and customers."

[44] The AgMedica Transaction will not generate sufficient proceeds to satisfy claims with a priority lower than the DIP Loan and first secured mortgage demonstrating, the Applicants say, that there is no value to be realized beyond the AgMedica Transaction.

[45] The Monitor supports the requested approval of the AgMedica Transaction and the RVO structure. Both the Applicant and the Monitor emphasize that, as with other transactions in this sphere, the RVO structure is necessary to maintain and preserve the licenses required to operate the "highly regulated businesses of the AgMedica Purchased Entities."

[46] Finally, the Applicants and Monitor maintain that the relevant stakeholders are no worse off under the proposed reverse vesting structure than they would be under a traditional vesting order, and that there is no viable alternative that would produce a more favourable economic result.

[47] With the exception of the last of these propositions, there is effectively no opposition to the Applicants' positions (with the exception of some differences about the scope of related releases, discussed below).

[48] It is fair to emphasize the value of the licenses in the acquired entities, and the central importance of those licenses to the purchasers in the AgMedica Transaction. In order for the Transaction to work, a structure conveying those regulatory permissions is essential.

[49] It is also apt to point to the going-concern outcome as a laudable result, maintaining employment and business relationships.

Discussion of Case Law re RVOs

[50] In a recent decision (*MCAP Financial Corporation v. QRD (Willoughby) Holdings Inc.*, 2024 BCSC 1654) Walker J. of the Supreme Court of British Columbia, in considering a proposed RVO structure relative to the sale of development lands, made observations emphasizing the caution required in considering the use of RVOs.

[51] After noting that RVOs are a relatively recent but increasingly frequent phenomenon, and typically structured so that “unwanted” assets and liabilities are removed and vended to a residual company while the desired or “good assets” remain with the debtor whose shares are being acquired by the purchaser, Walker J. wrote:

“RVOs are not routinely granted as they circumvent the processes established in insolvency legislation enacted by Parliament. RVOs may be granted where the applicant can demonstrate extraordinary circumstances exist, typically, e.g. where intangible assets such as licenses, permits, intellectual property, and tax attributes are difficult or impossible to transfer to the purchaser through an asset vending order. Close scrutiny of the proposed RVO is required to ensure that the restructuring is fair and reasonable having regard to the objectives and constraints of the statutory scheme in issue (in this case the BIA). An RVO is not to be granted merely because it may be more convenient or beneficial for the purchaser. There must be an evidence-based rationale for value in the proposed RVO transaction.”

[52] Justice Walker went on to note that, in addition to establishing that extraordinary circumstances exist to justify consideration of an RVO structure, the applicant seeking approval must also satisfy the factors set out in Penny J.’s seminal decision in *Harte Gold Corp. (Re)*, 2022 ONSC 653, known, as Walker J. confirmed, as the “Harte Gold Factors.”

[53] The Harte Gold Factors, consistent with factors set out in s.36(3) of the CCAA and largely corresponding to the *Soundair* criteria (as propounded in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R.(3d) 1), for approving an asset sale require the applicant to demonstrate:

- “(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;

- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.”

[54] In my view, subject to the argument advanced by the Attorney General of Canada discussed immediately below, the proposed RVO satisfies these criteria.

[55] As noted, the process leading to the proposed ARVO was extensive and robust, and was undertaken with the Monitor’s input and approval.

[56] The consideration to be realized appears fair, particularly in a market in which many participants are in financial distress.

[57] While there is some debate about the extent to which GreenSeal’s secured creditors were consulted along the way, their positions have been advanced, certainly before Penny J., in the two hearings (July 9 and 26) discussed above, and in that sense their views have been taken into account.

[58] The issue from these criteria meriting further discussion is the question of the effects of the proposed transaction on the Attorney General, as creditor with respect to deemed trusts for source deductions.

Opposition from Crown

[59] In that regard, in this case, the concerns and opposition to the ARVO come from the Attorney General of Canada (speaking on behalf of the CRA, together, the “Crown”).

[60] That opposition relates to the aspect of the AgMedica RVO which would vest out a source deduction deemed trust claim in the amount of \$1,772,417.69. (I should note that there are also substantial Excise tax obligations outstanding, but these claims are not secured, and the Crown implicitly acknowledged that the opposition it presses before me is in relation only to the statutory deemed trust claims for source deductions).

[61] The Crown makes its argument emphatically, both in its written submissions and in the impassioned oral submissions its counsel made before me.

[62] The Crown asserts that “vesting out a trust claim through an RVO – in and of itself an extraordinary remedy – would be an extraordinary result.”

[63] The argument urges the “sanctity” of the trust claims at issue, and says that issuing the RVO sought in this case would create inconsistency with subsection 6(3) of the CCAA, which requires payment in full of a source deduction of liability under a CCAA plan, along with subsection 37(2) of the CCAA which preserves the Source Deduction Deemed Trust in the CCAA.

[64] The Crown acknowledges that there is no plan of compromise or arrangement in the current case, but asserts that permitting a source deduction liability to be vested out through an RVO within a CCAA proceeding “would create disharmony and asymmetry between a CCAA plan and a CCAA RVO.” The Crown maintains that the “transaction vehicle of choice should be “source deduction neutral” and that there should be equality of treatment of the source deduction liability between a CCAA plan and a CCAA RVO.

[65] The Crown goes on to argue that the test laid out in the Court of Appeal for Ontario’s decision in *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, for assessing whether the interest of a third party should be extinguished through a vesting order, has not been satisfied, inasmuch as:

- “(i) a statutory trust claim is one of the highest claims known to the common law; and
- (ii) the Crown has not consented in any manner whatsoever to having its trust claim extinguished and, to the contrary, was expecting to be paid the exact same trust fund amounts that were used to keep the Atlas enterprise afloat prior to the initiation of the CCAA proceedings. The trust funds were effectively used as working capital by the Applicants, akin to a “Pre-CCAA DIP Loan”, with the Crown acting as an involuntary creditor.”

[66] In addition, and relevant to the third of the Harte Gold Factors in particular, the Crown alleges that it will be in a worse position under the proposed RVO than it would be under the presumed alternative, bankruptcy, in that recourse against the directors will effectively be foreclosed under the proposed RVO whereas the Crown would still have recourse against the directors in a bankruptcy scenario (subject to any due diligence defences). In making this submission, the Crown acknowledges that bankruptcy is not the preferred result here; it says that instead “Payment of the source deduction liability and affirmation of the sanctity of trust claims is the desired result.”

[67] Finally, the Crown complains that the proposition imbedded in this motion that the court is being asked to approve a binding letter of intent pursuant to a “draft Purchase Agreement” to be executed at a later date “on substantially the same terms of the binding LOI” does not allow the court to “scrutinize the agreement on its final terms” which it alleges is “also unfair to the stakeholders.”

[68] Dealing with this latter argument, again subject to the scope of releases, I do not perceive this as a significant concern. It was not pressed by the Crown in oral argument, and in any event, it is not unusual for peripheral terms to remain to be finalized, so long as the substantive terms are confirmed, and destined to remain “substantially the same.”

[69] On the other hand, the Crown's arguments about the sanctity of the trust for source deductions, and its concern about statutory asymmetry merit serious consideration.

[70] Indeed, the Applicants concede the critical importance of these source deductions, which it agrees are, as stated by the Crown, to be "at the heart of public finance in Canada." They also do not dispute the Crown's contention that employee withholdings are not the property of an employer (here AgMedica), and that when "an employer utilizes withholdings to increase liquidity and working capital, the Crown becomes an involuntary creditor."

[71] The Crown also points out, again with no disagreement, that the central importance of source deductions is confirmed by companion deemed trust vehicles in legislation beyond the *Income Tax Act* to allow recovery of employee tax deductions that employers fail to remit (including the *Canada Pension Plan* and the *Employment Insurance Act*).

[72] As noted, the Crown argues that this comprehensive legislative effort to preserve the deemed trust for source deductions explicitly finds its way into the CCAA. Although subsection 37(1) of the CCAA expressly nullifies deemed trusts in CCAA proceedings, s. 37(2) explicitly preserves the deemed trust for source deductions under the ITA, EIA and CPP. The Crown asserts that s. 37(2) of the CCAA represents "the effort of Parliament, after many years of legislative evolution, to balance the competing policy goals of tax collection and corporate restructuring."

[73] Finally on this score, as noted, the Crown points out that under subsection 6(3) of the CCAA, the court may only sanction a compromise or arrangement if it provides for full payment to the Crown, within six months, of all amounts that were outstanding at the time of the application included in the deemed trusts, which restriction can only be removed by consent of the Crown.

Applicants' Response to Crown: The CRA Claim Ranks Behind other Creditors

[74] Again, the Applicants acknowledge the overarching legislative scheme confirming the sanctity of deemed trust claims for source deductions. The Applicants argue, however, that in relation to the source deductions liability, the CRA's claim ranks behind the first-ranking claims of Shalcor, as DIP Lender, and of AgriRoots under the AgriRoots mortgage.

[75] As a credit bid, the Applicants note, the AgMedica Transaction does not provide cash proceeds to satisfy the lower-ranking CRA claim, and the Applicants aver that there is no basis on which a credit-bidding purchaser can be required to provide cash proceeds to satisfy lower priority claims; the credit bidder need only pay out higher ranking claims to obtain the secured assets in exchange for its debt. As such, the Applicants argue, the Crown's reliance on Osborne J.'s decision from *In the Matter of the Companies' Creditors Arrangement Act* and *In The Matter of CannaPiece Group Inc.*, 2023 ONSC 841, is misplaced. That is because, the Applicants argue, Osborne J. in *CannaPiece* "declined to approve an RVO that would have vested out the interest of a first-ranking secured creditor" and his decision is therefore distinguishable.

[76] The Applicants concede that when employers fail to withhold and remit source deductions, federal legislation gives statutory priority to such claims through mechanisms including a deemed trust. Thereby, in relation to withheld income tax, sections 227(4) and (4.1) of the ITA protect the

Crown's interest by deeming unremitted amounts to be held in trust for His Majesty, notwithstanding any security interest in the amount or property deemed to be held in trust. The Applicants acknowledge that the CCAA generally recognizes the priority created for these amounts.

[77] However, the Applicants contend, despite the importance of these protective provisions, there are limited circumstances in which the deemed trust for unremitted source deductions must cede priority to other higher-ranking creditors. The Applicants cite the decision of the Supreme Court of Canada in *Canada v. Canada North Group Inc.*, 2021 SCC 30 in support of this proposition.

[78] The Applicants argue that the statutory deemed trust for the unremitted source deductions here is subordinate to the AgriRoots mortgage and Shalcor DIP Facility, which are being paid out first under the AgMedica Transaction.

[79] Concerning the AgriRoots Mortgage, the Applicants point to s. 227(4.2) of the ITA – as was discussed in *Canada North* – which provides that, for “purposes of subsections 227(4) and 227(4.1), a security interest does not include a prescribed security interest.” A “prescribed security interest” is in turn defined by regulation, as follows:

“2201(1) For the purpose of subsection 227(4.2) of the Act, prescribed security interest....means that part of a mortgage securing the performance of an obligation of the person, that encumbers land or a building, where the mortgage is registered pursuant to the appropriate land registration system before the time the amount is deemed to be held in trust by the person (Income Tax Regulations, C.R.C., c. 945, s. 2201(1)).”

[80] The AgriRoots Mortgage encumbers land (the Chatham Facility) and charges AgMedica's property in an amount up to \$16.5 million. The Applicants assert, and the Crown does not contest, that \$16 million of the charge was in place before AgMedica first failed to remit the source deductions.

[81] As such, the Applicants' argument continues, the AgriRoots charge was registered “before the time the amount is deemed to be held in trust by the person” such that the AgriRoots Mortgage constitutes a “prescribed security interest” for the purposes of s. 227(4.2).

[82] Since the AgriRoots Mortgage was registered prior to the existence of the deemed trust, the Applicants' argument on this point concludes, the deemed trust is not a higher-ranking claim that would have to be satisfied by AgriRoots before it could acquire the AgMedica Purchased Entities by means of a credit bid. Moreover, the Applicants add, the AgriRoots Mortgage would enjoy this priority position whether the Applicants were in a CCAA proceeding or a bankruptcy.

[83] Relative to Shalcor, the DIP Charge, by the terms of the TARIO, is a first-ranking claim over the assets of the AgMedica Purchased Entities. In *Canada North*, the Supreme Court of Canada recognized that a priority ranking DIP Charge order by a CCAA court, can, pursuant to

the court's jurisdiction under the CCAA, take priority over deemed trusts for unremitted source deductions.

[84] In *Canada North*, the super-priority charges, which included a financing charge in favour of an interim lender, were granted using language substantially replicated in the TARIO with respect to the DIP Lender's Charge over AgMedica's property. In coming to that determination in *Canada North*, Karakatsanis J. wrote: "the CCAA generally empowers supervising judges to order super-priority charges that have priority over all other claims, including claims protected by deemed trusts."

[85] Given the use of substantially the same language in the TARIO as in *Canada North*, the Applicants assert that Shalcor's claim as DIP Lender has priority over the CRA claim for unremitted source deductions.

[86] The Applicants also maintain that the CRA's consent is not required for the Applicants' transfer of the unremitted source deduction liability to ResidualCo as an excluded liability. The Applicants say that this step is equivalent to what occurs in a traditional asset sale, in terms of the purchaser choosing which assets it purchases and which assets it leaves behind, and argues that whether the transaction is structured as an AVO or an RVO, the AgMedica Purchasers cannot be required to increase their price or to provide cash proceeds to satisfy a lower-ranking claim.

[87] With respect to s. 6(3) of the CCAA, the Applicants say that it does not change this outcome. The Applicants observe, fairly, that what s. 6(3) says is that a CCAA court cannot sanction a plan of compromise or arrangement unless it provides for payment in full, within six months of any unremitted source deductions. On its plain wording, this provision applies specifically – and only – to plans of compromise or arrangement. There is no plan proposed for the AgMedica Purchased Entities, and no economic basis on which such a plan could be viable (as the SISP has shown).

[88] The Applicants argue that therefore, contrary to the Crown's argument, there is no inconsistent result or asymmetry. The CCAA simply permits different approaches to achieving a restructuring. It is well-established that a debtor company can restructure by means of transactions other than a plan, such as an AVO or RVO. There is also no authority, the Applicants note, requiring that each approach be "source deduction neutral." Section 6(3) refers only to a plan, and not the well-entrenched alternative approaches, and it must be presumed, say the Applicants, that this was Parliament's intent.

[89] Finally on this front, the Applicants argue that, inasmuch as there are no other viable alternatives, the relevant comparison is whether the CRA would receive better treatment under a bankruptcy, which the Applicants say would not be the case.

Crown's Reply to Applicants' Arguments

[90] In its response to these arguments, the Crown effectively acknowledged the priority of the AgriRoots Mortgage and the Shalcor DIP Charge. Again in colorful and emphatic terms, counsel for the Crown urged that despite the technical priorities, given the sanctity and critical importance

of the source deduction regimen, I ought nonetheless to uphold the primacy of the deemed trust to “send a signal to the market.” To do otherwise, counsel insisted, would be to render the court “beholden to the tyranny of the market.”

Conclusion re ARVO

[91] While I too acknowledge the critical importance of the deemed trust for source deductions, and the benefits of the Crown’s interest prevailing in many if not most scenarios, I must also presume that Parliament intended the technical result yielded by the language of the relevant legislative and regulatory provisions and, subject to a change in that law, my task is to enforce those provisions as written, regardless of sympathies. I view this not as succumbing to the tyranny of the market, but rather to adhering to and enforcing the legislation as written.

[92] Addressing the Crown’s concern about losing the ability to pursue claims against directors and officers, the Applicants note that under the proposed ARVO pre-filing arrears and refunds are vested in ResidualCo and post-filing arrears (if any) and refunds stay with the AgMedica Purchased Entities, and that, in response to the Crown’s concern, any claims against the directors and officers in respect of unpaid taxes are channeled to insurance and the stay is lifted on a limited basis to permit the CRA to take steps to assert such claims. In my view this channeling of claims to insurance means the CRA is in no worse position than it would be in a bankruptcy scenario.

[93] In sum, the Applicants say that the ARVO mechanism does not harm the CRA, and that the CRA would be in the same position in a traditional asset sale scenario and in a bankruptcy.

[94] Overall, I agree.

[95] The ARVO will allow the Agmedica Purchased Entities to carry on business as a going concern, to the evident benefit of employees, vendors, suppliers, and customers.

[96] I accept that the RVO structure is necessary to transfer the required licenses to operate that going concern, and that therefore the extraordinary circumstances justifying the use of the RVO are in place.

[97] While it may be disheartening that the deemed trust asserted by the Crown relative to the source deductions cannot trump the interests of the AgriRoot Mortgage or the Shalcor DIP Charge, I find nonetheless that those priorities are clear and carry the day.

Resolution of Release Issue

[98] The remaining issue relative to the ARVO, as to associated releases, essentially worked itself out during the course of submissions.

[99] That is, there was a disagreement evident in the parties’ materials, and in the initial submission of the Applicants, on one hand, as against those of Stoke and YNCU, on the other, as to whether the proposed releases should include the directors and officers of GreenSeal.

[100] However, and to her credit, once Applicants' counsel heard the submissions on behalf of Stoke and YNCU, and that they had not expected that a release of the GreenSeal directors and officers would be part and parcel of the AgMedica ARVO, she agreed to exclude GeenSeal from the post-filing release. She did not, in so doing, resile from the principled basis for her position, but did so in light of accepting that counsel opposite were taken by surprise. In his even-handed submissions, counsel for the Monitor also supported the removal from paragraph 31 of the proposed order the post-filing release of GreenSeal's directors and officers.

[101] In all other respects, the form of release was in my view appropriately and rationally connected to relevant aspects of the restructuring, and appropriately limited to the extent necessary, and should remain as written.

[102] As such, with necessary modifications (there were various aspects of the draft ARVO order in the materials to be completed) I grant the ARVO order sought by the Applicants. I also extend the current stay, as requested to the end of October, 2024.

The GreenSeal Issues

[103] I turn back now to address the issues relative to the other business line within Atlas, that of GreenSeal.

[104] As noted earlier on, the SISP, while yielding the AgMedica Transaction, did not produce an executable deal relative to the GreenSeal business.

[105] It did, on the eve of the motion, yield the LOI, which was improved from the earlier term sheet from the same bidder.

[106] However, it was not the case, and nobody suggested, that the LOI was yet the basis for a final and definitive transaction.

[107] In simple terms, in the circumstances, counsel for the Applicants argued that the Applicants, together with the Monitor, whose SISP had led to the LOI that is currently on the table, should continue the process of negotiating with that bidder with a view to getting to a transaction acceptable for all concerned.

[108] Stoke and YNCU, on the other hand, argued that the Applicants, and in particular GreenSeal had taken their "one shot" contemplated by Penny J.'s July 9 endorsement, and, in light of that "shot" having not led to a definitive deal, should now yield to Stoke and YNCU, and their proposed CRO, to take considerably increased control over GreenSeal's operations, and take the lead in the ongoing negotiations, if warranted, with the remaining bidder.

[109] Counsel for the Applicants argued that she understood that the bidder had expressed reservations, or even an unwillingness, for GreenSeal's secured creditors, and/or their proposed CRO to become directly involved, such that, Applicant's counsel suggested, their participation could put the one potential transaction at risk.

[110] Counsel for Stoke, in particular, advised that her information was different than that of Applicants' counsel, and that she understood that the bidder in fact welcomed the participation of the proposed CRO (who has been functioning as information liaison for the last couple of months) and the opportunity to deal more directly with the secured creditors. Moreover, she emphasized that the position of the secured creditors deteriorates with each passing day, and that they ought to be permitted to protect their interests.

[111] A way around this developing impasse was suggested in the submissions of counsel for the Monitor. Again in an even-handed fashion, he observed that, although the involvement of the secured creditors and their CRO may create risk of the one potential transaction going by the wayside, the secured creditors were now specifically aware of that risk and, as the parties with something to lose, should be entitled to elect to run the stated risk and take their chances.

Conclusion re GreenSeal Issues

[112] I am drawn to this position. I had expressed a concern during argument that it makes sense for Stoke and YNCU, whose funds are at stake, to be more directly involved in the negotiation or other process(es) to explore potential ways forward relative to GreenSeal, and that the appointment of the CRO on their behalf would facilitate this more direct involvement. It is clear that the risk to the secured creditors is not nominal or theoretical; the evidence indicates that GreenSeal's current funding is precarious and likely short-lived.

[113] I note that the "ask" from the secured creditors at this stage is short of the receivership for which they were vying before Penny J. earlier on, and that in any event, as the parties with interests remaining at risk, appointing the CRO, with significant powers vis-à-vis the operation of GreenSeal's business, provides more direct information, considerably better control over those operations and an appropriate role and say in the outcome for the GreenSeal side of the business.

[114] I also find that the Charge included in the proposed order appointing the CRO is reasonable and appropriate in the circumstances, as is the fee to be paid. There was some debate about whether or not that fee represented a savings from current outlays; it appears to me that some savings will in fact be realized but, regardless, in my view the appointment of the CRO is nonetheless appropriate and beneficial for the reasons set out above. I find that the request for sealing and confidentiality of the Confidential Exhibit to the Goldstein Affidavit is appropriate, and meets the criteria of the Sherman Estate case.

[115] Accordingly, I grant the CRO Appointment order.

Return to Court as Required

[116] I expect that there may yet be issues to be addressed as these orders and related steps are implemented. In the circumstances, the parties may come back to this court (either to Penny J. or to me) to address any such remaining issues and steps.

DATE: October 7, 2024

W.D. BLACK J.

TAB 4

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-031195-241
(500-11-063779-249)

DATE: November 1, 2024

BEFORE THE HONOURABLE MARTIN VAUCLAIR, J.A.

ATTORNEY GENERAL OF CANADA
APPLICANT – Impleaded Party
v.

FORMER GESTION INC.
9379-3834 QUÉBEC INC.
FORMER GROUPE INC.
FORMER MANAGEMENT INC.
BOUFFONS MONTRÉAL INC.
BOUFFONS MTL ARTS DE LA TABLE
9517-3258 QUÉBEC INC.
RESPONDENTS – Applicants / Debtors
And

PRICEWATERHOUSE COOPERS INC.
IMPLEADED PARTY – Monitor
And

SEYA ACMAZALE
ABDELLAH ATBI
ARIANNE AUGER
NEIL BANSIL
NICOLAS BRAZAO
ANNE BUSSIÈRES-GODBOUT
CATHERINE CAHILL
KYRA CARLETON
ANDRÉ COURNOYER

**ISABELLE DESMARAIS
YOURI DROUADAINÉ
AMÉLIE DURAND
MARGO ELI
ANDRÉ JUNIOR GIRARDEAU
BRUCE HILLS
SUZANNE HINKS
MARIE-LAURENCE JACOB
ROBYN KASZOR
JESSIE KRAVITZ
LEE-ANNE LANCASTER
ÉRIC LAVOIE
AMY LEDUC-CAMERON
CHRISTOPHER MACGREGOR
FRÉDÉRIC MARCHAND
JUNIOR PATRICK MOURGAPANAİK VIRASSAMY
FRANÇOISE POIRIER-CHARETTE
THOMAS ANDREW QUIRK
ANDREW REDDICK
CHRISTINE MELKO ROSS
GABRIELLE ROSS
CHRISTINE ROZON
BRENT FRANCIS A. SCHIESS
LUCY SEGAL
LYNE THÉRIAULT
KIM THOMAS
JULIAN TISSIER
LYSANNE GAUDREAU VILLENEUVE
ROSIE WAXMAN
OZ WEAVER**

IMPLEADED PARTIES – Interested Persons

JUDGMENT

[1] I am seized with an application by the Attorney General of Canada (“AGC”) seeking leave to appeal the decision rendered on August 27, 2024, by the Honourable Justice David R. Collier of the Superior Court, District of Montreal. The decision was rendered in connection with the restructuring of the Just for Laughs Group (“JFL Group”) under the *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36 (“CCAA”): see *Arrangement relatif à Former Gestion Inc.*, 2024 QCCS 3645.

Context

[2] The context is fully explained in the decision of Collier, J. It is sufficient for the purposes of the present application to point out that negotiations yielded a transaction with ComediHa! 24 Inc. pursuant to which (1) certain entities of the JFL Group, notably Former Gestion Inc., sold the bulk of their assets under an asset vesting order, and (2) others sold their shares and transferred certain of their liabilities to a company newly incorporated for the transaction (“ResidualCo”) pursuant to a reverse vesting order (the “RVO Entities”). The transaction was made under the CCAA. On June 7, 2024, the Superior Court approved the transaction.

[3] The transaction agreement required that all employees of Former Gestion Inc. be terminated, and that 55 employees of five RVO Entities also be terminated and their employment liabilities transferred to ResidualCo. A difficulty arose regarding the latter group of employees.

[4] Before Collier, J., an application for declaratory relief was presented seeking to secure the application of the *WEPPA* for the terminated employees because of the concern “that Employment and Social Development Canada (ESDC), the body that administers *WEPPA*, may refuse to pay outstanding wages to the former employees of the RVO Entities”: 2024 QCCS 3645, para. 9.

The decision

[5] Collier, J. declared that the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 (“*WEPPA*”) applied to former employees of Former Gestion Inc. and to former employees of the RVO Entities.

[6] He determined that the RVO Entities (as well as Former Gestion Inc., but this is not at issue in the proposed appeal) met the criteria prescribed by s. 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 (“*WEPP Regulations*”) and that the *WEPPA* applied.

[7] It is undisputed, and I agree, that according to ss. 5(1)(iv) and 5(5) of the *WEPPA* and s. 3.2 of the *WEPP Regulations*, the Superior Court, as a court seized with relevant proceedings, may determine whether the criteria prescribed by s. 3.2 of the *WEPP Regulations* are satisfied. That limited conclusion is then factored in when establishing a former employee’s eligibility for payments under the *WEPPA*.

[8] Section 3.2 of the *WEPP Regulations* provides:

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

3.2 Pour l'application du paragraphe 5(5) de la Loi, le tribunal peut décider si l'ancien employeur est l'ancien employeur dont tous les employés ont été congédiés ou licenciés au Canada, à l'exception de ceux dont les services sont retenus pour cesser progressivement ses activités commerciales.

[9] It is also apparent that s. 3.2 of the *WEPP Regulations* gives the judge broad discretion to make the determination under that section.

[10] Collier, J.'s declaratory conclusion reads:

[37] DECLARES that pursuant to section 5(5) of WEPPA, Former Gestion Inc. and the RVO Entities as defined herein are former employers that meet the criteria prescribed by section 3.2 of the *WEPP Regulations*, and all their former employees in Canada who have been terminated are individuals to whom WEPPA applies;

Position of the parties

[11] The applicant submits that Collier, J. went further than required by arrogating the Minister's powers to himself. By declaring that the *WEPPA* applied, he infringed the discretion of the Minister, who, according to law, is responsible for determining the eligibility of individuals under the *WEPPA*. This error allegedly transpires from Collier, J.'s reasons, where he decided "the relevant time for determining when *WEPPA* applies" and referred, in passing, to s. 5(1)(c) of the *WEPPA*. The applicant insisted on the words used in paragraph 34 of the decision:

[34] The Court agrees with the Applicants that the relevant time for determining when *WEPPA* applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant. Consequently, in the event an employee is owed eligible wages by a former employer at the moment the former employer terminates all its employees, s. 5(1)(c) of *WEPPA* ("the individual is owed eligible wages by the former employer") is satisfied.

[Underlining added]

[12] In his application for leave to appeal, the AGC argues that Collier, J. erred:

a. by failing to decline to rule on a matter under the exclusive jurisdiction of the Minister to determine WEPP eligibility, which is subject to review only by the CIRB and the Federal Court of Appeal. The Superior Court, therefore, infringed upon the Minister's exclusive jurisdiction.

b. subsidiarily, by determining that the relevant time to determine eligibility is when all of an insolvent entity's employees are terminated. The criteria used by the Superior Court to make this determination is flawed. The relevant time for determining when WEPPA applies is the moment at which all the conditions of eligibility are met.

[Reference omitted]

[13] All of the respondents stress that the decision does not declare *eligibility*, but only the applicability of the *WEPPA*. Moreover, they submit, the decision is sound since it would be unfair that eligibility of terminated employees for the federal assistance program be determined by the mode of purchase, regardless of the structure or impact of the global transaction.

Leave to appeal

[14] Given the broad powers conferred on the judge in this respect, leave to appeal is granted only sparingly. Such leave is governed by s. 13 of the *CCAA*. The case law recognizes that, to obtain leave, four cumulative criteria must be met:

[15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:

1. whether the issue on appeal is of significance to the practice;
2. whether the issue raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
4. whether the appeal will unduly hinder the progress of the action.

[References omitted]

Stomp Pork Farm Ltd., Re, 2008 SKCA 73, para. 15; see also *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, paras. 29-30.

Analysis

[15] The applicant has failed to convince me that the appeal is *prima facie* meritorious.

[16] Again, it is undisputed, and I agree, that it is for the Minister to decide if an applicant under the *WEPPA* is *eligible* to receive a payment.

[17] Collier, J. never concluded that one or more of the employees is *eligible* to receive a payment under the *WEPPA*. The only declaratory conclusion is reproduced above, and it obviously does not speak to eligibility. Further, the applicant has failed to convince me that it does so indirectly.

[18] By declaring that the RVO Entities are former employers that meet the criteria prescribed by s. 3.2 of the *WEPP Regulations*, the judge stayed within the boundaries of the broad discretion conferred on him by law. Moreover, there is nothing wrong with the judge justifying his decision by using a time reference that is relevant to the specific realities of the case and pertinent for purposes of “determin[ing] whether the former employer is the former employer all of whose employees in Canada have been terminated”, as s. 3.2 requires. Finally, since the judge came to this conclusion, it is quite evident that the terminated employees are individuals to whom the *WEPPA* applies. The judge’s words to that effect seem somewhat superfluous, and in making that statement, the judge did not decide the question of *eligibility*, neither generally nor individually.

[19] In short, the judge addressed a specific situation and offered a response authorized by the *WEPPA* and its regulations. Despite the arguments ably presented by counsel for the applicant, the assertion that the decision readily qualifies all the employees as being *eligible* for a *WEPPA* payment has no merit in the circumstances.

FOR THESE REASONS, THE UNDERSIGNED:

[20] **DISMISSES** the application for leave to appeal, with legal costs.

MARTIN VAUCLAIR, J.A.

Mtre Kim Sheppard
Mtre Jonathan Bachir-Legault
DEPARTMENT OF JUSTICE CANADA
For the applicant

Mtre Ilia Kravtsov
Mtre Sandra Abitan
Mtre Jack Matthew Little
OSLER, HOSKIN & HARTCOURT
For the respondents

Mtre Denis Ferland
DAVIES WARD PHILLIPS & VINEBERG
For the impleaded party Pricewaterhouse Coopers inc.

Mtre Andrew J. Hatnay
Mtre Abir Shamim
KOSKIE MINSKY
Mtre Nicolas Brochu
FISHMAN FLANZ MELAND PAQUIN

For the impleaded parties Seya Acmazale, Abdellah Atbi, Arianne Auger, Neil Bansil, Nicolas Brazao, Anne Bussi res-Godbout, Catherine Cahill, Kyra Carleton, Andr  Cournoyer, Isabelle Desmarais, Youri Drouadaine, Am lie Durand, Margo Eli, Andr  Junior Girardeau, Bruce Hills, Suzanne Hinks, Marie-Laurence Jacob, Robyn Kaszor, Jessie Kravitz, Lee-Anne Lancaster,  ric Lavoie, Amy Leduc-Cameron, Christopher MacGregor, Fr d ric Marchand, Junior Patrick Mourgapanaik Virassamy, Fran oise Poirier-Charette, Thomas Andrew Quirk, Andrew Reddick, Christine Melko Ross, Gabrielle Ross, Christine Rozon, Brent Francis A. Schiess, Lucy Segal, Lyne Th riault, Kim Thomas, Julian Tissier, Lysanne Gaudreau Villeneuve, Rosie Waxman and Oz Weaver

Date of hearing: October 22, 2024

TAB 5

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL SEAT

No: 500-09-031382-252
(500-11-064718-246)

DATE: April 23, 2025

BEFORE THE HONOURABLE CHRISTIAN IMMER, J.A.

ATTORNEY GENERAL OF CANADA
APPLICANT – Impleaded Party

v.

VALEO PHARMA INC.
VPI PHARMACEUTICALS INC. / VPI PHARMACEUTIQUES INC.
VALEO PHARMA CORP.

RESPONDENTS – Debtors

and

ERNST & YOUNG INC.
IMPLEADED PARTY – Monitor

and

XEDITON PHARMACEUTICALS INC.
IMPLEADED PARTY – Purchaser

JUDGMENT

[1] The applicant, Attorney General of Canada (“AGC”), is seeking leave to appeal an Approval And Reverse Vesting Order (“ARVO”) delivered on February 4, 2025 by the Superior Court (the honourable David R. Collier)¹ and in support of which written reasons were provided on February 24, 2025².

¹ The ARVO is not reported. It was rendered in file 500-11-064718-246.

² *Arrangement relatif à Valeo Pharma inc.*, 2025 QCCS 580.

[2] On September 27, 2024, the debtor, Valeo Pharma inc. (“Valeo”), commenced proceedings under the *Companies’ Creditors Arrangement Act* (“CCAA”)³. Ernst & Young inc. was named to act as monitor (“Monitor”) and a stay of procedures was ordered which remains in place today.

[3] A court ordered sale and investment solicitation process was carried out and Xediton was selected to purchase Valeo’s business. The sale was to be carried out under the terms of a reverse vesting order (“RVO”).

[4] Under the proposed transaction, upon closing, Valeo was to retain 36 of its 60 employees and would pay the salary and vacation benefits of the other 24 employees, before transferring them to ResidualCo, who would then terminate their employment. Within 30 days after closing, Valeo could further elect not to retain some of the remaining 24 employees. In such an event, Valeo would pay the non-retained employees’ salary and vacation benefits and transfer them to ResidualCo, who would also terminate their employment.

[5] It was further envisaged that applications would be made on behalf of the employees whose employment was terminated by ResidualCo so that they could receive benefits under the federal *Wage Earner Protection Program Act* (“WEPPA”)⁴ for wages owed to them, namely severance pay. Valeo and the Monitor asked the Court to declare that ResidualCo was a former employer within the meaning of para. 5(5) WEPPA and that the criteria prescribed by s. 3.2 of the *Wage Earner Protection Program Regulations*⁵ (“WEPP Regulations”) were met.

[6] The AGC objected. It argued that paras. 32 to 35 of the ARVO give rise to a “structured legal fiction” where non-retained employees are transferred to an empty shell company, ResidualCo, which is not their true employer, to be subsequently terminated, for the sole purpose of creating “alternate facts” to anchor the declarations sought in the ARVO, thereby circumventing the objectives of the WEPPA program. The first instance judge rejected these arguments and rendered the ARVO as requested.

[7] Section 13 CCAA provides that leave may be obtained from the court to which the appeal lies “on such terms as the judge directs”.

[8] In determining whether to exercise the discretion to grant leave, four criteria must be met, cumulatively: i) the point of appeal must be of significance to the practice, ii) it must be of significance to the action or proceedings, iii) the appeal is *prima facie*

³ R.S.C. 1985, c. 36.

⁴ S.C. 2005, c. 47, s. 1.

⁵ (SOR/2008-222).

meritorious, and iv) it does not unduly hinder the progress of the action or proceedings⁶. Leave to appeal is granted only sparingly or parsimoniously as, generally, significant deference is owed to the first instance judge in the exercise of his or her discretion under s. 11 CCAA⁷.

[9] Even when the four criteria are met, the court may still refuse leave if it is in the interest of justice to do so⁸. Indeed, it may be that the orders being contested are effective and cannot be undone and that, consequently, the appeal is moot. Granting leave “would be akin to unscrambling scrambled eggs to put matters back where they were before the orders were implemented”⁹. To “second-guess the exercise of the judge’s discretion would not be in the interest of justice”¹⁰.

[10] The Monitor and Valeo contest the leave application.

[11] In my view, leave to appeal should be granted as all four criteria are met and it is in the interest of justice that the appeal be heard.

[12] Firstly, RVOs, generally, are a relatively recent innovation in insolvency proceedings¹¹. The extent of a supervising court’s powers in an RVO context remains a question of debate¹². Issues dealing with employee claims in insolvency proceedings generally, and in RVOs in particular, are significant to the practice of insolvency¹³. More specifically, the correct interpretation of *WEPPA* and *WEPP Regulations* is highly relevant for insolvency practitioners.

[13] Secondly, the applicant explains that the order, if it is left to stand, may result in a \$ 560,000 payment to non-retained employees. Hence, the question is of significance to the proceedings.

[14] Thirdly, the appeal is *prima facie* meritorious. In the present case, the applicant argues that the first instance judge adopted a statutory interpretation of s. 5 *WEPPA* and

⁶ *Aviva compagnie d'assurances du Canada c. Béton Brunet 2001 inc.*, 2016 QCCA 1837, para. 2 (Schrager J.C.A.); *Arrangement relatif à Groupe Sélection inc.*, 2022 QCCA 1596, para. 8 (Kalichman J.C.A.); *Arrangement relatif à Chrono Aviation inc.*, 2024 QCCA 1710, paras. 10-11.

⁷ *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488, para. 32 (Marcotte J.C.A.); *Arrangement relatif à Groupe Sélection inc.*, 2022 QCCA 1596, para. 9 (Kalichman J.C.A.); *Arrangement relatif à Chrono Aviation inc.*, 2024 QCCA 1710, para. 11 (Beaupré J.C.A.).

⁸ *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCA 1073, para. 9 (Healy J.C.A.).

⁹ *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, para. 20 (Hilton J.C.A.).

¹⁰ *Arrangement relatif à 9323-7055 Québec inc.*, 2018 QCCA 1345, paras. 10-15 (Schrager J.C.A.).

¹¹ *British Columbia v. Peakhill Capital Inc.*, 2024 BCCA 246, para. 3. RVOs were qualified as a “novelty” in *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488, para. 33 (Marcotte J.C.A.).

¹² See the extensive review carried out in Janis P. Sarra, *Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions*, Canadian Legal Information Institute, 2022 CanLIIDocs 431.

¹³ See amongst other the discussion in Michelle Pickett and Linc Rogers, *The Business Side of Reverse Vesting Orders*, 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13555.

the *WEPP Regulations* which is contrary to the wording and the regime's objectives. Without deciding on the merits of the applicant's position, I am satisfied that this aspect of the test is met. The case presents itself differently than in *Arrangement relatif à Former Gestion Inc.*¹⁴, where leave was refused.¹⁵ In that case, all employees were transferred, and the formulation of the declaratory conclusion in the contested order was different.

[15] Finally, the appeal does not unduly hinder the progress of the file, since the ARVO is executory notwithstanding appeal and the applicant is not asking that it be stayed during the appeal¹⁶. Indeed, closing occurred on the day the ARVO was rendered, and the non-retained employees have been transferred to ResidualCo and their employment terminated.

[16] The Monitor insists that since the employees were transferred and their employment was terminated, the Court will not be able to "unscramble the eggs" and that the issue is moot. With respect, without deciding this question, it is certainly arguable that the Court will find that the employees cannot apply for *WEPPA* payments, despite the fact that they were transferred to ResidualCo and that their employment was terminated.

FOR THESE REASONS, THE UNDERSIGNED:

[17] **GRANTS** the applicant's motion for leave to appeal;

[18] **GRANTS** leave to appeal from the Approval And Reverse Vesting Order rendered on February 4, 2025, by the Superior Court;

[19] **SETS May 30, 2025** as the delay, after notification to all parties, for the appellant to file five copies of his memorandum with the Office of the Court, which will contain an argument of a maximum length of **15 pages** along with the three annexes (art. 13 and 58 *R.C.A.Q.Civ.M.* and *Clerk's Practice Direction No. 7*);

[20] **SETS June 30, 2025**, as the delay, after notification to all parties, for impleaded party Ernst & Young Inc. to file five copies of its memorandum with the Office of the Court, which will contain an argument of a maximum length of **15 pages** and, if necessary, elements in addition to those in the appellant's schedules (art. 13 and 58 *R.C.A.Q.Civ.M.* and *Clerk's Practice Direction No. 7*);

[21] **SETS June 30, 2025**, as the delay, after notification to all parties, to file respondent Valeo Pharma Inc.'s copies of its memorandum with the Office of the Court, which will contain an argument of a maximum length of **10 pages**, and, if necessary, elements in

¹⁴ *Arrangement relatif à Former Gestion Inc.*, 2024 QCCS 3645, paras. 6 and 7.

¹⁵ *Attorney General of Canada v. Former Gestion Inc.*, 2024 QCCA 1441.

¹⁶ *Autorité des marchés financiers c. Valeo Pharma inc.*, 2024 QCCA 1741, para. 5.

addition to those in the appellant's schedules (art. 13 and 58 *R.C.A.Q.Civ.M.* and *Clerk's Practice Direction No. 7*);

[22] **REFERS** the matter to the maître des rôles so that a date may be set in the week of **September 29, 2025 in room Antonio-Lamer** for a 90 minute hearing: 45 minutes for appellant and 45 minutes to be divided amongst the Monitor and Valeo;

[23] **THE WHOLE**, with costs to follow the appeal's fate.

CHRISTIAN IMMER, J.A.

Mtre Kim Sheppard
ATTORNEY GENERAL OF CANADA
Department of Justice Canada
For the Applicant

Mtre Jos  ane Chr  tien
McMILLAN
For the Respondents

Mtre Alain N. Tardif
McCARTHY T  TRAULT
For the Impleaded Party Ernst & Young Inc.

Mtre D.J. Miller
THORNTON GROUT FINNIGAN
For the Impleaded Party Xediton Pharmaceuticals Inc.

Date of hearing: April 15, 2025
Reserved date: April 17, 2025

TAB 6

Century Services Inc. Appellant

v.

**Attorney General of Canada on behalf
of Her Majesty The Queen in Right of
Canada Respondent**

**INDEXED AS: CENTURY SERVICES INC. v. CANADA
(ATTORNEY GENERAL)**

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

**ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA**

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.3(1) — Excise Tax Act, R.S.C. 1985, c. E-15, s. 222(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

Century Services Inc. Appelante

c.

**Procureur général du Canada au
nom de Sa Majesté la Reine du chef du
Canada Intimé**

**RÉPERTORIÉ : CENTURY SERVICES INC. c. CANADA
(PROCUREUR GÉNÉRAL)**

2010 CSC 60

N^o du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

Présents : La juge en chef McLachlin et les juges Binnie,
LeBel, Deschamps, Fish, Abella, Charron, Rothstein et
Cromwell.

**EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE**

Faillite et insolvabilité — Priorités — Demande de la Couronne à la société débitrice, la veille de la faillite, sollicitant le paiement au receveur général du Canada de la somme détenue en fiducie au titre de la TPS — La fiducie réputée établie par la Loi sur la taxe d'accise en faveur de la Couronne l'emporte-t-elle sur les dispositions de la Loi sur les arrangements avec les créanciers des compagnies censées neutraliser ces fiducies? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 18.3(1) — Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222(3).

Faillite et insolvabilité — Procédure — Le juge en cabinet avait-il le pouvoir, d'une part, de lever partiellement la suspension des procédures pour permettre à la compagnie débitrice de faire cession de ses biens en faillite et, d'autre part, de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11.

Fiducies — Fiducies expresses — Somme perçue au titre de la TPS mais non versée à la Couronne — Ordonnance du juge exigeant que la TPS soit détenue par le contrôleur dans son compte en fiducie — Le fait que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte du contrôleur a-t-il créé une fiducie expresse en faveur de la Couronne?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the CCAA established above, because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a CCAA or BIA provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the CCAA and in s. 67(3) of the BIA in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the BIA or the CCAA, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la LACC dérogée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la LACC et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la LTA, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la LACC ou de la LFI confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la LTA, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la LACC et au par. 67(3) de la LFI en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la LTA. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la LFI ou la LACC, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith J.J.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, Owen J. James and Matthew J. G. Curtis, for the appellant.

Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell J.J. was delivered by

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

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, Owen J. James et Matthew J. G. Curtis, pour l'appelante.

Gordon Bourgard, David Jacyk et Michael J. Lema, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la LACC et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la LACC, et non la LTA, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la LACC et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 (“*BIA*”). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d’avis d’accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L’entreprise a vendu certains éléments d’actif excédentaires, comme l’y autorisait l’ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s’applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s’applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s’appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l’époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l’emportait sur la *LACC*, la Couronne jouissant ainsi d’un droit prioritaire à l’égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu’elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l’objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu’il sera utile de le faire.

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

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

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la LACC, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 \$ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la LFI. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la LFI (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la LACC n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the CCAA.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the CCAA and give priority to the Crown's *ETA* deemed trust during CCAA proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its CCAA authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la LACC, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la LTA, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la LTA à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la LACC.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

- (1) Le paragraphe 222(3) de la LTA l'emporte-t-il sur le par. 18.3(1) de la LACC et donne-t-il priorité à la fiducie réputée qui est établie par la LTA en faveur de la Couronne pendant des procédures régies par la LACC, comme il a été décidé dans l'arrêt *Ottawa Senators*?
- (2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la LACC en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?
- (3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor “[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)” (s. 222(3)), while the *CCAA* stated at the relevant time that “notwithstanding 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 [so] regarded” (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.’s conclusion that an express trust in favour of the Crown was created by the court’s order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). 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

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l’insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l’égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l’époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d’imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c’est souvent le cas, le conflit apparent peut être résolu au moyen des principes d’interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l’historique de la *LACC*, la fonction de cette loi parmi l’ensemble des textes adoptés par le législateur fédéral en matière d’insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d’insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l’objectif de cette loi et l’interprétation qu’en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l’espèce, j’aborderai la conclusion du juge Tysoe selon laquelle l’ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l’insolvabilité*

[12] L’insolvabilité est la situation de fait qui se présente quand un débiteur n’est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d’insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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.

[13] Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

[14] Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either

ayant pour effet de suspendre les mesures d'exécution de ses créanciers, puis tenter de conclure avec eux une transaction à caractère exécutoire contenant des conditions de paiement plus réalistes. Ou alors, les biens du débiteur sont liquidés et ses dettes sont remboursées sur le produit de cette liquidation, selon les règles de priorité établies par la loi. Dans le premier cas, on emploie habituellement les termes de réorganisation ou de restructuration, alors que dans le second, on parle de liquidation.

[13] Le droit canadien en matière d'insolvabilité commerciale n'est pas codifié dans une seule loi exhaustive. En effet, le législateur a plutôt adopté plusieurs lois sur l'insolvabilité, la principale étant la *LFI*. Cette dernière établit un régime juridique autonome qui concerne à la fois la réorganisation et la liquidation. Bien qu'il existe depuis longtemps des mesures législatives relatives à la faillite, la *LFI* elle-même est une loi assez récente — elle a été adoptée en 1992. Ses procédures se caractérisent par une approche fondée sur des règles préétablies. Les débiteurs insolvable — personnes physiques ou personnes morales — qui doivent 1 000 \$ ou plus peuvent recourir à la *LFI*. Celle-ci comporte des mécanismes permettant au débiteur de présenter à ses créanciers une proposition de rajustement des dettes. Si la proposition est rejetée, la *LFI* établit la démarche aboutissant à la faillite : les biens du débiteur sont liquidés et le produit de cette liquidation est versé aux créanciers conformément à la répartition prévue par la loi.

[14] La possibilité de recourir à la *LACC* est plus restreinte. Le débiteur doit être une compagnie dont les dettes dépassent cinq millions de dollars. Contrairement à la *LFI*, la *LACC* ne contient aucune disposition relative à la liquidation de l'actif d'un débiteur en cas d'échec de la réorganisation. Une procédure engagée sous le régime de la *LACC* peut se terminer de trois façons différentes. Le scénario idéal survient dans les cas où la suspension des recours donne au débiteur un répit lui permettant de rétablir sa solvabilité et où le processus régi par la *LACC* prend fin sans qu'une réorganisation soit nécessaire. Le deuxième scénario le plus souhaitable est le cas où la transaction ou l'arrangement proposé par le débiteur est

the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

[15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

[16] Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors*

accepté par ses créanciers et où la compagnie réorganisée poursuit ses activités au terme de la procédure engagée en vertu de la *LACC*. Enfin, dans le dernier scénario, la transaction ou l'arrangement échoue et la compagnie ou ses créanciers cherchent habituellement à obtenir la liquidation des biens en vertu des dispositions applicables de la *LFI* ou la mise sous séquestre du débiteur. Comme nous le verrons, la principale différence entre les régimes de réorganisation prévus par la *LFI* et la *LACC* est que le second établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire, ce qui rend le mécanisme mieux adapté aux réorganisations complexes.

[15] Comme je vais le préciser davantage plus loin, la *LACC* — la première loi canadienne régissant la réorganisation — a pour objectif de permettre au débiteur de continuer d'exercer ses activités et, dans les cas où cela est possible, d'éviter les coûts sociaux et économiques liés à la liquidation de son actif. Les propositions faites aux créanciers en vertu de la *LFI* répondent au même objectif, mais au moyen d'un mécanisme fondé sur des règles et offrant moins de souplesse. Quand la réorganisation s'avère impossible, les dispositions de la *LFI* peuvent être appliquées pour répartir de manière ordonnée les biens du débiteur entre les créanciers, en fonction des règles de priorité qui y sont établies.

[16] Avant l'adoption de la *LACC* en 1933 (S.C. 1932-33, ch. 36), la liquidation de la compagnie débitrice constituait la pratique la plus courante en vertu de la législation existante en matière d'insolvabilité commerciale (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), p. 12). Les ravages de la Grande Dépression sur les entreprises canadiennes et l'absence d'un mécanisme efficace susceptible de permettre aux débiteurs et aux créanciers d'arriver à des compromis afin d'éviter la liquidation commandaient une solution législative. La *LACC* a innové en permettant au débiteur insolvable de tenter une réorganisation sous surveillance judiciaire, hors du cadre de la législation existante en matière d'insolvabilité qui, une fois entrée en jeu,

Arrangement Act, [1934] S.C.R. 659, at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

[17] Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

[18] Early commentary and jurisprudence also endorsed the CCAA's remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

[19] The CCAA fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make

aboutissait presque invariablement à la liquidation (*Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659, p. 660-661; Sarra, *Creditor Rights*, p. 12-13).

[17] Le législateur comprenait, lorsqu'il a adopté la LACC, que la liquidation d'une compagnie insolvable causait préjudice à la plupart des personnes touchées — notamment les créanciers et les employés — et que la meilleure solution consistait dans un arrangement permettant à la compagnie de survivre (Sarra, *Creditor Rights*, p. 13-15).

[18] Les premières analyses et décisions judiciaires à cet égard ont également entériné les objectifs réparateurs de la LACC. On y reconnaissait que la valeur de la compagnie demeurait plus grande lorsque celle-ci pouvait poursuivre ses activités, tout en soulignant les pertes intangibles découlant d'une liquidation, par exemple la disparition de la clientèle (S. E. Edwards, « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587, p. 592). La réorganisation sert l'intérêt public en permettant la survie de compagnies qui fournissent des biens ou des services essentiels à la santé de l'économie ou en préservant un grand nombre d'emplois (*ibid.*, p. 593). Les effets de l'insolvabilité pouvaient même toucher d'autres intéressés que les seuls créanciers et employés. Ces arguments se font entendre encore aujourd'hui sous une forme un peu différente, lorsqu'on justifie la réorganisation par la nécessité de remettre sur pied des compagnies qui constituent des volets essentiels d'un réseau complexe de rapports économiques interdépendants, dans le but d'éviter les effets négatifs de la liquidation.

[19] La LACC est tombée en désuétude au cours des décennies qui ont suivi, vraisemblablement parce que des modifications apportées en 1953 ont restreint son application aux compagnies émettant des obligations (S.C. 1952-53, ch. 3). Pendant la récession du début des années 1980, obligés de s'adapter au nombre grandissant d'entreprises en difficulté, les avocats travaillant dans le domaine de l'insolvabilité ainsi que les tribunaux ont redécouvert cette loi et s'en sont servis pour relever les nouveaux défis de l'économie. Les participants aux

the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The manner in which courts have used CCAA jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the CCAA enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la LACC. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la LACC.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvable ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la LACC dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la LFI a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la LFI supplanterait rapidement la LACC, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3^e sess., 34^e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la LACC dans la pratique contemporaine,

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

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

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu’offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la *LACC* [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d’un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d’insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d’insolvabilité peuvent être régies par des régimes législatifs différents, elles n’en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l’objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

[TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d’éviter l’anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l’absence d’un processus collectif, chaque créancier sait que faute d’agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l’inefficacité et au chaos qui résulteraient de l’insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d’un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

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

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during CCAA reorganization despite language in the CCAA that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the CCAA purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the CCAA to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, “Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy” (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance (“EI”) and Canada Pension Plan (“CPP”) premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d’une priorité en cas d’insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l’insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l’objet d’aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu’elle l’était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l’État en cas d’insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l’État ne bénéficie d’aucune priorité, alors qu’aux États-Unis et en France il jouit au contraire d’une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d’une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l’impôt sur le revenu et des cotisations à l’assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s’applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n’a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as “source deductions”.

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 (“*PPSA*”). As then worded, an *ITA* deemed trust over the debtor’s property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the “*Sparrow Electric* amendment”).

également les biens détenus par un créancier garanti qui, si ce n’était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l’égard des retenues à la source relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC (voir par. 227(4) de la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J’emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d’un litige portant sur la priorité de rang entre, d’une part, une fiducie réputée établie en vertu de la *LIR* à l’égard des retenues à la source, et, d’autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l’Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D’après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l’égard des biens du débiteur pour une valeur égale à la somme due au titre de l’impôt sur le revenu — commençait à s’appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l’emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n’existait pas de biens susceptibles d’être visés par la fiducie réputée de la *LIR* lorsqu’elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu’elle est réputée s’appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l’arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

18.3 (1) Subject to subsection (2), notwithstanding 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 held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

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.

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(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*

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 . . .

. . . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

. . . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be “identical” (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 (“*C.C.Q.*”), was held to have repealed a more specific provision of the earlier *Quebec Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l’égard de la TPS dans le cadre de la *LACC*. Dans l’arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d’appel de l’Ontario a invoqué la doctrine de l’abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d’appel de l’Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu’en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

[TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d’appel de l’Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s’estimait donc tenue de suivre l’arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu’une disposition d’une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d’abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrerait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édicton visait justement à prévenir.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at “ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer” (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament’s express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l’effet de l’arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l’on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L’anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d’un projet de loi d’exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n’indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l’égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l’assurance-emploi et au Régime de pensions du Canada qu’un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l’employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l’égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l’égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from “identical” to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament’s overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament’s intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l’historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d’être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l’historique législatif. On ne peut donc pas dire que l’arrêt *Doré* commande l’application automatique d’une règle d’abrogation implicite.

[53] Un bon indice de l’intention générale du législateur peut être tiré du fait qu’il n’a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D’ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l’art. 18.3 a, comme nous l’avons vu plus tôt, été reprise sous une formulation différente à l’art. 37. Par conséquent, dans la mesure où l’interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d’abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l’engagement de procédures fondées sur la *LACC*, c’est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c’est dans la *LACC* qu’est exprimée l’intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d’accord avec ma collègue la juge Abella pour dire que l’al. 44f) de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21, permet d’interpréter les modifications de 2005 comme n’ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l’objet d’un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l’approche de la *LFI* et celle de la *LACC* à l’égard de l’insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by CCAA s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in CCAA proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the CCAA's override provision. Viewed in its entire context, the conflict between the *ETA* and the CCAA is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that CCAA s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the CCAA as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a CCAA reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the CCAA helps in understanding how the CCAA grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that “[t]he CCAA is skeletal in nature” and does not “contain a comprehensive code that lays out all that is permitted or barred” (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, “[t]he history of CCAA law has been an evolution of judicial interpretation” (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as “the hothouse of real-time litigation” has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the CCAA’s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a LACC est par nature schématisée » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]’histoire du droit relatif à la LACC correspond à l’évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la LACC découlent souvent de l’exercice discrétionnaire de certains pouvoirs. C’est principalement au fil de l’exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la LACC a évolué de façon graduelle et s’est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L’exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la LACC. Le caractère réparateur dont j’ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l’un des premiers exemples :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu’elle fournit un moyen d’éviter les effets dévastateurs, — tant sur le plan social qu’économique — de la faillite ou de l’arrêt des activités d’une entreprise, à l’initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la LACC comporte plusieurs aspects. Le tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA. Without exhaustively cataloguing the various measures taken under the authority of the CCAA, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la LACC ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la LACC. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la LACC, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of CCAA authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The CCAA has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the CCAA's supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[63] Judicial innovation during CCAA proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during CCAA proceedings? (2) What are the limits of this authority?

[64] The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[62] L'utilisation la plus créative des pouvoirs conférés par la LACC est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La LACC a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la LACC, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la LACC n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la LACC? (2) Quelles sont les limites de ces pouvoirs?

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la LACC et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la LACC, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding (see G. R. Jackson and J. Sarra, “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the CCAA and the recent history of the legislation, I accept that in most instances the issuance of an order during CCAA proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the CCAA empowered a court “where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d’appel ont déconseillé aux tribunaux d’invoquer leur compétence inhérente, concluant qu’il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu’interpréter les pouvoirs se trouvant dans la LACC elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d’accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdent d’abord à une interprétation des dispositions de la LACC avant d’invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d’une procédure fondée sur la LACC (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu’on lui donne l’interprétation téléologique et large qui s’impose, la LACC permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L’examen des parties pertinentes de la LACC et de l’évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la LACC relève de l’interprétation législative. D’ailleurs, à cet égard, il faut souligner d’une façon particulière que le texte de loi dont il est question en l’espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la LACC, le tribunal pouvait, « chaque fois qu’une demande [était] faite sous le régime de la présente loi à l’égard d’une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section” (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, “subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances” (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

[70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

d’un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l’ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l’espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l’art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu’il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l’interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d’une demande initiale que d’une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu’elle est indiquée et qu’il a agi et continue d’agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l’opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l’esprit lorsqu’il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l’opportunité de l’ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s’agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l’objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable. J’ajouterais que le critère de l’opportunité s’applique non seulement à l’objectif de l’ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” (see *Chef Ready*, at p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*’s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown’s enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d’une réorganisation sont meilleures lorsque les participants arrivent à s’entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu’il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l’échec » (voir *Chef Ready*, p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l’ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l’habilite à rendre à cette ordonnance.

[72] L’analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l’encontre de la Couronne, une fois qu’il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d’appel, le juge Tysoe a conclu que la *LACC* n’habilitait pas le tribunal à maintenir la suspension des mesures d’exécution de la Couronne à l’égard de la fiducie réputée visant la TPS après l’arrêt des efforts de réorganisation. Selon l’appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l’objectif fondamental de la *LACC* et n’a pas donné à ce texte l’interprétation téléologique et large qu’il convient de lui donner et qui autorise le prononcé d’une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d’autre choix que d’autoriser les mesures d’exécution à l’endroit de la fiducie réputée visant la TPS lorsqu’il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J’ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l’ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établissait une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [...] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [L]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferable from the court's order of April 29, 2008 sufficient to support an express trust.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3^e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of CCAA s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the BIA was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the CCAA restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [CCAA proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la LACC dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la LACC et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la LFI était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la LACC exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la LACC] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 \$ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the CCAA and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« LACC »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la LACC et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la LTA, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a CCAA or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”), where s. 227(4) *creates* a deemed trust:

(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. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(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 . . . 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

II

[96] Dans le contexte du régime canadien d’insolvabilité, on conclut à l’existence d’une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l’existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l’art. 222 de la *LTA*.

[98] La première est la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l’absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l’effet contraire n’a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l’insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d’un montant qu’une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d’une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the CCAA:

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la LACC :

18.3 (1) Subject to subsection (2), notwithstanding 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 held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

18.3(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(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*

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Subject to subsection (3), notwithstanding 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 bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) Subsection (2) 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*

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

[102] Thus, Parliament has first *created* and then *confirmed the continued operation* of the Crown's *ITA* deemed trust under *both* the CCAA and the *BIA* regimes.

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC* *que* sous celui de la *LFI*.

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (“*CPP*”). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 (“*EIA*”), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament’s intent to enforce the Crown’s deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament’s intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l’on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l’article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu’elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l’avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d’insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu’il prétende maintenir cette fiducie en vigueur malgré les dispositions à l’effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l’existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j’ai mentionnés fait donc défaut, ce qui témoigne de l’intention du législateur de laisser la fiducie réputée devenir caduque au moment de l’introduction de la procédure d’insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la personne, jusqu’à ce qu’il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, 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 collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or “building blocks”, for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it “inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception” (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la LFI. L'article 222 de la LTA ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la LFI dans la LTA.*

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 \$ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (“ETA”), and specifically s. 222(3), gives priority during *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”), proceedings to the Crown’s deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court’s discretion under s. 11 of the CCAA is circumscribed accordingly.

[115] Section 11¹ of the CCAA stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court’s discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

¹ Section 11 was amended, effective September 18, 2009, and now states:

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.

au titre de la TPS mais n’a pas encore été versée au receveur général du Canada — ne fasse l’objet d’aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l’art. 222 de la *Loi sur la taxe d’accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d’une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l’égard de la TPS non versée. À l’instar du juge Tysoe de la Cour d’appel, j’estime que tel est le cas. Il s’ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l’art. 11 de la *LACC* est circonscrit en conséquence.

[115] L’article 11¹ de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l’insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu’une demande est faite sous le régime de la présente loi à l’égard d’une compagnie, le tribunal, sur demande d’un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l’ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l’art. 11, il est nécessaire de trancher d’abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l’espèce, prévoit ce qui suit :

¹ L’article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

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.

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, 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 collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, 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 a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[116] Century Services argued that the CCAA's general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during CCAA proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding 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 held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the CCAA (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) ... [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with “any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)”, s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.’s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d’interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c’est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s’applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d’application du par. 222(3) et en déclarant de façon non équivoque qu’il s’applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d’appel MacPherson dans l’arrêt *Ottawa Senators* :

[TRADUCTION] L’intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) », c’est le par. 222(3) qui l’emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l’emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l’insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L’opinion du juge d’appel MacPherson suivant laquelle le fait que la *LACC* n’ait pas été soustraite à l’application de la *LTA* témoigne d’une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l’édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n’a pas été modifié.

[120] L’absence de modification du par. 18.3(1) vaut d’être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the CCAA.

[123] Nor do I see any “policy” justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the CCAA and ETA described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the BIA as an exception when enacting the current version of s. 222(3) of the ETA without considering the CCAA as a possible second exception. I also make the observation that the 1992 set of amendments to the BIA enabled proposals to be binding on secured creditors and, while there is more flexibility under the CCAA, it is possible for an insolvent company to attempt to restructure under the auspices of the BIA. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is “later in time” prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d’inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l’application du par. 18.3(1) de la LACC.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d’aller à l’encontre, par voie d’interprétation législative, de l’intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l’a fait le juge d’appel Tysoe les raisons pour lesquelles l’argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l’espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

[TRADUCTION] Je ne conteste pas qu’il existe des raisons de politique générale valables qui justifient d’inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n’a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu’il a adopté les modifications susmentionnées à la LACC et à la LTA. Comme le juge MacPherson le fait observer au par. 43 de l’arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu’il a adopté la version actuelle du par. 222(3) de la LTA, ait désigné expressément la LFI comme une exception sans envisager que la LACC puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la LFI ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la LACC, il est possible pour une compagnie insolvable de se restructurer sous le régime de la LFI. [par. 37]

[124] Bien que je sois d’avis que la clarté des termes employés au par. 222(3) tranche la question, j’estime également que cette conclusion est même renforcée par l’application d’autres principes d’interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l’emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The “later in time” principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that “[a] more recent, general provision will not be construed as affecting an earlier, special provision” (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be “overruled” by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu’il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3^e éd. 2000), p. 358).

[126] L’exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n’est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu’il a employés, a exprimé l’intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d’interprétation visent principalement à faciliter la détermination de l’intention du législateur, comme l’a confirmé le juge d’appel MacPherson dans l’arrêt *Ottawa Senators*, au par. 42 :

[TRADUCTION] ... en matière d’interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l’intention du législateur lorsqu’il a adopté la loi. Cette règle fondamentale l’emporte sur toutes les maximes, outils ou canons d’interprétation législative, y compris la maxime suivant laquelle le particulier l’emporte sur le général (*generalia specialibus non derogant*). Comme l’a expliqué le juge Hudson dans l’arrêt *Canada c. Williams*, [1944] R.C.S. 226, [...] à la p. 239 ... :

On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n’est pas une règle de droit mais un principe d’interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4^e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005², le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44f) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 The amendments did not come into force until September 18, 2009.

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

“new law” unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

. . .

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an “enactment” as “an Act or regulation or any portion of an Act or regulation”.

[130] Section 37(1) of the current CCAA is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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.

18.3 (1) Subject to subsection (2), notwithstanding 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 held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[131] The application of s. 44(f) of the *Interpretation Act* simply confirms the government’s clearly expressed intent, found in Industry Canada’s clause-by-clause review of Bill C-55, where s. 37(1) was identified as “a technical amendment to re-order the provisions of this Act”. During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l’al. 44f)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d’abrogation et de remplacement, les règles suivantes s’appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n’est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l’art. 2 de la *Loi d’interprétation* : « Tout ou partie d’une loi ou d’un règlement. »

[130] Le paragraphe 37(1) de la LACC actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

18.3 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l’absence de la disposition législative en question, il ne le serait pas.

[131] L’application de l’al. 44f) de la *Loi d’interprétation* vient tout simplement confirmer l’intention clairement exprimée par le législateur, qu’a indiquée Industrie Canada dans l’analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d’ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1^{re} sess., 38^e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the CCAA proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(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 or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(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 or proceeding with any other action, suit or proceeding against the company.

. . . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

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

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

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

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium,

(iv) au moment de tout défaut d’exécution de la transaction ou de l’arrangement,

(v) au moment de l’exécution intégrale de la transaction ou de l’arrangement;

b) la suspension de l’exercice par Sa Majesté du chef d’une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l’égard d’une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

(2) [Cessation] L’ordonnance cesse d’être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person

d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

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

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n’ont pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding 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 held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] 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 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 where

(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, notwithstanding 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.

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

18.3 (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

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

and for the purpose of paragraph (c), the provision of provincial legislation 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 subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. — initial application] 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 30 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.

(2) [Stays, etc. — other than initial application] 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);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

11. [Pouvoir général du tribunal] 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.

11.02 (1) [Suspension : demande initiale] 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 trente 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.

(2) [Suspension : demandes autres qu'initiales] 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) 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.

(3) [Burden of proof on application] The court shall not make the order unless

(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.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

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.

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

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.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a)(i)* à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l’égard d’une compagnie qui est un débiteur visé par la loi provinciale, s’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

(2) [Cessation d’effet] Les passages de l’ordonnance qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d’avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l’égard de toute somme qui devient due à Sa Majesté après le prononcé de l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection

perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

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

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

and for the purpose of paragraph (c), the provision of provincial legislation 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 subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L’ordonnance prévue à l’article 11.02, à l’exception des passages de celle-ci qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

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

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

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] 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) [Exceptions] 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.

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s’applique pas à l’égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des sommes réputées détenues en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d’une loi de cette province, si, dans ce dernier cas, se réalise l’une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l’impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l’application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l’encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d’accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, 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 collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, 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 a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding 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 bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) 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 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 where

(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

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas a) et b),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)a), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

(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, notwithstanding 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.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers’ compensation, in this section and in section 87 called a “workers’ compensation body”, rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

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

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l’application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l’encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d’une faillite ou d’une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d’une province ou d’un organisme compétent au titre d’une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

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

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

and for the purpose of paragraph (c), the provision of provincial legislation 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 subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. dissenting.

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

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

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

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA est dissidente.

Procureurs de l’appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l’intimé : Procureur général du Canada, Vancouver.

TAB 7



Reasons for decision

In the matter of an appeal of the Minister's decision
under section 32.5 of the *Wage Earner Protection
Program Act*,

Pei Hsuan Chiang,

applicant.

Board File: 034672-C

Neutral Citation: 2022 CIRB **1027**

June 24, 2022

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, assigned to this matter pursuant to section 14.1 of the *Wage Earner Protection Program Act (WEPP Act)*.

Parties' Representatives of Record

Ms. Pei Hsuan Chiang, on her own behalf;

Ms. Danijela Hong, for the Minister of Labour.

I. Nature of the Application

[1] On May 1, 2021, Ms. Pei Hsuan Chiang (the applicant) filed an application to appeal pursuant to section 14(1) of the *WEPP Act*. The Board notes that this is one of several applications to appeal filed by different individuals under the *WEPP Act* related to the reorganization of the Comark Entities described below.

[2] Section 14(1) of the *WEPP Act* provides the right to appeal a review decision regarding eligibility for payment. However, Ms. Chiang's application relates to a review decision regarding an overpayment (and not eligibility). Accordingly, the Board will treat it as having been filed pursuant to section 32.5(1) of the *WEPP Act*.

[3] Ms. Chiang appeals the review decision issued by the Minister of Labour (the Minister) that found that she had been paid amounts that she was not owed under the Wage Earner Protection Program (WEPP).

[4] Having reviewed the application, the Board has decided to confirm the Minister's review decision.

II. Background and Facts

[5] The facts of this application stem from a complex corporate reorganization undertaken pursuant to the *Companies' Creditors Arrangement Act* (CCAA). The central issue is whether 11909509 Canada Inc. (11909509), a bankrupt entity that was created to permit the corporate reorganization, is Ms. Chiang's former employer. The Minister determined that 11909509 was not her former employer and that her actual former employer was not bankrupt or subject to a receivership. As a result, the Minister concluded that Ms. Chiang was not eligible for a WEPP payment since she did not meet the requirement at section 5(b) of the *WEPP Act*:

5 An individual is eligible to receive a payment if

(a) the individual's employment ended for a reason prescribed by regulation;

(b) **the former employer is bankrupt or subject to a receivership;** and

(c) the individual is owed eligible wages by the former employer.

(emphasis added)

[6] The Board is aware that the eligibility criteria of section 5 of the *WEPP Act* were amended on November 20, 2021. However, the Board will apply the version of the *WEPP Act* that was in force when Ms. Chiang made her application for a WEPP payment, which is also the version that was applied by the Minister. In any event, the version of section 5 that is now in force would not change the outcome of the present case.

A. The Reorganization

[7] Ms. Chiang was employed by Bootlegger Clothing Inc. (Bootlegger).

[8] Bootlegger, Cleo Fashions Inc. (Cleo), Ricki's Fashions Inc. (Ricki's) and Comark Holdings Inc. (Comark) (together, the Comark Entities), a chain of retailers, experienced financial difficulties. They sought protection from their creditors under the CCAA. This protection was granted by the Superior Court of Justice of Ontario (the Court) on June 3, 2020, and Alvarez & Marsal Canada Inc. was appointed as the monitor (the Monitor).

[9] While the CCAA proceedings were ongoing, the Comark Entities proceeded to a reorganization that involved the sale of their shares pursuant to a Purchase Agreement made on July 7, 2020 (the Purchase Agreement).

[10] As part of the reorganization, some stores were closed and the number of staff was reduced. This included the termination of the applicant's employment with Bootlegger on July 10, 2020. Some wages were paid to her upon her termination, but she retained a claim for termination pay. Other employees whose employment was terminated as part of the reorganization also retained a claim for termination pay and/or severance pay.

[11] The reorganization was structured as a "reverse vesting order." Unwanted assets and liabilities were transferred out of the business to be purchased. Those unwanted assets and liabilities (the Excluded Assets and Excluded Liabilities) were transferred to 11909509, a wholly owned subsidiary of Comark, constituted for the sole purpose of allowing the reorganization.

[12] Claims for wages by employees who had not been retained by the Comark Entities, such as the applicant's claim for termination pay, were part of the Excluded Liabilities transferred to 11909509. The terms of the reorganization also provided for the release of the Comark Entities and their directors from any of the liabilities transferred to 11909509.

[13] As a result of the "reverse vesting order," the Comark Entities emerged from the CCAA proceedings as a going concern while 11909509 became the sole applicant in the CCAA proceedings.

[14] The terms of this reorganization were approved by the Court on July 13, 2020, with the granting of the Approval and Vesting CCAA Termination Order (Approval Order). The transaction as approved in the Approval Order closed on August 7, 2020.

B. The WEPP Process

[15] Following the implementation of the reorganization, the subsidiary 11909509 filed for bankruptcy on August 20, 2021, under estate number 31-2666153. Alvarez & Marsal Canada Inc., the Monitor in the CCAA proceedings, was appointed as its trustee in bankruptcy (the Trustee).

[16] The Trustee advised Ms. Chiang that she could make a claim to the WEPP for the termination pay to which she was entitled following her termination. It also advised her to name 11909509 as her former employer. Ms. Chiang therefore filed a claim for termination pay naming 11909509 as her former employer, and the Trustee filed a Trustee Information Form (TIF) also naming 11909509 as her former employer.

[17] Service Canada and the Labour Program of Employment and Social Development Canada both administer the WEPP on behalf of the Minister. Service Canada is responsible for WEPP operations, and the Labour Program sets the policies and can undertake a review of WEPP applications on behalf of the Minister. While Service Canada processes WEPP applications, the Labour Program provides it with guidance on the *WEPP Act* and the *Wage Earner Protection Program Regulations*.

[18] Ms. Chiang's claim for termination pay was initially approved for payment by Service Canada on September 24, 2020. The approval letter names 11909509 as her former employer and 31-2666153 as the estate number.

[19] On October 30, 2020, representatives of the Labour Program held discussions with the Trustee and their legal counsel. The Trustee confirmed that the Comark Entities had terminated the employment of the employees affected by the reorganization, like Ms. Chiang. On December 16, 2020, the Labour Program informed the Trustee that the WEPP applications submitted under 11909509 would be denied on the basis that the individuals did not meet the eligibility criteria of section 5 of the *WEPP Act* as their former employer was not bankrupt or subject to a receivership. The Labour Program acknowledged that 11909509 was bankrupt but considered that it was not the former employer.

[20] On December 23, 2020, the Trustee wrote to the Labour Program, explaining that it disagreed with their position and that it would file a motion to amend the Approval Order "to deem 11909509

Canada Inc. as the former employer of the former employees of the Comark Entities whose claims against the Comark Entities were transferred to 11909509.” It stated that a similar order had been granted by the Supreme Court of British Columbia where a transaction had also been implemented as a “reverse vesting order.” It asked that Service Canada not take any further steps until the motion was heard. The motion was filed on December 30, 2020, but it was withdrawn on January 25, 2021, before being heard. As a result, the Approval Order was not amended.

[21] Around March 9, 2021, the Labour Program instructed Service Canada to process the Comark files. The applicants whose claims were related to estate number 31-2666153 were to be denied on the basis that their employment had been terminated by the Comark Entities and not by 11909509. By that time, some claims had already been processed and paid, like Ms. Chiang’s, while others had been suspended at the request of the Labour Program.

[22] As a result, on March 10, 2021, Service Canada issued an overpayment decision to Ms. Chiang, on the basis that her former employer was not bankrupt:

Based on new information provided by the [Trustee], your WEPP entitlement has changed.

Under section 5 of the *Wage Earner Protection Program Act*, an individual may be eligible to receive a payment if their former employer is bankrupt or subject to a receivership. It has been determined that your former employer, Comark Entities, is not bankrupt nor subject to a receivership. A separate company, 11909509 Canada Inc. did file for bankruptcy; however, this company is not your former employer. Therefore, you are not eligible to receive a payment.

[23] Ms. Chiang filed a request for review of the decision. On April 15, 2021, Service Canada issued a review decision that confirmed its overpayment decision and essentially repeated the reasons it had given in that decision. It also added:

A search of the records maintained by the Office of the Superintendent of Bankruptcy confirms that your former employer (Comark Entities) is neither bankrupt nor subject to a receivership.

As your former employer (Comark Entities) has not declared bankruptcy or gone into receivership, we suggest you contact your provincial, territorial or federal labour standards office to file a claim for lost wages.

[24] Ms. Chiang then filed an application to appeal with the Board.

III. Positions of the Parties

A. The Applicant

[25] Ms. Chiang filed two sets of submissions: one responding to the documents provided by the Minister, which consist of documents that Service Canada relied upon to issue its review decision, and one responding to the Minister's submissions, which included the various CCAA proceedings documents and explained the Labour Program's reasoning for rejecting the claims related to 11909509. The Board considered both sets of submissions.

[26] Ms. Chiang states that her former employer Bootlegger, part of the Comark Entities, laid her off in July 2020 without termination pay or severance pay. She was informed by the Trustee that her claim for termination pay had been transferred to 11909509 and that she was eligible to claim amounts owed under the *Employment Insurance Act* (though the Board understands this to mean a WEPP claim). She applied for a payment, and her application was approved. However, in January 2021, she received a letter from the Trustee informing her that she was not eligible for a payment since her former employer was not 11909509. She then received the overpayment decision in March 2021.

[27] In Ms. Chiang's view, the WEPP should provide payment of outstanding wages for people who encounter financial difficulties and need support. She argues that her former employer used the CCAA process to transfer its financial losses to former employees and that the eligibility definition/decision leaves out people in situations like hers.

[28] She states that she is not trying to take advantage of government financial assistance and that the company she worked for took advantage of the situation to clear away debts in order to remain a viable company. She submits that employees were not provided with the opportunity to oppose the manner in which the reorganization was structured and that their employment was ultimately terminated because of bankruptcy. She argues that consideration should be given to the way individuals' rights are handled when companies face financial hardships. In her view, the decision could set a precedent when a "reverse vesting order" is used instead of a "vesting order." She argues that the Minister erred in law in their interpretation of employee rights when such rights and claims are transferred to a numbered bankrupt company through a restructuring process.

[29] More specifically, she argues that the Board cannot rely on the case law argued by the Minister, since those cases did not involve a “reverse vesting order.”

[30] Ms. Chiang submits that the Minister incorrectly interpreted the Approval Order when they concluded that her contract of employment was not part of the Excluded Contracts and Excluded Liabilities transferred to 11909509. Relying on article 5(c) of the Approval Order, she argues that the fundamental values and all agreements within her employment contract, including rights, benefits and severance, were transferred to 11909509. She argues that it would be illogical to conclude that employees’ contracts remained with the Comark Entities while their rights under those contracts were transferred to another company. Relying on paragraph 36 of the Third Affidavit of Mr. Gerald Bachynski, the President of Comark, she argues that all her rights were transferred to 11909509:

36. ... Any person who, prior to the Effective Time, had a valid right or claim against the Comark Entities under or in respect of any Excluded Contract or Excluded Liability (each, an “**Excluded Liability Claim**”) shall no longer have such right or claim against the Comark Entities but will have an equivalent Excluded Liability Claim against [11909509] in respect of the Excluded Contract or Excluded Liability from and after closing. The Excluded Liability Claim of any person against [11909509] following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against the Comark Entities prior to the Effective Time.

[31] She indicates that her claim was denied on the basis that she is not an employee of 11909509 even though it is obvious that this is only a company on paper that did not exist prior to the bankruptcy and that was created solely for the purpose of allowing the Comark Entities to eliminate their liabilities.

[32] Ms. Chiang argues that she only learned of the Motion to Amend when the Minister included it in their submissions. She states that if the motion had been granted and 11909509 had been deemed the former employer, the outcome would have been favourable to her and the other employees in her position. She points out that the motion was not granted, not because it did not have merit, but because the Monitor lacked the funds to pursue it.

[33] Finally, Ms. Chiang takes issue with “reverse vesting orders” that allow large corporations’ unwanted liabilities to be transferred to a shell company which ultimately files for bankruptcy. She submits that this approach is becoming the new normal and that the WEPP’s eligibility criteria should be revised to allow individuals in her position to receive assistance. She takes the position

that her claim was denied on the basis of form over substance. While “reverse vesting orders” help companies remain as a going concern, they do not take into account the rights or claims of former employees. The WEPP’s purpose is to protect and assist employees, and she wonders where such protection and assistance are in her case.

B. The Minister

[34] The Minister argues that the Board should confirm the review decision and that the applicant has not shown an error of law or jurisdiction.

[35] The Minister argues that pursuant to the Purchase Agreement, certain employees of the Comark Entities were designated as Excluded Employees, that is, their employment remained with the Comark Entities but was terminated. Other employees were designated as Retained Employees and were transferred to the purchaser. In addition, all Excluded Liabilities were transferred to, assumed by and vested absolutely and exclusively in 11909509 such that the Excluded Contracts and Excluded Liabilities became obligations of 11909509. The Excluded Liabilities included liabilities related to Excluded Employees. However, employment contracts were not identified as Excluded Contracts. Therefore, the employment contracts of the Excluded Employees were not transferred to 11909509. The Minister’s position is that the employment contracts of the Excluded Employees remained with the Comark Entities until they were terminated in July 2020.

[36] When 11909509 was assigned into bankruptcy on August 20, 2020, the termination and severance liabilities of the Comark Entities had been vested in 11909509. The Minister states that the Monitor confirmed that 11909509 was the only company that was bankrupt but that Comark, Bootlegger, Cleo and Ricki’s had emerged from the CCAA proceedings. The Minister, through the Labour Program, determined that WEPP applications would be denied as the former employer was not bankrupt or subject to a receivership.

[37] The Minister states that Service Canada initially determined that the applicant’s claim was eligible based on the information provided on the TIF. However, the new information gathered by the Labour Program from the Trustee triggered a reconsideration which led to the overpayment decision and request for review.

[38] The Minister argues that they did not err in law as they applied the correct legal test and considered the entire record. The Minister examined the eligibility requirements under section 5 of the *WEPP Act* and concluded that they were not met because the applicant's former employer was not bankrupt or subject to a receivership (see section 5(b)).

[39] The Minister also argues that the purpose of the *WEPP* is not to provide payment of outstanding wages for individuals who encounter financial difficulties and need support. Rather, it is to compensate individuals who did not receive the wages to which they were entitled following their employer's bankruptcy or because their employer is subject to a receivership. Based on the information on record, Bootlegger, a Comark Entity, is not bankrupt or subject to a receivership. According to the records of the Office of the Superintendent of Bankruptcy of Canada, no valid bankruptcy or receivership exists for any of the Comark Entities.

[40] The Minister adds that a disagreement with the eligibility criteria does not give rise to an error of law or jurisdiction.

[41] The Minister asks the Board to confirm the review decision.

IV. The Board's Role on Appeal

[42] Applications to appeal filed under the *WEPP Act* can only raise a question of law or jurisdiction (see section 32.5(1)). The Board's only role is to consider the review decision and the information that was before the Minister to determine what legal questions were analyzed and which facts were considered. The Board cannot obtain additional evidence or documents even if that may be of assistance in clarifying disputed facts (see section 32.7). The Board may then confirm, vary or rescind the Minister's review decision (see section 32.8).

[43] In this case, Ms. Chiang alleges that the Minister made an error of law when they determined that she was not eligible for a *WEPP* payment because her former employer was not bankrupt.

[44] In *Au*, 2020 CIRB 931, the Board explained that a question of law is a question about a legal test. It determined that in the appeal context, it would consider the following questions:

[22] ...

1. whether the Minister's delegate applied the correct legal test and asked the right questions in coming to the decision;
2. whether all aspects of the legal test were applied to the facts; and
3. whether the Minister's delegate took into account all the key facts and the evidence that the law requires them to take into account in the application of a test.

[45] *Au* was issued in the context of an application to appeal an eligibility decision filed pursuant to section 14(1) of the *WEPP Act*, whereas the present application concerns an overpayment decision. However, since the Board's role and powers are the same in both types of applications, it will apply the test developed in *Au* to the present matter (see *Rhodes*, 2022 CIRB 1005).

V. Analysis and Decision

[46] The key issue in this matter is whether the Minister made an error of law when they concluded that Ms. Chiang was not eligible for a payment under the *WEPP Act*. More precisely, the Board must determine whether the Minister made an error of law when they determined that 11909509 was not the former employer of Ms. Chiang.

[47] This determination was made by representatives of the Labour Program who administer the WEPP on behalf of the Minister. The Labour Program then instructed Service Canada to implement its determination for all claimants who had filed a claim for unpaid wages in relation to 11909509. Accordingly, the Board will first review the Labour Program's decision and its record.

A. The Labour Program's Decision

1. The Labour Program's Record

[48] Along with their submissions, the Minister filed the documents relied upon by the Labour Program to come to its determination that 11909509 was not the former employer. The documents include:

- the Motion Record of the Applicants–Motion for Sale Approval dated July 7, 2020, which includes:

-
- the Notice of Motion–Motion for Sale Approval dated July 7, 2020, seeking the Court’s approval of the Approval Order;
 - the Third Affidavit of Mr. Bachynski sworn on July 7, 2020, explaining the structure and purpose of the proposed reorganization;
 - the Purchase Agreement made on July 7, 2020, including Schedule 1.1(a) Excluded Contracts, Schedule 1.1(b) Excluded Leases, Schedule 1.1(c) Retained Leases, Schedule 1.1(d) Permitted Encumbrances and Schedule 1.1(e) Form of Approval and Vesting Order; and
 - the Approval Order granted by the Court on July 13, 2020, and the Monitor’s Certificate.
- The Motion Record–Motion for Amendment Order filed by the Monitor in December 2020, which includes:
 - the Notice of Motion–Motion for Amendment Order returnable January 6, 2021, seeking an amendment to the Approval Order to deem 11909509 the former employer of any former employee of a Comark Entity;
 - the Amendment Order;
 - the Affidavit of John-Luke Ip, an employee of the Monitor, sworn on December 29, 2020, explaining the purpose of the amendment;
 - the emails between the Labour Program and the Monitor in which they disagree over the WEPP eligibility of the individuals who made claims under 11909509;
 - the Second Report of the Monitor made to the Court on July 8, 2020; and
 - a decision of the Supreme Court of British Columbia in which a company was deemed a former employer in the context of a reorganization structured as a “reverse vesting order.”

[49] While the Board has reviewed the Minister’s record, it will only address the portions that are relevant to this decision.

2. Did the Labour Program make an error of law?

[50] The eligibility requirements are set out in section 5 of the *WEPP Act*. More specifically, for an individual to be eligible for a payment, their former employer must be bankrupt or subject to a receivership (see section 5(b)). If that is not the case, an individual cannot make a claim for payment under the WEPP. This is supported by the purpose of the WEPP as defined in section 4 of the *WEPP Act*, which is “to make payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership.” It is also in line with the overall structure of the WEPP which allows the Government of Canada to provide immediate payment to former employees of bankrupt employers for unpaid wages and to take their place as a creditor in the bankruptcy or receivership proceedings. Therefore, a former employer’s bankruptcy or receivership is a central factor for eligibility for a WEPP payment. If the former employer is not bankrupt or subject to a receivership, it would usually be responsible for any unpaid wages.

[51] However, the *WEPP Act* does not provide a definition for “former employer” or “employer.” These words are not defined in the *Bankruptcy and Insolvency Act* either (see section 2(4) of the *WEPP Act*). Therefore, these words should be interpreted as they are commonly understood.

[52] Various dictionaries define “employer” as:

- “a person or organization that employs people” (see Cambridge Dictionary)
- “1. a person, business, firm, etc, that employs workers; 2. a person who employs, user” (see Collins Dictionary)
- “one that employs or makes use of something or somebody... **especially:** a person or company that provides a job paying wages or a salary to one or more people” (see Merriam-Webster Dictionary).

[53] An “employer” is a person or organization that employs people and pays them wages in exchange for their work. It logically follows that the “former employer” is the person or organization that employed the individual and paid them wages or a salary in exchange for their work.

[54] Ms. Chiang does not argue that 11909509 is her former employer in this sense. It would be difficult to conclude that there was an employment relationship between her and 11909509 given

that she never worked for that company and only heard about its existence when she received the letter from the Trustee advising her about the WEPP.

[55] Further, Ms. Chiang does not dispute the fact that her employment was terminated by a Comark Entity. However, she argues that in light of the “reverse vesting order,” the Minister made an error of law in concluding that her former employer is a Comark Entity and not 11909509.

[56] This is similar to the position taken by the Monitor in its communications with the Labour Program in December 2020 and in the Motion to Amend it filed in January 2021 seeking to have 11909509 deemed the former employer. The basis of the motion was that the claims of the Former Employees of the Comark Entities had been transferred to and assumed by 11909509. The Monitor submitted that, pursuant to the Approval Order, Excluded Contracts and Excluded Liabilities relating to the Former Employees of the Comark Entities had been transferred to, assumed by and vested in 11909509 on August 7, 2020. The termination and severance claims of the Former Employees were therefore transferred to and assumed by 11909509. The Monitor indicated in its motion that it was necessary to ensure that the Former Employees would not be prejudiced by the “reverse vesting structure” through which the transaction was implemented. It pointed to paragraph 16 of the Approval Order, which provides that the nature of the Excluded Liabilities shall not be affected or altered as a result of their transfer to 11909509 and that persons who had a claim against a Comark Entity prior to August 7, 2020, had the same claim against 11909509 after August 7, 2020.

[57] Did the Labour Program make an error of law when it concluded that the employment contracts of the employees whose employment had been terminated had not been transferred along with the claims for termination pay and severance pay?

[58] Article 5 of the Approval Order states that upon the delivery of the Monitor’s certificate to the purchaser, certain transactions shall occur or be deemed to have occurred within a specific sequence. The Monitor delivered its certificate on August 7, 2020.

[59] First, 11909509 would be added as an applicant to the CCAA proceedings and its directors and officers would be deemed to have resigned. Second, all of the Comark Entities’ right, title and interest in and to the Excluded Assets would be vested in 11909509 and the claims and

encumbrances would continue to attach to the Excluded Assets with the same nature and priority as before the transfer. Third, Excluded Liabilities and Excluded Contracts would be transferred to, assumed by and vested absolutely and exclusively in 11909509. Further, article 5(c) of the Approval Order makes a distinction between Excluded Liabilities and liabilities related to Excluded Contracts. To understand what was transferred, it is necessary to see how these terms are defined in the Purchase Agreement.

[60] The Purchase Agreement defines “Excluded Liabilities.” The definition makes a distinction between liabilities related to Excluded Contracts and those related to Employee Costs for Excluded Employees:

“Excluded Liabilities” means all Liabilities of the Comark Entities other than the Retained Liabilities, and includes without limitation all Liabilities:

(a) for Employee Costs, wages, vacation pay, employee benefits or other Claims, owing by any Comark Entity to, or arising from or in connection with, any (i) Excluded Employee, or (ii) other individual formerly employed or engaged by any Comark Entity whose employment or engagement ended prior to [June 3, 2020];

(b) arising from or in connection with the conduct of the Business, the operation of the Retained Assets or the use of the Leased Real Property prior to the Closing Time, including any Claims from Employees relating to events or circumstances occurring prior to the Closing Time (other than those specifically included in Retained Liabilities);

(c) arising from, in connection with or otherwise accruing before or after [June 3, 2020] relating to any Excluded Contract;

(d) arising from or in connection with any Excluded Assets; and

(e) that are added as Excluded Liabilities pursuant to Section 2.7.

(page 8; emphasis added)

[61] “Employee Costs” are defined in the Purchase Agreement and include termination pay and severance pay.

[62] “Excluded Employees” are also defined in the Purchase Agreement:

“Excluded Employees” means those Employees of the Comark Entities that are:

(a) designated as Excluded Employees in writing by the Purchaser to the Vendor and the Comark Entities on or prior to the date of this Agreement [July 7, 2020]; or

(b) any Employees that are added as Excluded Employees pursuant to Section 2.7.

(page 8)

[63] The list of Excluded Employees is not part of the record. However, if the claims for termination pay and severance pay (that is, claims for Employee Costs) were transferred to 11909509, it is because employees who have those claims are Excluded Employees, pursuant to the definition of Excluded Liabilities. Otherwise, their claims would have remained with the Comark Entities.

[64] Furthermore, “Excluded Contracts” is defined in the Purchase Agreement:

“**Excluded Contracts**” means all the Contracts of the Comark Entities, that:

- (a) relate to any Excluded Assets;
- (b) are Excluded Leases;
- (c) are listed on Schedule 1.1(a); or
- (d) are added as Excluded Contracts pursuant to Section 2.7.

(page 7)

[65] The employment contracts are not an Excluded Asset or an Excluded Lease. No employment contracts are listed in Schedule 1.1(a) or (d) of the Purchase Agreement. There is no indication that the employment contracts were excluded pursuant to section 2.7. In addition, if employment contracts had been included as Excluded Contracts, there would have been no need to create a specific category of liabilities for Employee Costs.

[66] The Board also notes that the Purchase Agreement and the Approval Order do not define or make any reference to “Former Employees.” This term was first employed by the Monitor in its Motion to Amend the Approval Order when it sought to have 11909509 deemed the former employer.

[67] After considering the various terms in the Purchase Agreement and the Approval Order, the Board agrees with the Minister’s analysis and conclusion. The employment contracts of the employees whose employment was terminated by a Comark Entity during the restructuring were

not transferred to 11909509 even though the claims related to those contracts were transferred as Excluded Liabilities. This is consistent with the Monitor's assertion that the Comark Entities and not 11909509 terminated the employment of the employees affected by the reorganization. The Board is of the view that the Minister did not make an error of law in concluding that the employment contracts had not been transferred to 11909509.

[68] The Board now turns to whether the WEPP claims were transferred to 11909509 as suggested by Ms. Chiang. She relied on the Affidavit of Mr. Bachynski to argue that her claim had been transferred to 11909509. Section 16 of the Approval Order states that "the nature of the Excluded Liabilities, ... shall not be affected or altered as a result of their transfer to [11909509]." That same section further provides that as of August 7, 2020, persons who had any claim against a Comark Entity with respect to an Excluded Liability had the same right against 11909509.

[69] It is not disputed that the termination of the employees' employment gave rise to claims for severance pay and termination pay against the Comark Entities. Those claims were transferred to and vested in 11909509. However, the claims that were transferred to and vested in 11909509 were not WEPP claims but rather claims for severance pay and termination pay. As explained above, a WEPP claim would only have arisen if the former employer had been bankrupt or subject to a receivership. Since the Comark Entities did not file for bankruptcy and were not subject to a receivership, it follows that WEPP claims could not be transferred to 11909509 as they never actually materialized.

[70] Ms. Chiang argues that the Minister looked at the form of the transaction while its substance should have been taken into account. She adds that reorganizations structured as "reverse vesting orders" are the new normal since they allow a corporation to continue as a going concern. She submits that the *WEPP Act* eligibility criteria should reflect this reality. Otherwise, she argues, individuals who are terminated due to reorganizations that are structured as "reverse vesting orders" will never receive assistance from their former employer or the government.

[71] It is unclear whether the Minister specifically took into account the fact that the transaction was structured as a "reverse vesting order." However, the WEPP's eligibility criteria do not require the Minister to look at the nature of the transaction when making a determination on eligibility. The Minister's role is to apply the *WEPP Act* as drafted. The Minister (or their delegate) does not have

discretion to alter the eligibility criteria (see *Gouda*, 2020 CIRB 935). Similarly, the Board has a limited power in an appeal as it can only review the decision and the record and ensure the Minister did not make an error of law or jurisdiction. The Board does not have the power to alter the eligibility criteria, even if the result appears unfair. The *WEPP Act* exists to provide employees with immediate payment of wages owed by an employer that is bankrupt or subject to a receivership. However, it does not cover every situation in which an employer experiences financial difficulties and terminates the employment of its employees resulting in wage claims.

[72] For all of the reasons above, the Board concludes that the Minister did not make an error of law when they determined that employees who had filed a claim under 11909509 were not eligible for a WEPP claim on the basis that this entity was not the former employer and that their former employer, a Comark Entity, was not bankrupt or subject to a receivership.

B. Service Canada's Review Decision

[73] As a result of its determination, the Labour Program instructed Service Canada to deny all claims related to the estate of 11909509 (estate number 31-2666153).

[74] More specifically, the Labour Program indicated that the 53 claimants who had received a payment were to be "put into overpayment" and that the pending claims of other claimants were to be denied. It also provided the reason that was to be given for denying the claims:

It has been determined that your former employer, Comark Entities, is not bankrupt nor subject to a receivership. A separate company, 11909509 Canada Inc, did file for bankruptcy; **however, this company is not your former employer. Therefore, you are not eligible to receive a payment.**

(emphasis added)

[75] Ms. Chiang was notified by Service Canada of the overpayment decision on March 10, 2021. She filed a request for review of this decision, and, on April 15, 2021, Service Canada confirmed the overpayment decision.

1. Service Canada's Record

[76] The Review File Summary (the Summary) that was prepared by Service Canada contains an overview of the facts considered in the review process and the reasoning that led to the review

decision. Based on the Summary, it appears that the delegate who processed Ms. Chiang's file considered the following facts:

- A sale transaction was concluded during the CCAA proceedings whereby the shares of Comark were sold to a purchaser that continued the operations of the restructured business.
- Pursuant to the Court Order, 11909509 was added as an applicant to the CCAA proceedings. Pursuant to the Approval and Vesting Order, all liabilities excluded from the Purchase Agreement were transferred to and vested in 11909509 Canada Inc.

[77] 11909509 entered into bankruptcy on August 20, 2020, under estate number 31-2666153. However, there are no records of a bankruptcy or receivership for Comark, although CCAA proceedings were initiated for the Comark Entities on June 3, 2020.

[78] The TIF indicated that Ms. Chiang's employment ended on July 10, 2020, that she had a claim for termination pay and that the business's name was 11909509.

[79] Service Canada received new information from the Labour Program on March 10, 2021. Based on that information, it was determined that the former employer had not filed for bankruptcy or a receivership.

[80] The WEPP Review Supplementary Record indicates that there was a telephone conversation between Ms. Chiang and the Minister's delegate on April 15, 2021, where the delegate explained that the overpayment decision would be confirmed. The delegate asked Ms. Chiang whether she had any further information to include in her request to review such as a pay stub, trustee letter, record of employment or employment contract. Ms. Chiang indicated that she did not have anything that would indicate that 11909509 was the employer.

[81] The Summary states the decision outcome:

In this case, it was determined that the former employer "Comark" did not file for bankruptcy or receivership.

The company 11909509 Canada Inc. filed for bankruptcy but is not the former employer.

Consequently, the eligibility and program requirements were verified against the initial WEPP decision and found to be unmet. Under section 5 of the Wage Earner Protection Program Act, an individual may be eligible to receive a payment if their former employer (Comark) is bankrupt or subject to a receivership. It has been determined that the former employer, Comark Entities, is not bankrupt nor subject to a receivership. A separate company, 11909509 Canada Inc., did file for

bankruptcy; however, this company is not the former employer. Therefore, client is not eligible to receive a payment. According to the information on file, Service Canada is confirming the previous WEPP decision rendered on 10/03/2021.

[82] The overpayment decision was confirmed:

As per WEPPA s.5 (b) the former employer (Comark) must be either bankrupt or subject to a receivership. A search of the records maintained by the Office of the Superintendent of Bankruptcy confirms that the former employer (Comark) is neither bankrupt nor subject to a receivership.

2. Did Service Canada make an error of law?

[83] In her request for review, Ms. Chiang essentially acknowledged that her former employer was not 11909509. She now argues that she experienced financial hardships because of her employer's restructuring and that the WEPP is meant to assist people like her. Unfortunately, and as explained previously, the purpose of the WEPP is somewhat narrower in that it only compensates individuals who are owed eligible wages by an employer who is bankrupt or subject to a receivership.

[84] Service Canada's review decision is based on the fact that Ms. Chiang's former employer is a Comark Entity and not 11909509. Ms. Chiang's termination letter is not part of the record; however, she does not dispute those facts and confirmed herself that her employment had been terminated by Bootlegger.

[85] The Board has not been convinced that the Minister's delegate made an error of law in confirming the overpayment decision. Ms. Chiang was unable to provide any information suggesting that her former employer is 11909509 and not a Comark Entity. Therefore, her claim does not meet the requirement of section 5(b) of the *WEPP Act*.

VI. Conclusion

[86] After reviewing the Minister's record and decision, the Board finds no error of law in the analysis and the conclusion reached with respect to eligibility. Therefore, the Board confirms the Minister's review decision.

[87] The Board understands that Ms. Chiang did not make a claim for payment for an improper motive and is now having to reimburse the money she received through no fault of her own. She

made a claim naming 11909509 as her former employer because the Trustee had advised her to do so. It may have been the intention of the parties to the Approval Order and the Purchase Agreement that the former employees be able to make WEPP claims for their termination pay and severance pay. However, WEPP eligibility is not determined by the Trustee, the Monitor or any party to a corporate transaction made under the CCAA. Rather, it is the Minister that makes that determination (see section 9 of the *WEPP Act*) as the authority responsible for the administration of the WEPP and the distribution of public funds.

[88] Furthermore, even if the Motion to Amend had been granted and 11909509 had been deemed the former employer, it is not clear that the Minister would have been bound by the Purchase Agreement and the Approval Order for the purpose of determining WEPP eligibility.

[89] As explained above, the WEPP exists to provide payments with respect to wages owed by employers who are bankrupt or subject to a receivership. It is not a tool to be used by a restructuring employer to pass on its liabilities and responsibilities vis-à-vis its former employees to a publicly funded program.

[90] This is an unfortunate situation for Ms. Chiang and other employees who may be without a recourse as a result of corporate restructurings that are implemented as “reverse vesting orders.” However, the eligibility requirements are clearly set out in the *WEPP Act* and, unless the Act is amended, it appears that it is up to the courts and monitors to consider the impact of such corporate transactions on former employees.

Ginette Brazeau
Chairperson

TAB 8

Court of King's Bench of Alberta

Citation: Cleo Energy Corp (Re), 2025 ABKB 621

Date: 20251110
Docket: B301 163430
Registry: Calgary

IN THE MATTER OF THE **BANKRUPTCY AND INSOLVENCY**
ACT, RSC 1985, C B-3, AS AMENDED
AND IN THE MATTER OF THE NOTICE OF INTENTION TO
MAKE A PROPOSAL OF CLEO ENERGY CORP.

Corrected judgment: A corrigendum was issued on November 10, 2025; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby**

I. Introduction

[1] Reverse Vesting Orders (“RVOs”) burst on to the scene in 2019. Since then, RVOs have gone from “extraordinary to ordinary.”¹ The present application by the Receiver of Cleo Energy Corp. (“Cleo”) for approval of an RVO involves what before 2019 would likely have been a standard oil and gas transaction implemented through a *Companies’ Creditors Arrangement*, RSC 1985, c C-36 (“CCAA”) plan or a traditional approval and vesting order (“AVO”). The present application raises two questions relevant to insolvency and restructuring practice in the oil and gas industry and a third question of broader application.

[2] The first question that must be decided is if the RVO structure is necessary in the present case. **Harte Gold (Re)**, 2022 ONSC 653, the leading RVO case, held that an RVO must be necessary. The Receiver asserts that the proposed RVO transaction is necessary because it is

¹ Victor Olusegun, “The Journey of Reverse Vesting Orders from ‘Extraordinary’ to Ordinary: Is it Time for Parliamentary Intervention?” (2024) 22 Annual Review of Insolvency Law 16.

more efficient than alternative transaction structures and it is required by the purchaser. The second question that must be decided is whether the RVO structure may be used to shed liability for cure costs relating to unpaid royalties owing pursuant to Crown petroleum and natural gas leases. The third question, raised by Employment and Social Development Canada (“Employment Canada”), concerns potential adverse consequences for employees who made Wage Earner Protection Program (“WEPP”) claims because of use of the RVO structure.

II. The Cleo Energy Corp. Receivership Proposal

[3] Cleo is a private oil and gas company that owned and operated assets in East Central Alberta. Cleo filed a Notice of Intention to Make a Proposal (“NOI”) pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“BIA”) on December 8, 2024. During the NOI proceedings, some of Cleo’s assets were sold through a sales and investment solicitation process. However, not all Cleo’s assets were sold within six months of Cleo filing the NOI. So, to avoid a deemed bankruptcy pursuant to s 50.4(8) of the BIA, uCapital – uLoan Solutions Inc. (the “Interim Financier”) applied for and was granted a receivership order on June 2, 2025. Alvarez & Marsal Canada Inc. was appointed as receiver (the “Receiver”).

[4] The Receiver conducted what it called a remarketing process to sell the Cleo assets that were not sold in the sales and investment solicitation process conducted during the NOI proceedings. The remarketing process engaged with 37 potential interested parties of which 11 signed non-disclosure agreements to gain access to the virtual data room. Eight non-binding bids resulted from the remarketing process. The receiver selected 2698902 Alberta Corporation (the “Purchaser”) as the successful bidder.

[5] The Receiver proposes that the transaction be effected by way of an RVO. The proposed RVO contemplates the creation of ResidualCo that will take on assets, liabilities, and contracts that the Purchaser does not want. Cleo, which will be acquired by the Purchaser, will retain, among other things, “the Retained Contracts, the Title and Operating Documents, Petroleum and Natural Gas Rights....”

[6] The Receiver stated in its First Report that the RVO structure is “essential to maximize value....” The Receiver explained that “[b]y using an RVO, the Purchaser can avoid seeking AER approval for multiple licence transfers, a process that could be lengthy and introduce additional risk and cost to the Transaction and deplete the remaining cash on hand for distribution to creditors.” Further, the Receiver reported that “[t]he Purchaser has advised the Receiver that it is only prepared to proceed with a reverse vesting transaction, rather than a traditional asset purchase, as this structure allows for the efficient transfer of applicable licences and contracts.” The Receiver stated that it “considers the Purchase Price being paid to reflect:

- (i) the importance and value of the time it would take to undertake the additional steps required by the AER under a traditional asset sale/vesting order transaction; and
- (ii) the value attributable to certain of Cleo’s attributes which may be preserved.

[7] Despite offering this opinion, the Receiver gave no estimate of the time it would take to complete AER licence transfers or any explanation of what “attributes” of Cleo that would be preserved or why such attributes might have value sufficient to justify proceeding by way of

RVO. Presumably, if the Receiver is prepared to offer an opinion to the Court concerning the purchase price and the “value of time” required to effect licence transfers, it must have conducted some analysis to support that opinion. There is no support for the Receiver’s opinion to be found in either its First Report or Supplement to the First Report.

[8] The Receiver asserts that alternatives to the proposed RVO “would in all likelihood result in material environmental liabilities and abandonment and reclamation obligations being transferred to the OWA.” Again, no evidence or analysis was offered to substantiate this claim other than to point out that other bids contemplated environmental liabilities being assumed by the OWA.

[9] The proposed RVO provides that Cleo will retain Crown mineral leases with the liabilities for unpaid royalties and rent being transferred to ResidualCo. As I will explain, this is a departure from the usual insolvency and restructuring treatment of executory contracts.

III. Reverse Vesting Orders (“RVOs”)

[10] Courts often say that a RVO is an “extraordinary” remedy: see, for example, **British Columbia v Peakhill Capital Inc**, 2024 BCCA 246 at para 32. Courts also say this about injunctions: see, for example, **Unifor, Local 707A v Suncor Energy Inc**, 2018 ABCA 75 at para 8. This is not helpful and needs to stop. Using the adjective “extraordinary” to describe something indicates it is unusual or remarkable. A conclusion that something is extraordinary is a product of observation, not legal analysis. As I said in **R v TGB**, 2023 ABKB 526 at para 5, “[e]mphasizing the extraordinary nature of a remedy, its rarity, or that it is a last resort says nothing about the legal test to be applied; instead, it encourages the trial judge to close her mind to the availability of the remedy.” A bigger problem with saying that RVOs are extraordinary is that it is not true. RVOs are now a common way for insolvency and restructuring matters to be resolved. I refuse to subscribe to the polite fiction that RVOs are extraordinary in 2025.

[11] Justice Penny’s framework in **Harte Gold** at para 38 for analyzing if an RVO should be granted has been adopted widely, including by the Alberta Court of King’s Bench: see, for example, **Delta 9 Cannabis Inc (Re)**, 2025 ABKB 52 at para 61 and **Long Run Exploration Ltd (Re)**, 2024 ABKB 710 at para 18. Justice Penny in **Harte Gold** explained that before an RVO is granted, a court must consider four questions:

- (a) Why is the RVO necessary in this case?
- (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
- (d) Does the consideration being paid for the debtor’s business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[12] Penny J in **Harte Gold** at para 38 also observed that an RVO should not be approved just because “it may be more convenient or beneficial for the purchaser.”

[13] Justice Marion in **Delta 9** at paras 61-62 explained other criteria that may be considered by a court before granting an RVO, but for the present case I will focus on the **Harte Gold**

factors as that is how all the interested parties framed their submissions. And, further, I will address only the two *Harte Gold* factors that were disputed by the parties.

IV. Should the Receiver's Application to Approve the Cleo RVO be Granted?

A. Is the RVO Structure Necessary in this Case?

[14] An important preliminary question is whether the necessity criterion should be taken seriously. The RVO criteria from *Harte Gold* are a recent judicial invention; the ink is not yet dry. Outside the cannabis industry, which is arguably a special case, RVOs are often used in restructurings where previously CCAA plans or AVOs would have been used. Though the RVO cases have repeatedly affirmed the necessity criterion, the proliferation of RVOs and what courts have found to constitute necessity suggests that a lower standard is being applied. The analysis that follows takes the caselaw at face value and proceeds on the basis that necessary means necessary. With that said, appellate guidance on the question of whether an RVO must be necessary before it may be approved would be of great assistance to lower courts and insolvency and restructuring professionals.

[15] Justice Simard, shortly before his appointment to the bench, and his co-authors compared AVO transactions with RVO transactions with a focus on the oil and gas industry in Chris Simard, et al, "Restructuring and Insolvency Deals in the Oil Patch: Recent Trends and Developments" (2022) 60 Alberta Law Review 363 at 388-92. An AVO, they explained, "allows for the removal of the *assets* from the debtor's insolvent estate." A shortcoming of a standard AVO is that it does not "allow for the purchase and sale of attributes of the debtor company that are *not* assets."

[16] The traditional way for non-asset attributes to be conveyed in insolvency proceedings is via a plan under the CCAA or a proposal pursuant to the BIA. Both CCAA plans and BIA proposals provide creditors the right to vote and a claims process. Justice Simard explained at 389, "a court-approved Plan can, in essence, deliver to a third party the ownership of a debtor company that has been 'cleansed' of all creditor claims but that still retains all its assets, along with all inherent corporate attributes that are not assets (such as tax attributes and regulatory licences)." An RVO delivers the benefits of a CCAA plan or BIA proposal without the messiness and expense associated with creditor democracy: see, Daniel Alievsky, "Reverse Vesting Orders: Did We Forget About Creditor Democracy?" (2023) 12:7 IIC-ART 143 at 149.

[17] The Receiver has identified one reason why an RVO structure must be used in the present case – to avoid the transfer of licences issued by the Alberta Energy Regulator ("AER"). The Receiver asserts that the transfer of licences will take time and cost money which, in turn, will create more risk and reduce the return to Cleo creditors. The Receiver also states that the Purchaser made proceeding by RVO a condition of its offer. I agree with Mr. Alievsky who contends at 152 that "courts should compel parties to explain why and on what evidentiary basis they assert the RVO is not just economically advantageous to its stakeholders, but also better than any alternative." Where it is claimed that there is an obstacle to proceeding using alternative structures such as the cost, risk, and delay of licence transfers, that must be substantiated.

[18] The proposed transaction could be completed by way of a CCAA plan. Proceeding by way of a CCAA plan would allow Cleo to avoid the licence transfer problem that it has identified. But proceeding by way of a CCAA plan would mean that Cleo would have to deal with the

inconvenience and expense of affording creditors their statutory rights under the CCAA when there will be no recovery for most creditors. I note that neither the Receiver's First Report nor its Supplement to the First Report offers any reasons why a CCAA plan is not feasible. Nevertheless, I will consider the Receiver's contention that the transfer of licences necessitates use of an RVO structure.

[19] The cost, delay, and risk associated with the transfer of licences has been found to justify the use of an RVO structure. For example, the non-transferability of licences in the cannabis industry has been a significant factor driving the increased use of RVOs: *Atlas Global Brands Inc*, 2024 ONSC 5570 at para 36; *Delta 9* at para 69. But the transfer of licences has also been used to justify RVOs in the mining industry and the oil and gas industry where licences are transferrable: see, for example, *Harte Gold* and *Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp (Re)*, 2025 ABKB 30 at para 32. Justice Penny in *Harte Gold* at para 71 explained:

The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[20] Justice Penny later noted at para 73 that these were "material risks, delays, and costs" [emphasis added]. Presumably the applicant provided him with evidence to substantiate the materiality of risks, delays, and costs associated with the licence transfers.

[21] The problem in the present case is that delays, risks, and costs associated with the transfer of AER licences are asserted but not proved. Sometimes in Commercial List matters, the Court will accept assertions made by insolvency and restructuring professionals who serve as Monitors, Trustees, and Receivers. But I cannot do so here because the claim runs contrary to common sense.

[22] Oil and gas licence transfers are an everyday part of business in the oilpatch. Part of the AER's job is to process licence transfers. While it is true that parties sometimes structure transactions as share deals or, in the context of insolvency, use CCAA plans to avoid the hassle and expense of licence transfers that does not mean that avoidance of licence transfers is always necessary. If the Receiver claims that the burdens associated with licence transfers necessitate that this transaction use an RVO structure, those claims must be substantiated.

[23] To be clear, I am not saying that the Court requires sworn testimony from the Receiver. Rather, I mean that the Receiver's report should show that the Receiver has done the work to determine what the delays, risks, and costs associated with licence transfers are likely to be. For example, instead of asserting that there will be delays, costs, and risks associated with the licence transfers, the Receiver should specify what delays, costs, and risks are apprehended and why the Receiver believes those concerns to be genuine and material. Put differently, the Receiver must provide backup to justify its conclusion respecting the materiality of the risks, delays, and costs associated with the required licence transfers.

[24] I accept that it is possible that the cost of AER licence transfers may be material to the proposed transaction given that much of the deal consideration is comprised of assumed liabilities that would otherwise be transferred to the Orphan Well Association (“OWA”). But for me to reach such a conclusion, the Receiver must provide an estimate of the costs associated with the AER licence transfers and a reasoned explanation why the estimated amount is material to the proposed transaction.

[25] The fact that the Purchaser requires that the proposed transaction proceed by way of an RVO does not move me. Purchasers always demand what is most favourable from their perspective. The Purchaser has agreed to acquire Cleo’s assets for a substantial consideration which includes cash and assumed environmental liabilities. The Court must assume that the Purchaser will behave rationally. Under the circumstances, if an RVO is not available as a deal structure, the economically rational thing for the Purchaser to do is not to walk away but to negotiate a reduction of the purchase price by the amount that it estimates it will have to pay to effect the licence transfers. Perhaps there are other factors, such as tax, that might affect the price the Purchaser is prepared to pay but that is not clear from anything before the Court. The bottom line is that there is no cogent explanation offered by the Receiver as to what the financial impact is of using structures other than the proposed RVO. Assertions that the transaction must be an RVO are not enough to establish that it is necessary.

B. Is Any Stakeholder Worse Off Under the RVO Structure?

i. Viable Alternative?

[26] *Harte Gold* requires the Court to consider if any stakeholder is worse off under the RVO structure than they would have been under any other viable alternative. The Receiver submits that there are no viable alternatives to the proposed transaction. The Receiver says that the proposed transaction is the only bid received in the remarketing process that would not result in properties being transferred to the OWA. The Receiver further submits that “[a]ny proceeds derived from these hypothetical alternative transactions would not result in proceeds going to satisfy Alberta Energy’s alleged cure costs. Instead, the proceeds would be paid to the OWA....”

[27] The Receiver’s argument attacks a straw man. The viable alternative is not one of the seven rejected bids; it is a differently structured transaction with the successful bidder. As I noted before, the Court must assume that the Purchaser will act in an economically rational way. The viable alternative to the current RVO structure that absolves the Purchaser of responsibility for paying Alberta Energy cure costs is an RVO where the Purchaser is required to pay cure costs. That means that the Purchaser would take on a liability of \$150,000 that it is not under the current structure. A rational economic actor would not walk away; it would reduce the purchase price by a corresponding amount. I note that even with a \$150,000 reduction in purchase price, the Purchaser would still have the highest bid.

[28] Since I have found that the Receiver has not established that an RVO is necessary, it is appropriate to also consider if there is a non-RVO viable alternative. The difficulty with this is that the Receiver has constructed a binary choice between the proposed RVO and the seven unsuccessful bids. Given value that the Purchaser has offered under the proposed RVO structure, it is possible, that a restructured version of the transaction without using the RVO mechanism would still be preferable to the seven other bids. The failure of the Receiver to engage with this possibility leaves the Court unable to assess whether there is a non-RVO viable alternative.

ii. Crown Lease Cure Costs

[29] Cleo owes Alberta \$170,000 in unpaid royalties and \$70,000 in unpaid rent in respect of its Mineral Leases. Of the total \$240,000 owing by Cleo to Alberta, \$90,000 is post-filing debt which the Receiver has confirmed will be paid. The RVO contemplates that “Crown Liabilities,” which is the \$150,000 pre-filing debt for unpaid royalties and rent, will be vested in ResidualCo while the Mineral Leases will remain in Cleo. The RVO allows Cleo to retain the Mineral Leases without paying the arrears to Alberta.

[30] Most oil and gas rights in the province are owned by Alberta. From time to time, Alberta conducts public sale processes where oil and gas companies may bid for Crown oil and gas rights. After a sale, Alberta Energy will issue the successful bidder a petroleum and natural gas lease which is sometimes called a PNG Lease or Mineral Lease. A Mineral Lease grants the lessee the right to drill for, and recover, oil and gas within the leased area. A Mineral Lease does not grant mineral ownership to the lessee; Alberta remains the owner. In exchange, the lessee is required to pay royalties and rent to Alberta.

[31] Tracy Wadson, Alberta’s Director, Royalty Operations swore an affidavit describing how Alberta Energy approaches the transfer of Mineral Leases in insolvency matters as follows:

Upon sale of an insolvent’s Mineral Leases (in an asset sale, not a share purchase arrangement), the receiver or trustee requests that Alberta Energy transfer those Mineral Leases to the name of the purchaser.

Under s 18(2) of the [*Mines and Minerals*] Act [RSA 2000, c M-17], and, in particular, s 5(1)(g) of the *Crown Minerals Registration Regulation*, AR 264/1997 (the **Regulation**”), the Minister (through Alberta Energy) is authorized to refuse the transfer of a Crown agreement.

Alberta Energy requires payment of cure costs (i.e. the Crown Liabilities – the monetary defaults under the Mineral Lease) before it will transfer Mineral Leases to the purchaser (the “**Transfer Requirement**”).

Alberta Energy routinely enforces the Transfer Requirement in insolvency asset transactions and, based on my experience, both industry and receivers/trustees are aware of the Transfer Requirement.

[32] Ms. Wadson’s affidavit did not speak to Alberta Energy’s approach when a debtor is restructured pursuant to a CCAA plan. She did, however, explain that Alberta Energy’s standard approach when royalties and rent are not paid is to issue a Notice of Default as a first step toward cancelling the relevant Mineral Lease. Presumably this means that where a debtor retains Mineral Leases under a CCAA plan, Alberta Energy requires payment of royalty and rental arrears to maintain the Mineral Leases going forward.

[33] Cleo’s Mineral Leases are what are sometimes called executory contracts because there are ongoing obligations: *Kary Investment Corporation v. Tremblay*, 2005 ABCA 273 at paras 19-20. Receivers have the power to adopt or reject executory contracts: Frank Bennett, *Bennett on Receiverships*, 4th ed, (Toronto: Thomson Reuters, 2021) at 557-65; *Spyglass Resources Corp v Bonavista Energy Corporation*, 2017 ABQB 504 at para 67. Executory contracts that are rejected give rise to claims that may be proved in the receivership process: *Bellatrix Exploration Ltd (Re)*, 2021 ABCA 85 at para 44. Receivers adopt executory contracts when they help to maximize value for creditors. This occurs when the executory contract is advantageous or

essential to a restructuring business and will make the business more attractive to a potential purchaser. When a receiver adopts an executory contract, monetary defaults in respect the executory contract must be cured: Simard et al, “Restructuring and Insolvency Deals in the Oil Patch” at 373. Put differently, if a receiver decides to keep a contract, it must keep both the benefits and the burdens of the contract.

[34] The treatment of executory contracts in the CCAA context is similar. Where a debtor company is restructured and an executory contract is retained, the counterparty may demand payment of cure costs as a condition of ongoing performance. Where a CCAA plan calls for the assignment of an executory contract, CCAA s 11.3(4) precludes a court from making an assignment order “unless it is satisfied that all monetary defaults in relation to the agreement ... will be remedied on or before the day fixed by the Court.”

[35] I must pause here to address the question of fairness. Is the payment of cure costs to Alberta Energy fair to the Purchaser and to creditors of Cleo? Yes, it is. The reason that the Purchaser is buying Cleo is because it has Crown oil and gas rights and, in turn, that is why consideration is flowing to creditors. The only reason that Cleo has oil and gas rights is because it has the Mineral Leases. There is nothing unfair about requiring the Purchaser to pay cure costs to maintain the Mineral Leases.

[36] The present application is the second time in the last two months before this Court where a restructuring entity sought to retain the benefit of an executory contract while absolving itself of the responsibility to remedy monetary defaults through the device of an RVO. In **AlphaBow Energy Ltd (Re)**, 2025 ABKB 550, many months after the approval of an RVO, the applicant sought to amend the RVO to retain a contract with a third party for the purchase of carbon dioxide while shedding liabilities associated with the contract. Justice Johnston observed at para 52 that that the applicant had disclaimed the contract in the first instance because it hoped to negotiate a new contract that would avoid payment of cure costs. Justice Johnston declined to exercise her discretion to permit the amendment of the RVO to permit the applicant to retain the contract while shedding the associated liabilities.

[37] Though the Receiver did not provide any cases where courts have approved RVOs where the receiver or purchaser is not required to pay cure costs for retained contracts, I note that it has occurred: see, for example, **Acerus Pharmaceuticals Corporation (Re)**, 2023 ONSC 3314 at para 31. The language used by Justice Penny in **Acerus** suggests, however, that parties whose contracts were retained in that case were allowed to choose to perform or terminate the contracts where cure costs are not paid. He explains at para 31 that the RVO “does not require FGC to cure pre-filing arrears under the Retained Contracts,” and that such parties “have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so.” This is quite different than what is proposed in the present case. I also note that despite the precedent in **Acerus**, RVOs continue to require the payment of cure costs: see, for example, **Razor Energy Corp** at para 60.

[38] I remain open to the possibility that there may be cases where an RVO that provides for the retaining contracts without a corresponding obligation to pay cure costs can be justified, but this is not one of them. The payment of cure costs to Alberta Energy is a reasonable price for the Purchaser to pay to get the ongoing value of the Mineral Leases and it will cause a justified decrease in the value to be received by the creditors of Cleo on their claims.

[39] The use of RVOs to allow contracts to be retained without payment of cure costs alters the incentive structure around insolvency. Moreover, allowing contracts to be retained without payment of cure costs is a curtailment of the principle of freedom of contract beyond what is normal in insolvency proceedings. These are matters that demand consideration by appellate courts and legislators.

iii. Potential Clawback of WEPP Payments

[40] Employment Canada appeared at the application to advise the Court of potential adverse consequences of the RVO for former employees. Employment Canada, however, maintained that it was not taking a position on the appropriateness of the RVO.

[41] Employment Canada advised the Court that pursuant to the *Wage Earner Protection Payment Act*, S.C. 2005, c. 47 (“WEPPA”) former employees of Cleo who had received payments pursuant to WEPP could have their payments clawed back if the RVO is approved.

[42] WEPPA s 5 outlines the eligibility criteria for employees whose former employer is in receivership. The key requirements are that “the former employer is subject to a receivership” and that “the individual is owed eligible wages by the former employer.”

[43] Employment Canada submits:

Should the RVO be granted, the liabilities related to unpaid wages of the former employees of Cleo would be transferred to ResidualCo. Equally, Cleo would emerge from the receivership proceedings and continue to carry on its business operations as a viable corporation.

Following the issuance of the RVO, the eligibility criteria under s. 5(1)(b)(ii) and 5(1)(c) of the WEPPA would no longer be met and, the objective of the WEPP would equally be undermined. As a result, this would likely affect the former employees’ entitlement to WEPP benefits and lead to an overpayment of program benefits, which would be subject to recovery.

[44] Employment Canada further states that whether the conditions for eligibility are met is within the exclusive discretion of the Minister responsible for WEPPA, subject to an appeal before the Canada Industrial Relations Board, which, in turn, is subject to judicial review under the exclusive jurisdiction of the Federal Court of Appeal.

[45] Employment Canada’s submission is, in essence, a warning that following the approval of the Cleo RVO, payments to former employees of Cleo may be clawed back followed by a warning that this Court has no say in the matter. I beg to differ. Justice Collier in *Arrangement relatif à Former Gestion Inc*, 2024 QCCS 3645 at para 34 dispensed with a similar argument by Employment Canada as follows:

[T]he relevant time for determining when WEPPA applies is the moment at which all an insolvent entity’s employees are terminated due to a bankruptcy or restructuring. That is when the employee’s entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant.

[46] I agree. WEPP exists to protect employees from the adverse consequences of the insolvency of their employer. Terminated employees have no control over how insolvency and restructuring transactions are structured after their termination. Terminated employees who have

received WEPPs payment and have no inkling of the possibility of a clawback may have used the money to pay for groceries or rent. A choice to clawback payments made to terminated employees of an insolvent corporation because of subsequent events beyond their control would be to the immense discredit of the Minister and, I would hope, be swiftly reversed by the Canada Industrial Relations Board or the Federal Court of Appeal.

V. Conclusion

[47] The Receiver's application is dismissed without prejudice to its ability to apply again for approval of the proposed transaction with additional supporting material and/or for a restructured transaction.

Heard on the 17th day of October, 2025 with additional written submissions received on the 22nd and 24th of October.

Dated at the City of Calgary, Alberta this 28th day of October, 2025.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Sam Gabor and Tom Cumming, Gowling WLG (Canada) LLP
for Cleo Energy Corp.

James Reid and Pavin Takhar, Miller Thomson LLP
for the Proposal Trustee, Alvarez & Marsal

Melissa N. Burkett, Alberta Justice
for Alberta Energy

Daniel Segal, Department of Justice Canada
for Employment and Social Development Canada

George Wong,
for the Alberta Energy Regulator

Ryan Zahara, MLT Aikins,
for the Orphan Well Association

**Corrigendum of the Reasons for Decision
of
The Honourable Justice Colin C.J. Feasby**

A change was made to the list of lawyers who appeared in this case.

TAB 9

Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in
Right of Ontario et al.*

Alouche v. Landing Strip Inc. et al.

[Indexed as: Downtown Eatery (1993) Ltd. v. Ontario]

54 O.R. (3d) 161
[2001] O.J. No. 1879
2001 CanLII 8538
Docket No. C33989

Court of Appeal for Ontario,
McMurtry C.J.O., Borins and MacPherson JJ.A.
May 22, 2001

*Application for leave to appeal to the Supreme Court of Canada was dismissed with costs January 31, 2002 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28744. S.C.C. Bulletin, 2002, p. 155.

Corporations--Oppression--Employee brought successful action for damages for wrongful dismissal--Company which employed him ceased to do business after action commenced--Employee unable to recover judgment--Employee sought oppression remedy on basis that corporate reorganization oppressive or unfairly prejudicial to him--Trial judge erred in dismissing claim on basis that reorganization not undertaken for purpose of depriving employee of recovery of judgment--Oppressive conduct need not be undertaken with intention of harming complainant --Acts of directors in causing company to go out of business were unfairly prejudicial to or unfairly disregarded employee's interests as person who stood to obtain judgment against company--Business Corporations Act, R.S.O. 1990, c. B.16, s. 248.

Actions--Bars--Issue estoppel--Employee brought action for damages for wrongful dismissal--Employer went out of business after action commenced--Employee moved to add directors of company as defendants but withdrew motion to avoid delaying trial--Employee obtained judgment against company but was unable to recover against company--Employee subsequently asserted claim against directors' other companies on basis of common employer doctrine and against directors personally
 --Employee estopped from asserting claim against directors
 --Common employer doctrine not litigated in first action
 --Doctrine of estoppel did not bar claim against companies.

Employment--Wrongful dismissal--Common employers--Employee worked as manager of nightclub--Nightclub owned and operated through consortium of companies--Employee paid by B Inc.--Employee wrongfully dismissed--Employee obtained judgment against B Inc. but was unable to recover on it--B Inc. had ceased to do business--Common employer doctrine applied
 --Judgment could be enforced against consortium of companies which owned and operated nightclub and against successor or merged companies created by corporate reorganization.

HG and BG owned and operated two nightclubs through a consortium of companies. HG hired A in 1992 as manager of one of the nightclubs. A received his paychecks from B Inc. A was dismissed in 1993. He brought an action for damages for wrongful dismissal against B Inc. Several years after the action was commenced, there was a major reorganization of HG and BG's companies. B Inc. ceased to do business. A moved to add HG and BG as co-defendants to his claim against B Inc. Faced with a potential adjournment of the trial to permit HG and BG to retain counsel, A withdrew the motion. A was successful at trial, and judgment in the amount of \$59,906.76 was granted in his favour. B Inc. paid him nothing pursuant to the judgment. Sheriffs attended at the nightclub premises and, in purported execution of the judgment, seized \$1,855 in cash. D Ltd., claiming that the money belonged to it, brought an action against A. A defended the action and counterclaimed against all of the companies controlled by HG and BG and against BG and HG personally, basing his claim on the common employer doctrine and the oppression remedy under the Ontario

Business Corporations Act. The trial judge dismissed the counterclaim. On the common employer issue, he rejected A's submissions both on the merits and because A, having been content in his wrongful dismissal action to allege that B Inc. was his employer and to be bound by that conclusion, was estopped from now alleging a different or expanded employment obligation. The trial judge also held that an oppression remedy was not appropriate because the reorganization of the HG-BG companies was not undertaken for the purpose of depriving A of recovery of his judgment against B Inc. A appealed.

Held, the appeal should be allowed.

The issue which A considered on the eve of his wrongful dismissal trial was whether to sue HG and BG in their personal capacities as potential employers because of his concern that B Inc., the corporate entity which he regarded as his employer because it paid him, might have no assets. He made a conscious decision not to join HG and BG in the wrongful dismissal action because it would have delayed the trial of that action. The trial judge did not err in concluding that A was estopped from suing BG and HG personally as potential employers in his subsequent action. However, the common employer issue was not considered by A on the eve of the wrongful dismissal trial. The common employer issue raised by A's counterclaim against the corporations did not constitute relitigating an issue. The common employer issue as it related to the corporations should be determined on the merits.

When A was dismissed in 1993, there was a highly integrated or seamless group of companies which together operated all aspects of the nightclub. While an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. A was wrongfully dismissed, and his employer had to meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures but does not permit that complexity to defeat the legitimate entitlements of

wrongfully dismissed employers. The trial judge's focus on the absence of a contract between A and any of the potential common employers and on the fact that there was no holding out by the employer of joint and several liability of more than one company was too narrow. A's true employer in 1993 was the consortium of HG and BG companies which operated the nightclub.

The 1996 corporate reorganization was undertaken for business reasons unrelated to A's action. However, A's judgment should be enforced against the successor or merged companies which were created by the reorganization.

In dismissing A's claim for an oppression remedy, the trial judge found that the amalgamation and reorganization were not undertaken for the purpose of depriving A of recovery of judgment. The trial judge failed to appreciate that the oppressive conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the complainant. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

There was no question that the acts of HG and BG, as the directors of B Inc., in causing the company to go out of business and transferring its assets to other companies within the group of companies they owned and operated in 1996 in the face of a trial scheduled to begin a few months later, effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of, A as a person who stood to obtain a judgment against B Inc. When B Inc. went out of business, it was profitable, and its accumulated profits were available to satisfy any claims arising from employment contracts. HG's evidence indicated that, although he was aware that A's pending claim might result in a judgment against B Inc., he took no steps to ensure that B Inc. retained a reserve to meet that contingency. A was entitled to be protected, and HG and BG had an obligation to ensure that such protection continued. A was

entitled to an oppression remedy against HG and BG.

Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270, 40 C.C.E.L. (2d) 1, 99 C.L.L.C. 210-013 (C.A.), affg (1997), 30 C.C.E.L. (2d) 123 (Ont. Gen. Div.); *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1998), 40 O.R. (3d) 563, 162 D.L.R. (4th) 367, 43 B.L.R. (2d) 155 (C.A.), varg (1995), 131 D.L.R. (4th) 399, 25 B.L.R. (2d) 179 (Ont. Gen. Div.); *Sinclair v. Dover Engineering Services Ltd.* (1988), 49 D.L.R. (4th) 297 (B.C.C.A.), affg (1987), 11 B.C.L.R. (2d) 176 (S.C.), apld

Other cases referred to

Bagby v. Gustavson International Drilling Co. (1980), 24 A.R. 181 (C.A.), varg (1979), 20 A.R. 244 (T.D.); *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1989), 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670, 45 B.L.R. 110 (C.A.), staying (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Q.B.) (sub nom. 315888 v. First Ed. Place); *Gray v. Standard Trustco Ltd.* (1994), 29 C.B.R. (3d) 22, 8 C.C.E.L. (2d) 46 (Ont. Gen. Div.); *Jacobs v. Harbour Canoe Club Inc.*, [1999] B.C.J. No. 2188 (S.C.); *Johnston v. Topolinski* (1988), 23 C.C.E.L. 285 (Ont. Dist. Ct.); *Jones v. CAE Industries Ltd.* (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.); *MacPhail v. Tackama Forest Products Ltd.* (1993), 86 B.C.L.R. (2d) 218, [1994] 3 W.W.R. 36, 11 B.L.R. (2d) 19, 50 C.C.E.L. 136 (S.C.); *Olson v. Sprung Instant Greenhouses Ltd.* (1985), 64 A.R. 321, 41 Alta. L.R. (2d) 325, 12 C.C.E.L. 8 (Q.B.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 245, 248
Employment Standards Act, R.S.O. 1990, c. E.14, s. 12(1)

Authorities referred to

Ball, S., *Canadian Employment Law* (Aurora: Canada Law Book, 1999)
Nicholls, C.C., "Liability of Corporate Officers and Directors to Third Parties" (2001), 35 C.B.L.J. 1

APPEAL from a judgment of Campbell J. (2000), 2 C.C.E.L. (3d) 66 dismissing a counterclaim for oppression remedy and to recover for an unsatisfied judgment.

J. Gardner Hodder, for appellant.

John Conway, for respondents.

The judgment of the court was delivered by

BORINS and MACPHERSON JJ.A.:--

A. Introduction

[1] In his valuable text, *Canadian Employment Law* (Aurora: Canada Law Book, 1999), Stacey Ball states, at p. 4-1:

The courts now recognize that, for purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.

[2] The mechanism whereby the law concludes that an employee may be employed by more than one company at the same time is the common employer doctrine. The doctrine has a well-recognized statutory pedigree in most jurisdictions. For example, in Ontario, s. 12(1) of the *Employment Standards Act*, R.S.O. 1990, c. E.14, deems associated or related businesses to be "one employer" for the purpose of protecting the benefits to which employees are entitled under the Act.

[3] A major issue in this appeal is the definition and application of the common employer doctrine in a common law context. A dismissed employee sued his employer for wrongful

dismissal. Following a trial, he was awarded substantial damages. Unfortunately, the employer company had no assets and consequently the employee was unable to enforce his judgment. In a subsequent action, the employee sued related companies and the two main principals of all the companies in an attempt to widen its net of potential sources of recovery. His principal legal submission in support of his attempt was, and is on this appeal, the common employer doctrine. In Canadian Employment Law, Mr. Ball states that "[t]he finding that more than one corporation is the employer may be a benefit when parts of the corporate group are more solvent than others" (p. 4-1). That is precisely the benefit the dismissed employee seeks to achieve in this litigation.

[4] A second important issue in this appeal is the availability of an oppression remedy to a dismissed employee in the context of a corporate reorganization shortly before a wrongful dismissal trial which has the effect of denying the employee any recovery on a judgment he obtains at the trial.

B. Facts

(1) The parties and the events

[5] In 1992, the respondents Herman Grad ("Grad") and Ben Grosman ("Grosman") were in the nightclub business in Toronto. They owned and operated two nightclubs, The Landing Strip at 191 Carlingview Drive and For Your Eyes Only at 557/563 King Street West.

[6] The appellant, Joseph Alouche ("Alouche"), was born in Egypt and came to Canada in 1974. He attended the Toronto School of Business, took courses in hotel management and received a diploma. He also took correspondence courses relating to the hospitality industry and computers.

[7] In December 1992, Grad offered Alouche a position as manager of the nightclub For Your Eyes Only. The only entity specifically identified in the written employment contract was For Your Eyes Only. However, the contract also provided that Alouche would receive the health care and insurance benefits

available "in our sister organization", which was not identified by name.

[8] Alouche commenced work on December 29, 1992. During the next few months, he received his pay cheques from Best Beaver Management Inc. ("Best Beaver"), a company controlled by Grad and Grosman. In May 1993, Alouche was sent a formal Notice of Discipline on the letterhead of For Your Eyes Only for committing several infractions, including:

- the employee, while soliciting in excess of \$1,000.00 gratuity only generated sales of \$250.00 for the employer.
- the employee allowed numerous waitresses to abandon their assigned sections to solicit gratuities in the amount of \$2,800.00.

[9] On June 15, 1993, Alouche was dismissed. On October 13, 1993, he commenced an action against Best Beaver. In subsequent proceedings which form the basis for this appeal, Alouche explained the choice of Best Beaver as the defendant in the first action: "I sued Best Beaver . . . because the paycheque that they gave me in For Your Eyes Only, it says Best Beaver Management Inc."

[10] In the spring of 1996, there was a major reorganization of the Grad-Grosman companies. Best Beaver ceased to do business. In July 1996, Grad discharged Best Beaver's counsel. Shortly before the start of the trial in his wrongful dismissal action in August 1996, Alouche, worried about recovery if successful in the action, moved to add Grad and Grosman as co-defendants to his claim against Best Beaver. Faced with a potential adjournment of the trial to permit Grad and Grosman to retain counsel, Alouche withdrew the motion.

[11] The trial proceeded with Best Beaver as the only defendant. Grad, a director of Best Beaver, represented it throughout the trial. The trial judge, Festeryga J., found in favour of Alouche. He awarded Alouche damages of \$59,906.76, plus pre-judgment interest of \$8,608.36 and costs of \$15,387.79.

[12] Best Beaver paid Alouche nothing pursuant to the judgment. Two sheriffs, in purported execution of the judgment, attended at the premises of For Your Eyes Only and seized \$1,855 in cash. This provoked Downtown Eatery (1993) Ltd., which claimed that the money belonged to it, to commence an action against Alouche. [See Note 1 at end of document] Alouche defended the action and counterclaimed against all of the companies controlled by Grad and Grosman and against Grad and Grosman personally. In December 1997, Kiteley J. ordered that the \$1,855 seized by the sheriffs be paid into court to the credit of the action.

[13] There are other facts relevant to the disposition of the appeal, including two reorganizations of the Grad-Grosman companies. However, we find it convenient to describe those facts in the context of the specific issues to which they relate.

(2) The litigation

[14] The trial proceeded before C. Campbell J. in February 2000. The essence of the trial was Alouche's counterclaim in which he sought to recover against any or all of the defendants for his unsatisfied judgment against Best Beaver.

[15] Alouche advanced several bases for recovery of his earlier judgment against the new defendants. The trial judge addressed three of them in his reasons for judgment -- the common employer doctrine, oppression relief under the Ontario Business Corporations Act, R.S.O. 1990, c. B.16, and a tracing remedy associated with a fraudulent conveyance.

[16] The trial judge dismissed Alouche's counterclaim in its entirety. On the common employer issue, the trial judge rejected Alouche's submissions, both on the merits and because of the concept of estoppel. With respect to a potential oppression remedy, the trial judge held that such a remedy would not be appropriate because the reorganization of the Grad-Grosman companies was not undertaken for the purpose of depriving Alouche of recovery of his judgment against Best

Beaver. For similar reasons, he held that the defendants had not made any fraudulent conveyance, and, therefore, a tracing order was not appropriate.

[17] The appellant appeals from the trial judge's decision on the common employer and oppression remedy issues. At the hearing of the appeal, the appellant abandoned his appeal on the fraudulent conveyance/tracing issue.

C. Issues

[18] The issues on the appeal are:

- (1) Did the trial judge err in failing to find that some or all of the respondents were a common employer of the appellant? [Se Note 2 at end of document]
- (2) Did the trial judge err in failing to find that the conduct of the respondents was "oppressive" or "unfairly prejudicial" as those terms are used in the Ontario Business Corporations Act?

D. Analysis

(1) The common employer issue

[19] The trial judge decided this issue against Alouche for two reasons: (1) Alouche was estopped from raising the issue in his counterclaim action to enforce his previous judgment because he had not raised it in his original wrongful dismissal action; and (2) Alouche had not established the prerequisites necessary to identify any of the respondents as a common employer, along with Best Beaver.

(a) Res judicata/estoppel

[20] It will be recalled that shortly before the wrongful dismissal trial, Alouche brought a motion to add Grad and Grosman as defendants because he was concerned that Best Beaver might not respond to a judgment against it. Because this motion would have resulted in an adjournment of the trial, Alouche

decided to abandon it. The respondents submit that these steps precluded Alouche from raising the issue in the subsequent proceedings. The trial judge briefly reviewed the doctrines of *res judicata*, cause of action estoppel and issue estoppel. It is not entirely clear which of these doctrines he applied. However, it is clear that he agreed with the respondent's essential submission on this issue. He concluded:

I am satisfied on the evidence before me that Alouche was content in his wrongful dismissal action to allege that Best Beaver was his employer and to be bound by that conclusion, notwithstanding the possibility of some responsibility on the part of Messrs. Grad and Grosman.

On that basis, Alouche is now estopped from alleging a different or expanded employment obligation when he is now unable to recover on the first judgment.

[21] Let us say candidly that this is a plausible analysis and conclusion. On the eve of the wrongful dismissal trial, Alouche was concerned that the corporate reorganization about which he had recently learned might mean that Best Beaver no longer had assets which could potentially satisfy any judgment he obtained. Alouche's response was to consider, initiate and then abandon adding Grad and Grosman as defendants. In light of these steps, it is plausible to conclude, as the trial judge did, that Alouche considered the general question of whom he should sue and decided to proceed against only Best Beaver.

[22] However, in the end we do not think that this conclusion is correct. A particularly valuable discussion of *res judicata* and of issue estoppel is found in this court's decision in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270 (C.A.) ("*Minott*"). Laskin J.A. articulated the underlying purpose of the concept of issue estoppel in this fashion, at p. 340 O.R.:

Issue estoppel is a rule of public policy, and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two

interests will be in conflict, or, at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

[23] In our view, the issue Alouche considered on the eve of his wrongful dismissal trial was whether to sue Grad and Grosman in their personal capacities as potential employers because of his concern that Best Beaver, the corporate entity which he regarded as his employer (because it paid him), might have no assets. Alouche considered this option because, as he testified at the second trial, he regarded them as his employer:

Q At the time you signed this agreement that appears at Tab 1 [the employment contract], who did you believe to be your employer?

A. It was Herman Grad. I started working at For Your Eyes Only. That's the only place I know there.

However, in the end, Alouche made a conscious decision not to join Grad and Grosman in the wrongful dismissal action because it would have delayed the trial. Taking account of that decision, the trial judge concluded that Alouche was estopped from suing Grad and Grosman personally as potential employers in his subsequent action. We see no reason to interfere with this component of the trial judge's decision.

[24] However, the issue of a potential common employer for Best Beaver, drawn from the stable of Grad-Grosman companies that were closely connected with the operation of the For Your Eyes Only nightclub, was not considered by Alouche on the eve of the wrongful dismissal trial. He did not think about adding other companies at that juncture because the only entities of which he was aware were the nightclub, For Your Eyes Only, with which he had a contract of employment, and Best Beaver, which issued his pay cheques. He decided to sue Best Beaver "because

the paycheque that they gave me in For Your Eyes Only, it says Best Beaver Management Inc." This was a perfectly sensible reason for suing Best Beaver.

[25] Only later, after he had won a substantial judgment at trial and had been unable to collect on it from Best Beaver, did Alouche begin to think of other companies which might have been closely connected with For Your Eyes Only and Best Beaver. That inquiry led him, for the first time, to the respondent corporations.

[26] In summary, we cannot say that the trial judge erred by concluding that Alouche was estopped from pursuing Grad and Grosman personally as potential common employers in the counterclaim relating to the enforcement of the previous judgment in the wrongful dismissal action. However, we do not think that the common employer issue, as it relates to the corporate respondents, constitutes, in the language of Minott, "relitigating an issue". In this appeal, the balance between finality of litigation and achieving justice between litigants should be struck in favour of the latter. The common employer issue relating to the corporate respondents should be determined on the merits.

(b) The merits

[27] For Your Eyes Only was a simple entity, a single site nightclub in downtown Toronto. Yet, beneath the surface of lights, liquor and entertainment, there was a fairly sophisticated group of companies involved in the operation of the nightclub. Twin Peaks Inc. ("Twin Peaks") was the owner and lessor of the nightclub premises. The Landing Strip Inc. ("The Landing Strip") leased the premises from Twin Peaks. It also owned the trademark for For Your Eyes Only and held the liquor and adult entertainment licences. Downtown Eatery Limited ("Downtown Eatery") owned the chattels and equipment at the nightclub and operated it under a licence from The Landing Strip. Best Beaver paid the nightclub employees, including Alouche. In June 1993, all of these companies were owned and controlled by Bengro Corp. and Harrad Corp., the holding companies for Grosman and Grad.

[28] The trial judge considered Alouche's common employer argument on the merits. He concluded that Downtown Eatery was "the most logical of the companies to be treated as a co-employer", but that this did not help Alouche because Downtown Eatery amalgamated with Best Beaver in September 1993, and there was nothing fraudulent or even suspicious about the amalgamation.

[29] The trial judge then considered The Landing Strip:

Counsel for Alouche suggests that Landing Strip Inc., which held the lounge license and the franchise trademark, would be logical co-employers. There is nothing in the record before me that would suggest that Alouche ever had a contractual relationship with Landing Strip Inc.

Then, speaking more generally, the trial judge observed that "there has been no holding out here by either the employee or the employer of joint and several liability of more than one company".

[30] The common employer doctrine, in its common law context, has been considered by several Canadian courts in recent years. The leading case is probably *Sinclair v. Dover Engineering Services Ltd.* (1987), 11 B.C.L.R. (2d) 176 (S.C.), affd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.) ("*Sinclair*"). In that case, *Sinclair*, a professional engineer, held himself out to the public as an employee of *Dover Engineering Services Ltd.* ("*Dover*"). He was paid by *Cyril Management Limited* ("*Cyril*"). When *Sinclair* was dismissed, he sued both corporations. Wood J. held that both companies were jointly and severally liable for damages for wrongful dismissal. In reasoning that we find particularly persuasive, he said, at p. 181 B.C.L.R.:

The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case, that single entity was

obviously Dover.

I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.

There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

See also: *Bagby v. Gustavson International Drilling Co.* (1980), 24 A.R. 181 (C.A.); *Olson v. Sprung Instant Greenhouses Ltd.* (1985), 64 A.R. 321, 41 Alta. L.R. (2d) 325 (Q.B.); *Johnston v. Topolinski* (1988), 23 C.C.E.L. 285 (Ont. Dist. Ct.); *MacPhail v. Tackama Forest Products Ltd.* (1993), 86 B.C.L.R. (2d) 218, 50 C.C.E.L. 136 (S.C.); and *Jacobs v. Harbour Canoe Club Inc.*, [1999] B.C.J. No. 2188 (S.C.).

[31] In Ontario, the common employer doctrine has been considered in several cases. In *Gray v. Standard Trustco Ltd.* (1994), 8 C.C.E.L. (2d) 46, 29 C.B.R. (3d) 22 (Ont. Gen. Div.), Ground J. said, at p. 47 C.C.E.L.:

. . . it seems clear that, for purposes of a wrongful dismissal claim, an individual may be held to be an employee of more than one corporation in a related group of corporations. One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group.

[32] In *Jones v. CAE Industries Ltd.* (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.) ("Jones"), Adams J. reviewed many of the leading authorities and observed, at p. 249:

The true employer must be ascertained on the basis of where effective control over the employee resides . . . I stress again that an employment relationship is not simply a matter of form and technical corporate structure.

[33] *Sinclair, Jacobs v. Harbour Canoe Club Inc.* and *Jones* were all cases involving a "paymaster" company closely connected with another corporate entity, with both being controlled by the same principals. In all three cases, the courts found that the other company was a common employer. Similarly, in the present appeal, Best Beaver served only as a paymaster for the employees of the nightclubs owned and operated by other Grad and Grosman companies. Accordingly, the question becomes, in Adams J.'s language in *Jones*, "where effective control over the employee resides".

[34] In our view, in June 1993, when Alouche was dismissed, there was a highly integrated or seamless group of companies which together operated all aspects of the For Your Eyes Only nightclub. Twin Peaks owned the nightclub premises and leased them to The Landing Strip which owned the trademark for For Your Eyes Only and, significantly for a nightclub, held the liquor and entertainment licences. Downtown Eatery operated the nightclub under a licence from The Landing Strip and owned the chattels and equipment at the nightclub. Best Beaver served as

paymaster for the nightclub employees. Controlling all of these corporations were Grad and Grosman and their family holding companies, Harrad Corp. and Bengro Corp.

[35] Grad and Grosman could easily have operated the nightclub through a single company. They chose not to. There is nothing unlawful or suspicious about their choice. As Wood J. said in *Sinclair*, "it is a perfectly normal arrangement frequently encountered in the business world."

[36] However, although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, Alouche's situation is a simple, common and important one -- he is a man who had a job, with a salary, benefits and duties. He was fired -- wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.

[37] The trial judge focused on the absence of a contract between Alouche and any of the potential common employers. With respect, we think this focus is too narrow. A contract is one factor to consider in the employer-employee relationship. However, it cannot be determinative; if it were, it would be too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets.

[38] The trial judge also observed that there was no holding out by the employer of joint and several liability of more than one company. Again, with respect, we do not attach much significance to this factor. After all, the contract of employment that Alouche signed was with For Your Eyes Only, which was only a name, not a legal entity.

[39] In these circumstances, when he was wrongfully

dismissed, Alouche did his best -- he sued the company which had paid him. Later, it turned out that that company had no assets. Yet the nightclub continued in business, various companies continued to operate it and, presumably, Grad and Grosman continued to make money. In these circumstances, Alouche decided to try to collect the money to which [the] Superior Court of Justice had determined he was entitled. In our view, the common employer doctrine provides support for his attempt.

[40] In conclusion, Alouche's true employer in 1993 was the consortium of Grad and Grosman companies which operated For Your Eyes Only. The contract of employment was between Alouche and For Your Eyes Only which was not a legal entity. Yet the contract specified that Alouche would be "entitled to the entire package of medical extended health care and insurance benefits as available in our sister organization". The sister organization was not identified. In these circumstances, and bearing in mind the important roles played by several companies in the operation of the nightclub, we conclude that Alouche's employer in June 1993 when he was wrongfully dismissed was all of Twin Peaks, The Landing Strip, Downtown Eatery and Best Beaver. This group of companies functioned as a single, integrated unit in relation to the operation of For Your Eyes Only.

[41] There is a final matter to be considered on the common employer issue. Alouche was dismissed in June 1993. There was a reorganization of Grad and Grosman companies in September 1993. A second reorganization took place in May 1996, three months before the trial in Alouche's wrongful dismissal action. The trial judge found that there was nothing nefarious about these reorganizations; they were undertaken for business reasons unrelated to Alouche's action. We see no reason to disagree with this conclusion.

[42] The question which the reorganizations pose is whether Alouche's judgment, which we have determined should be enforced against all of the companies involved in June 1993 in the operation of For Your Eyes Only, should also be enforced against the successor or merged companies which have been created by the reorganizations.

[43] We have no hesitation answering this question in the affirmative. Grad testified at the trial that he was very careful to protect the positions, seniority and benefits of current employees when he and Grosman were accomplishing the reorganizations. He said:

Everyone had a job . . . Everyone that worked for one had a job in the other . . . No one would lose anything . . . The employees were not to lose anything, were not to be hurt.

[44] This was, of course, admirable treatment of the current employees of the Grad and Grosman companies. It commends itself, in our view, as a just basis for consideration of Alouche's position after the reorganizations. If, as Grad explained, his current employees were not to be hurt in any way by the reorganizations, it seems obvious and fair that a similar result should flow for Alouche, a man who might also be a current employee but for the fact of his wrongful dismissal.

[45] We conclude, therefore, that the list of the original common employers should be expanded to include the other corporate respondents.

(2) The oppression issue

[46] Alouche contends that the conduct of the respondents, specifically the corporate reorganizations which resulted in Best Beaver ceasing to exist, was "oppressive" or "unfairly prejudicial" as those terms are used in the Ontario Business Corporations Act ("OBCA"). Section 248 of the OBCA provides:

248(1) A complainant . . . may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a

result;

- (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
- (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

A "complainant", in addition to being a current or former shareholder, director or officer of the company, is defined in s. 245 to include:

.

- (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

Although it appears from the pleadings and the factum that Alouche is advancing the oppression argument against all of the respondents, in oral argument counsel made it clear that the focus of Alouche's claim on this issue is the respondents Grad and Grosman.

[47] As a preliminary matter, we note that there is no question of res judicata or estoppel with respect to the appellant's oppression claim. There was nothing about this claim in the pleadings in the first action, the trial judge in the second action dealt with the claim on the merits, and the respondents in this appeal do not contend that the oppression claim was barred by these doctrines.

[48] Turning to the merits, in the Agreed Statement of Facts, facts pertaining to the oppression remedy are sparse. These

facts are: Grad and Grosman were directors and officers of Best Beaver at all material times; in September 1993, there was a corporate reorganization of Best Beaver and several of the other corporate respondents in response to apprehended union activities; and in or about March 1996, Best Beaver ceased operations.

[49] In his trial testimony, Grad stated that because the "union threat" had disappeared in 1996 there was no need to retain Best Beaver as a separate company. This resulted in Best Beaver ceasing operations in March 1996, followed by a corporate reorganization in May 1996. He testified that these events were not influenced by the pending litigation involving Alouche. Indeed, it was Grad's belief that Best Beaver would win the lawsuit. He described what occurred as "a business decision". Grad confirmed that he and Grosman were the owners of Best Beaver and all of the corporate respondents. He also confirmed that "the role and function" of Best Beaver were to pay the employees of the corporations that he and Grosman owned and that the company carried out this role "based on advice from [his] accountants".

[50] Although Grad testified that Alouche's pending claim did not influence his decision to terminate the operations of Best Beaver in March 1996, he acknowledged that at that time a summer trial date had been fixed for the wrongful dismissal trial. He stated that he discharged Best Beaver's lawyer about two weeks before the trial began "because there was no money in the account and [Best Beaver] could not afford to pay" the lawyer. At the trial, Grad acted as Best Beaver's legal representative.

[51] Syd Bojarski ("Bojarski") was a partner in the accounting firm that acted for the corporate respondents and Grad and Grosman. He provided extensive evidence concerning the corporate and financial affairs of these entities. He testified that in each year of its existence, Best Beaver earned a profit. He agreed with counsel for Alouche that Best Beaver's accumulated profits were available to pay "whatever obligations [Best Beaver] had". He further agreed that if that company had continued its operations, its accumulated profit could have

been applied "to satisfy unexpected claims arising from employment [contracts]".

[52] In the following questions and answers Grad was asked to comment on Bojarski's evidence:

Q. Mr. Bojarski gave evidence that it was the role and function of Best Beaver Management as a corporation to pay employees until, of course, until it ceased to do that. But that was its obligation, correct?

A. Yes.

Q. Do you agree with Mr. Bojarski that its obligation was also to pay any claims that individual employees might have against it as employer?

A. It was responsible for all the employees and the management of those people.

[53] In dismissing Alouche's claim for an oppression remedy, the trial judge accepted Grad's reasons for the corporate reorganizations of September 1993 and May 1996 and for Best Beaver's cessation of operations in March 1996. He provided the following reasons for dismissing Alouche's claim for an oppression remedy:

In the case before me, if I had been satisfied that the amalgamation of 1993 or the reorganization of 1996 had been undertaken with the intention of depriving Mr. Alouche of the opportunity to recover against Best Beaver, then an oppression remedy might have been appropriate. In the circumstances where the amalgamation and reorganization took place before he obtained the status of a judgment creditor and those actions were not undertaken for the purpose of depriving him of recovery of judgment, then it would appear that the oppression remedy is not appropriate.

[54] At trial, C. Campbell J. also dismissed a claim by Alouche based on the submission that the May 1996 corporate reorganization constituted a fraudulent conveyance resulting in

Best Beaver having no assets in the event that he recovered judgment against it. No appeal was taken from this aspect of the judgment. However, the following findings of fact made by the trial judge in deciding this issue are relevant to the oppression remedy issue:

As noted previously, I am satisfied on the evidence, the reorganization was not entered into for the purpose or with the intent of depriving Alouche from recovering on an anticipated judgment.

I do recognize, however, that the effect of the reorganization left Best Beaver essentially as a non-operating company and that Grad took advantage of this, when faced with the pending trial (by discharging counsel) and by non-payment of the judgment.

[55] In our view, this case is similar to *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399, 25 B.L.R. (2d) 179 (Ont. Gen. Div.), varied (1998), 40 O.R. (3d) 563, 162 D.L.R. (4th) 367 (C.A.) ("*Sidaplex-Plastics*"). As in *Sidaplex-Plastics*, Alouche, as a judgment creditor of a corporate party, seeks an oppression remedy in the absence of bad faith or want of probity on the part of individuals who were the directors and shareholders of the corporation. As in *Sidaplex-Plastics*, the corporation, Best Beaver, is no longer in business, having ceased operations in March 1996, at a time when a trial date of August 1996 had been fixed for the wrongful dismissal action against it. Thus, Alouche seeks to invoke the oppression remedy provisions of the OBCA against Grad and Grosman in order to rescue himself from the inability of Best Beaver to pay his judgment which resulted from their decision to terminate its business operations and to render it without assets capable of responding to a possible judgment against it.

[56] The application of the principles governing s. 248(2) of the OBCA to the trial judge's findings of fact and to the evidence in the trial record leads to the conclusion that the trial judge erred in failing to grant an oppression remedy against Grad and Grosman. In our view, the trial judge failed

to appreciate that the "oppressive" conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the plaintiff. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

[57] In *Sidaplex-Plastics*, Blair J. provided a careful and thorough analysis of the principles governing the award of an oppression remedy that was accepted by this court. At p. 403 D.L.R., he stated that it "is well established . . . that a creditor has status to bring an application as a complainant, pursuant to s. 245(c)." At pp. 403-04, he added:

Moreover, while some degree of bad faith or lack of probity in the impugned conduct may be the norm in such cases, neither is essential to a finding of "oppression" in the sense of conduct that is unfairly prejudicial to or which unfairly disregards the interests of the complainant, under the OBCA.

Blair J. continued, at p. 404 D.L.R.:

What the OBCA proscribes is "any act or omission" on the part of the corporation which "effects" a result that is "unfairly prejudicial to or that unfairly disregards the interests" of a creditor.

(Emphasis in original)

[58] At p. 404, Blair J. adopted the following factors to be assessed in considering whether an oppression remedy should lie, as described by McDonald J. in *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) at p. 57 B.L.R.:

More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: the

protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The elements of the formula and the list of considerations as I have stated them should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case.

[59] In s. 248(2)(c) of the OBCA, the legislature has included the exercise of the powers of a company's directors in targeting the kinds of conduct encompassed by an oppression remedy. In this regard, Blair J. stated, at pp. 405-06 D.L.R.:

Courts have made orders against directors personally, in oppression remedy cases: see, for example, *Canadian Opera Co. v. Euro-American Motor Cars*, supra; *Prime Computer of Canada Ltd. v. Jeffrey*, supra; *Tropxe Investments Inc. v. Ursus Securities Corp.*, [1993] O.J. No. 1736 (QL) (Gen. Div.) [summarized 41 A.C.W.S. (3d) 1140]. These cases, in particular, have involved small, closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question has redounded directly to the benefit of that person.

[60] Although the trial judge found that the cessation of Best Beaver's operations in March 1996 and the subsequent corporate reorganization were not undertaken with the intention of depriving Alouche of the ability to recover against Best Beaver if he were to succeed in his forthcoming action against the company, he went on to find that the effect of this conduct "left Best Beaver essentially as a non-operating company and that Grad took advantage of this, when faced with the pending trial (by discharging counsel) and by non-payment of the judgment". In our view, there is no question that the acts of Grad and Grosman, as the directors of Best Beaver, in causing the company to go out of business and transferring its assets to other companies within the group of companies they owned and operated in the spring of 1996 in the face of a trial scheduled

to begin a few months later, effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of, Alouche as a person who stood to obtain a judgment against Best Beaver. Moreover, there was nothing that Alouche could have done to prevent the effective winding-up of Best Beaver.

[61] In our view, the evidence of Bojarski, with which Grad agreed, is relevant to whether an oppression remedy is appropriate. From Bojarski's testimony, it is clear that when Best Beaver went out of business it was profitable and that its accumulated profits were available to satisfy any claims arising from employment contracts. The inference can be drawn from this evidence that even though it was abundantly clear to Grad that Alouche's pending claim might result in a judgment against Best Beaver, he took no steps to ensure that Best Beaver retained a reserve to meet that contingency. Rather, believing that Alouche's action would fail, he discharged the company's lawyer and personally assumed its defence at trial. As in *Sidaplex-Plastics* at p. 405 D.L.R., it was Alouche who was entitled to be protected, and, in our view, it was Grad and Grosman who had the obligation to ensure that such protection continued. See Christopher C. Nicholls, "Liability of Corporate Officers and Directors to Third Parties", (2001) 35 C.B.L.J. 1 at pp. 30 et seq.

[62] In our view, there are additional inferences that can be drawn from the trial judge's findings of fact and from the evidence at the trial. It was the reasonable expectation of Alouche that Grad and Grosman, in terminating the operations of Best Beaver and leaving it without assets to respond to a possible judgment, should have retained a reserve to meet the very contingency that resulted. In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely held company, is clear. By diverting the accumulated profits of Best Beaver to other companies that they owned, they were able to insulate these funds from being available to satisfy Alouche's judgment.

[63] For the foregoing reasons, it is our opinion that Alouche has demonstrated his entitlement to an oppression

remedy against Grad and Grosman.

E. Disposition

[64] We would allow the appeal against all of the respondents. The appellant is entitled to recover from the respondents the amounts he was awarded in the wrongful dismissal action, namely damages of \$59,906.76, pre-judgment interest of \$8,608.36 and assessed costs of \$15,387.79 totalling \$83,902.91, together with post-judgment interest thereon from the date of Festeryga J.'s judgment to the date of this order and post-judgment interest thereafter. He is also entitled to recover his costs of the second trial before C. Campbell J. and his costs of the appeal.

Appeal allowed.

Notes

Note 1: Downtown Eatery (1993) Ltd. also name Her Majesty the Queen in Right of Ontario as a defendant, presumably on the basis of its alleged responsibility for the sheriffs. This component of the action was subsequently discontinued.

Note 2: In his factum, the appellant identified a separate ground of appeal as the trial judge's failure to permit Alouche to proceed by what he called an "alter ego" action. In oral argument, the appellant suggested that the common employer doctrine is a sub-species of the alter ego doctrine. Like the trial judge, we do not consider the injection of the nebulous concept of alter ego corporations useful. The common employer doctrine is well-recognized in Canadian law and provides a sound and straightforward foundation on which to assess the corporate relationship issue in this appeal.

TAB 10

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

- [2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

- [3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.
- [4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.
- [5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.
- [6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated \$7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

- [7] At the time of its initial application to the court, Harte Gold's assets were valued at \$163.8 million. Its liabilities were valued at \$166.1 million. On a balance sheet basis, therefore, Harte Gold was insolvent.
- [8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.
- [9] This pre-filing strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.
- [10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.
- [11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.
- [12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.
- [13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.
- [14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the \$10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US\$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at \$7.5 million but with a \$10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction. The employment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over \$160 million.

Issues

[17] There are three principal issues:

- (1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;
- (2) Whether the stay should be extended; and,

- (3) Whether the Monitor's mandate should be extended to include additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "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".

[19] Section 36(1) of the CCAA provides:

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

- [22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a “reverse vesting order” under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.
- [23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:
 - (a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,
 - (b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

- [24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re)*, (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found “the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise.”
- [25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.
- [26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.
- [27] In *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCS 3218 at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc*, 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

- [28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that “the terms ‘sell or otherwise dispose of assets outside the ordinary course of business’ under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*”: *Nemaska QCCA* at para 19.
- [29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court’s authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent “with the remedial purposes of the CCAA” and consistent with the Supreme Court of Canada’s ruling on CCAA jurisdiction in 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is “appropriate” in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.
- [30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.
- [31] Fitzpatrick J. relied on *Callidus* to the effect that:
- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the “broad reading of CCAA authority developed by the jurisprudence”. 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”

- the CCAA generally prioritizes “avoiding the social and economic losses resulting from liquidation of an insolvent company”
- Where a party seeks an order relating to a matter that falls within the supervising judge’s purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 “for the most part supplants the need to resort to inherent jurisdiction” in the CCAA context
- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence
- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

- [32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor’s insolvency; preserving and maximizing the value of a debtor’s assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.
- [33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.
- [34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not “meritorious”, also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. “reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings”: *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

- [35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.
- [36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor ‘selling or otherwise disposing of assets outside the ordinary course of business’, as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and “vesting out” from the debtor to a new company, of unwanted assets, obligations and liabilities.
- [37] I am, therefore, not sure I agree with the analysis which finds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.
- [38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the “norm” or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
- (a) Why is the RVO necessary in this case?
 - (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
 - (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

- [40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.
- [41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.
- [42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.
- [43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.
- [44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the pre-filing strategic process and the SISP.
- [45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

- [46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.
- [47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.
- [48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.
- [49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

- [50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately \$28 million in respect of its hedge agreements. Silver Lake has claims of approximately \$95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US\$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.
- [51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.
- [52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

- [53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.
- [54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

- [55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:
- (a) the retention and payment in full of the claims of almost all creditors of Harte Gold;
 - (b) continued employment for all except four of the Harte Gold's employees;
 - (c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and
 - (d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.
- [56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.
- [57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.
- [58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).
- [59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

- [60] The evidence of Harte’s financial problems and balance sheet insolvency, the unsuccessful pre-filing strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.
- [61] Under s. 186(1) of the OBCA, “reorganization” includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term “proposal” is unfortunate (because there are no formal “proposals” under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.
- [62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.
- [63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.
- [64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold’s, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re)*, 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.
- [65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

- [66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.¹
- [67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.
- [68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the pre-filing strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".
- [69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

- [70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.
- [71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

¹ The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

- [72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to \$10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.
- [73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.
- [74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.
- [75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counterparties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.
- [76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

- [77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

- [78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

- [79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

- [80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

- [81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

- [82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

- [83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.
- [84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.
- [85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.
- [86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

- [87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.
- [88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

TAB 11

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-064115-245

DATE: October 8, 2024

BY THE HONOURABLE JANET MICHELIN, J.S.C.

IN THE MATTER OF: The *Companies' Creditors Arrangement Act* of:

INTELGENX CORP.
and
INTELGENX TECHNOLOGIES CORP.
Debtors
and

ERNST & YOUNG INC.
Monitor

JUDGMENT
(Reasons for issuance of an Approval, Assignment
and Vesting Order and Ancillary Relief
Companies' Creditors Arrangement Act, ss. 11, 11.02(2) and 36)

OVERVIEW

[1] On May 17, 2024, the Court, relying on the powers conferred on it by the *Companies' Creditors Arrangement Act (CCAA)*,¹ issued an Initial First Order. On May 27, 2024, the Court issued an Amended and Restated Initial Order (**ARIO**) and an Order Approving a Sale and Investment Solicitation Process and Approving a Stalking Horse Agreement of Purchase and Sale (the **SISP Order**), with reasons dated June 3, 2024.

[2] On August 29, 2024, the Court extended the stay period to October 11, 2024.

[3] On September 30, 2024, the Applicants presented an *Application for the Issuance of an Approval, Assignment and Vesting Order and Ancillary Relief* (the **Application**). In the Application, they requested the issuance of the following orders to:

- 3.1. Approve the amended and restated agreement of purchase and sale (the **Purchase Agreement**)² between the Debtors and 6544631 Canada Inc. as vendors and atai Life Sciences AG as purchaser (**Atai** or the **Purchaser**);
- 3.2. Approve the purchase and sale and other transactions (the **Transaction**) contemplated in the Purchase Agreement;
- 3.3. Approve the pre-closing reorganization steps set out in Schedule E of the Purchase Agreement;
- 3.4. Extend the stay period to January 17, 2025;
- 3.5. Grant additional powers to the Monitor; and
- 3.6. Declare that pursuant to section 5(5) of the *Wage Earner Protection Program Act*,³ the Debtors meet the criteria established by section 3.2 of the *Wage Earner Protection Program Regulations*.⁴

[4] The following are the reasons that the Court signed the requested orders.

ANALYSIS

[5] IntelGenx Corp. (**IntelGenx**) is a Canadian contract development and manufacturing organization (CDMO) offering various drug development and manufacturing services, including formulation prototype development, technology transfer, process scale-up, regulatory support and clinical studies monitoring.

[6] IntelGenx is the subsidiary of IntelGenx Technologies Corp. (**IntelGenx Tech** and collectively with IntelGenx, the **Debtors**) a Delaware public company trading on the Toronto Stock Exchange (TSX) and quoted on the OTCQB market in the United States.

¹ R.S.C. (1985), c. C-36.

² Exhibit R-2.

³ S.C. 2005, c. 47, s. 1 (the **WEPPA**).

⁴ SOR/2008-222 (the **WEPP Regulations**).

[7] IntelGenx operates out of leased premises located in Saint-Laurent, Quebec. At the commencement of the restructuring proceedings, it had 53 employees, most of whom worked out of the Saint-Laurent office. InterGenx currently has no products that have been launched for commercial sale and, accordingly, has not generated any revenue from product sales.

[8] IntelGenx has developed or is developing four principal programs. The first is VersaFilm, a drug delivery platform consisting of a thin polymeric film that enables the development of oral thin films (such as those used in breath strips). VersaFilm uses pharmacopeia components approved by the U.S. Food and Drug Administration (**FDA**) for use in food, pharmaceutical and cosmetic products. The second program is VetaFilm, which uses the same film technology but in the veterinary space. The third program is Disinteq, a delivery system that allows for disintegration at a controlled rate, allowing a slower release of the drug into the oral cavity. Fourthly, they are working on a psychedelic program for the treatment of depression with Atai, who is also the most important secured creditor.

[9] IntelGenx has funded its operations primarily through research and development support payments, agreements with strategic partners whereby the partner pays to develop a program based on a given molecule in the hope that it would lead to a clinical trial, eventual approval by the FDA and entry into the market, as well as private equity offerings, issuance of convertible debentures and loans.

[10] Atai is IntelGenx's principal creditor. At the time of the institution of the restructuring proceedings, IntelGenx owed Atai approximately \$12M USD and its assets totaled approximately \$7M USD.

[11] In early 2024, IntelGenx attempted an unsuccessful digital offering. In addition, difficulties resulted from delays in the regulatory approval process for the commercialization of certain of its products, in turn resulting in the postponement of potential additional revenue streams by six to nine months.

[12] Accordingly, IntelGenx sought bridge financing with Atai, to which Atai agreed on the condition that the financing be done in the context of a formal process under the CCAA providing for the implementation of a SISP.

[13] On May 27, the Court approved the ARIO and the SISP Order in which the parties requested approval of a Stalking Horse Agreement for the purpose of the implementing the SISP. The DIP Term Sheet approved by the Court provided that Atai, as Interim Lender, had the exclusive option, but not the obligation, to act as a Stalking Horse Bidder in the SISP. A stalking horse agreement is a sale between the debtor and a buyer contingent upon the absence of a higher bid during the subsequent SISP. It therefore sets the baseline for the bidding process⁵ and it guarantees that a transaction will take place.

⁵ David F.W. Cohen and D.S. Kolesar, "Canadian Perspective on the Chapter 11 Stalking Horse Bid Process" (2004), 21 Nat. Insolv. Rev. 25, at page 26.

[14] As for the SISP, it was implemented under the supervision of the Monitor, including its affiliate Ernst & Young Orenda Corporate Finance Inc. (**EYO**). A total of 92 potential bidders were identified in collaboration with Monitor, EYO, the Debtors and Atai. Of those potential bidders, only 7 executed non-disclosure agreements to pursue discussions regarding a possible acquisition. On July 11, one potential bidder submitted a non-binding letter of intent for a potential acquisition of certain specific intellectual property assets. Since this did not meet the definition of a Qualified Bid as set out in the Bidding Procedures, it was not considered. Accordingly, the Stalking Horse Bid presented by Atai was determined to be the successful bid in the SISP process.

[15] The Debtors therefore requested the approval of the transaction with Atai. Closing is scheduled for October 2 and the purchase price will be paid by way of a credit bid totalling the fair market value of Atai's secured debt. At the time of the hearing, the secured debt was approximately \$24.1M. (the **Secured Debt**)

1. APPROVAL OF THE TRANSACTION

1.1 The structure of the Transaction

[16] The Transaction provides for the acquisition by Atai of substantially all of IntelGenx's key assets,⁶ the culmination of which will result in Atai acquiring all of InterGenx's issued and outstanding shares. The consideration consists of an amount equivalent of the fair market value of the Secured which consideration will be satisfied by way of set off.

[17] The steps of the pre-closing Reorganization, which are detailed in Schedule E to the Purchase Agreement, can be summarized as follows:

17.1. IntelGenx incorporates:

17.1.1. a new parent corporation (**New ParentCo**), IntelGenx subscribes for one non-participating redeemable and retractable voting share of New ParentCo (the **Voting Share**); and

17.1.2. a residual corporation (**ResidualCo**). New ParentCo subscribes for one common share of ResidualCo;

17.2. New ParentCo and ResidualCo become parties to the CCAA Proceedings;

17.3. IntelGenx makes a cash transfer of approximately \$311,000 to New ParentCo in exchange for a promissory note (the **IGX Note**). This amount is intended to cover the winddown costs of the CCAA proceedings;

17.4. All of the issued shares of IntelGenx are exchanged for common shares

⁶ Exhibit R-2.

of New ParentCo on a one-for-one basis. At the same time, the Voting Share held by IntelGenx will be simultaneously cancelled for its subscription price;

- 17.5. IntelGenx transfers its Excluded Assets to ResidualCo for a promissory note having a principal amount equal to the fair market value of the Excluded Assets (the **ResidualCo Note**);

The Excluded Assets consist of the deposits totalling \$115,000 made to restructuring professionals and will vest into and be assumed by ResidualCo.⁷

- 17.6. New ParentCo assumes the Excluded Liabilities and the Excluded Contracts are assigned by IntelGenx to New ParentCo. IntelGenx transfers to New ParentCo, in partial consideration thereof, the ResidualCo Note and the IGX Note. Novation is effected and IntelGenx is discharged of all of its obligations under the Excluded Liabilities.

The Excluded Liabilities are those not included in the definition of Retained Liabilities.⁸ Retained Liabilities include any current costs and liabilities under the Retained Contracts, all outstanding post-filing pre-closing liabilities of the Debtors, such as amounts owed to suppliers, the total accrued salaries, vacations and KERP payments owed at closing to the Retained Employees⁹ and any other liabilities retained by the Purchaser as set out in the Purchase Agreement. Even some pre-filing liabilities were accepted by Atai as a way of maintaining healthy relationships with the Debtors' suppliers.

The Excluded Contracts are the contracts not expressly retained by Atai.¹⁰

- 17.7. Atai assigns the Secured Debt to New ParentCo for a purchase price equal to the fair market value of the Secured Debt (the **Deferred Debt Purchase Price**), which Deferred Debt Purchase Price will be payable on demand and the obligation in respect of which shall be secured;
- 17.8. New ParentCo subscribes for additional common shares of IntelGenx for a subscription price equal to the fair market value of the Secured Debt and New ParentCo assigns the Secured Debt to IntelGenx in payment of the subscription price. The Secured Debt is extinguished by confusion; and
- 17.9. Atai acquires all of the issued and outstanding shares in the capital of IntelGenx from New ParentCo for an aggregate purchase price (the **Share Purchase Price**) equal to the aggregate fair market value of the Secured

⁷ Exhibit R-7, Third Report of the Monitor dated September 27, 2024, para. 39; Exhibit R-2, Schedule D.

⁸ Exhibit R-2, Schedule H.

⁹ Exhibit R-2, Schedule G.

¹⁰ Exhibit R-2, Schedule F.

Debt. Atai and New ParentCo agree that the Share Purchase Price and the Deferred Debt Purchase Price be fully satisfied by way of set off against one another,

1.2 Legal principles

[18] In *Proposition de Brunswick Health Group inc.*, Justice Christian Immer sets out the principles that establish the Court's jurisdiction to grant RVOs under the CCAA:¹¹

- 18.1. The RVO structure was crafted to allow businesses to continue through the debtor company, when the corporate vehicle owned the valuable "assets" that could be not transferred.
- 18.2. The following are examples of situations where valuable assets cannot be transferred:
 - if the debtor operates in a highly-regulated environment in which its existing permits, licenses or other rights are difficult or impossible to reassign to a purchaser;
 - if the debtor company is a party to certain key agreements that would be difficult or impossible to assign to a purchaser; or
 - if maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction tax losses.
- 18.3. When deciding to grant relief, Courts must rely first on an interpretation of the provisions of the CCAA's text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding.
- 18.4. The features of an RVO make it different from the transaction contemplated by par. 36(1) CCAA, because what is contemplated is not the sale of assets of the debtor, but rather "a purchase of the shares of the debtor and the "vesting out" from the debtor to a new company of unwanted assets, obligations and liabilities".
- 18.5. Given that s. 36(1) may not anchor an RVO, the inherent or equitable jurisdiction of Section 11 of the CCAA must be relied on.
- 18.6. S. 11 confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast.
- 18.7. 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". The exercise of this discretion must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness – i.e. whether it advances the policy

¹¹ 2023 QCCS 4643, par. 39.

objectives of the CCAA - , good faith, and due diligence.

- 18.8. Resort to RVOs must be unusual and extraordinary and involve close scrutiny.
 - 18.9. The debtor must seek the relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders.
 - 18.10. Debtors should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.
- (citations omitted)

1.3 Discussion

[19] After concluding that the Court's analysis of its jurisdiction to issue an RVO under the CCAA applies to its jurisdiction to do so under the *Bankruptcy and Insolvency Act*, Justice Immer groups the principles he sets out, as well as others factors referred in the jurisprudence, into four headings. The Court will therefore conduct its analysis with reference to these headings.

1.3.1 Is the RVO necessary?

[20] The Monitor's representative, Martin Carrière, testified at the hearing. He explained why the RVO is necessary.

[21] The structure of the RVO allows the Debtors to continue operating. Since they operate in the pharmaceutical industry, they benefit from permits and licences that cannot be easily transferred in the context of a traditional AVO, which would add significant delays and costs to the restructuring process, thereby interrupting the Debtors' operations. The RVO structure avoids these challenges and eliminates any uncertainty regarding the transfer of those licenses and permits. The RVO also allows the Debtors to continue to benefit from certain tax advantages, such as possible GST and QST reimbursements as well as as research and development tax credits.

[22] The Court concluded that this criterion is met.

1.3.2 What is the impact on interested parties and are they worse off as a result of the RVO?

[23] Mr. Carrière explained the impact on the various interested parties.

[24] In the context of the Transaction, the employment of 19 employees will be retained and 22 employees will be laid off.¹² The entirety of the salaries and vacation pay of the 22 employees has been paid out to them. The KERP payments have been or will be paid to those who are eligible in virtue of the plan. No other offer received in the context of the SISP provided for a better outcome for the employees.

¹² Exhibit R-2, Schedule G.

[25] The impact on the creditors is the same whether the restructuring is done by way of RVO or AVO. Bankruptcy proceedings would cause additional delays and costs, would jeopardize the Debtors' operations and would likely result in the termination of the employment of all of the Debtors' employees. Since the sale would therefore be done in the liquidation context, it would be unlikely to result in a higher realization value for the creditors. In fact, no creditor contested the Debtors' application.

[26] Given the above, the Monitor is of the view that the Transaction contemplated is more beneficial to creditors and stakeholders than bankruptcy proceedings. The Court agrees.

1.3.3 Is the consideration paid fair and reasonable?

[27] The Monitor is of the opinion that the Transaction is fair and reasonable in the circumstances.

[28] The SISP was implemented under the supervision of the Monitor and its affiliate EYO. Out of 92 potential bidders, only 7 executed non-disclosure agreements in order to pursue discussions regarding a possible acquisition and only one potential bidder submitted a non-binding letter of intent. This expression of interest did not meet the definition of a Qualified Bid as set out in the Bidding Procedures. Accordingly, the only remaining option was the Stalking Horse Bid presented by Atai.

[29] The consideration to be paid under the Stalking Horse Bid is an amount equivalent to the fair market value of the Secured Debt which will be satisfied by way of set off. At the time of the hearing, the Secured Debt was \$24.1M.

[30] A robust SISP process did not give rise to any offers. This speaks to the marketability of the Debtors at this stage of their growth. The only offer received will result in the elimination of the Debtors' debts, the maintenance of employment for numerous employees and the continuation of the Debtors' operations

[31] In such circumstances, the Court concludes that the consideration is fair and reasonable.

1.3.4 To what extent has the Monitor been involved and what weight must be given to his recommendations?

[32] Since the outset of the proceedings, the Monitor has been actively involved with the Debtors' activities, as set out in paragraph 9 of its Third Report. For example, the Monitor has transmitted information and participated in calls with Atai's legal advisors, has assisted with the finalizing the Purchase Agreement, has responded to questions from stakeholders and suppliers, has assisted the Debtors in improving efficiency in their operations and has monitored the daily receipts and disbursements.

[33] The Court also places weight on Mr. Carrière's testimony regarding the implication of the Debtors' directors and officers. He stated that the Debtors' directors and officers have acted in good faith and with all due diligence. More specifically, since the commencement of proceedings, board meetings and management meetings have

been held weekly, with the Monitor's participation. This demonstrates their collaboration with the Monitor, Atai and the companies' partners and stakeholders.

[34] Furthermore, both the president and the CEO agreed to forego some of the vacation pay due to them. The CFO agreed to a 50% salary reduction and although his time was reduced as well, he remained active in discussions and available throughout the process. For the Monitor, this is also evidence of the Debtors' good faith.

[35] As for Atai, Mr. Carrière noted their important contribution. Prior to the CCAA proceedings, the Debtors' indebtedness was approximately \$14M. It is now \$24.1M, including the interim financing. Without Atai's contribution and collaboration, the Debtors' operations could not have continued because they have no revenue. This contribution has therefore allowed the restructuring to take place.

[36] It is clear that the Monitor has been closely involved throughout the entire process and his opinion therefore carries significant weight. He is of the view that the RVO should be approved.

[37] The Court agrees. Similar structures have been approved by this Court¹³ and the Transaction is clearly the best option to ensure the continuity of the Debtors' operations.

2. WEPPA RELIEF

[38] The WEPPA is federal legislation which provides for the payment of outstanding wages by the government to individuals whose employment is terminated as a result of their employer's insolvency. The Debtors seek a declaration pursuant to section 5(5) of the WEPPA that IntelGenx meets the criteria established by section 3.2 of the WEPP Regulations, such that the employees whose employment has been terminated will be able to benefit from the available relief.

[39] An individual will be eligible to receive a payment if their employment has ended for one of the reasons set out in the WEPP Regulations, which include:¹⁴

- 39.1. The individual resigned or retired;
- 39.2. The individual's employment has terminated; or
- 39.3. The term of the individual's employment has expired.

[40] At the beginning of the CCAA Proceedings, IntelGenx has terminated the employment of 5 employees and 3 more resigned. On September 27, all but 19 remaining employees were laid off. As a result of the structure of the Transaction, the employment liabilities of the terminated employees will be transferred to New ParentCo, other than the KERP payments and vacation pay obligations.

¹³ *Arrangement relative à Blackrock Metals Inc.*, 2022 QCCS 2828 (leave to appeal dismissed 2022 QCCA 1073, leave to appeal at the Supreme Court of Canada dismissed, 2023 CanLII 36969 (SCC)); *Arrangement relatif à Namaska Lithium inc.*, 2020 QCCS 3218 (leave to appeal dismissed 2020 QCCA 1488, leave to appeal at the Supreme Court of Canada dismissed, 2021 CanLII 34999 (SCC), 2021 CanLII 35003 (SCC));

¹⁴ Section 5 of the WEPPA. Section 3 of the WEPP regulations.

[41] The Monitor submits that the employees in question come within the categories set out in the WEPP Regulation.

[42] In *In the Matter of the compromise or Arrangement of Juste Pour Rire (Just for Laughs)* group of companies¹⁵, Justice David Collier held that the WEPPA applies to the former employees of insolvent corporations that are restructured under a reverse vesting order issued pursuant to the CCAA.

[43] He explains that the WEPPA's stated purpose "to provide for payments to individuals in respect of wages owed to them by employers who are insolvent"¹⁶ must be interpreted to include former employees in this context because "in the case of both an asset sale and a reverse vesting order, employees who have lost their jobs have no solvent employer from whom they can claim lost wages".¹⁷ This is therefore precisely who the WEPPA is intended to protect.

[44] The Court agrees with this reasoning.

3. EXTENSION OF THE STAY PERIOD

[45] The Applicants are seeking an extension of the Stay Period until and including January 17, 2025. This is necessary to implement the Transaction and the WEPP for the benefit of the terminated employees, to prepare the bankruptcy of the residual corporations and to coordinate with counsel in the United States to initiate Chapter 7 proceedings in respect of IntelGenx Tech.

[46] Mr. Carrière explained that the cashflows prepared through to January 19 show that the Debtors will have sufficient liquidity to maintain operations during the requested stay period extension. The anticipated expenses include those required to maintain normal operations, including payment of salaries and KERP payments, professional fees and winddown costs for the residual corporations and IntelGenx Tech.

[47] The Monitor also highlighted the agreement to extend the Directors and Officers Liability insurance for an additional 12 months, which cost is also included in the cashflows. They are currently insured for \$15M but requested an extension of the insurance for a reduced amount of \$5M. This is to protect them during the winddown process, and in particular against any potential claims that American investors may have in the context of IntelGenx Tech's Chapter 7 proceedings. While the Monitor considers the possibility of such claims to be remote, a compromise was reached to reassure the directors, but for a lesser amount than the current coverage amount.

[48] Mr. Carrière is of the opinion that the extension of the stay period is required in order to complete the CCAA proceedings.

¹⁵ Montreal 500-11-063779-249, August 27, 2024, (on appeal) (*Juste pour rire*)

¹⁶ Section 4.

¹⁷ *Juste pour rire*, *supra* note 15, par. 32.

[49] In view of the foregoing, the Court therefore concluded that the extension should be granted.

4. THE ADDITIONAL POWERS REQUESTED FOR THE MONITOR

[50] Following the Transaction, the employees' employment will have been either terminated or continued with the Purchaser. Accordingly, there will be no employees to participate in the remaining steps required for the restructuring, notably to control the receipts and disbursements of ResidualCo, New ParentCo and IntelGenxTech, to open bank accounts for those companies, to implement necessary protective measures to preserve their remaining assets, to carry out their business and activities, to assign them into bankruptcy, to act as their trustee and to proceed with the disposition of their assets.

[51] The Court agrees that it is necessary for the Monitor to be granted these additional powers to facilitate the orderly completion of the CCAA Proceedings, including the implementation of the WEPP and the assignment into bankruptcy of the residual companies, the whole for the benefit of the Applicant's stakeholders.

5. EXECUTION NOTWITHSTANDING APPEAL

[52] The interim financing ended on September 30, which was the date of the hearing. The Transaction was expected to close on October 2. The Debtors therefore requested that the Orders be executory notwithstanding appeal to prevent any uncertainty that could arise during the period in which permission to appeal could be sought.

[53] In light of the timing of the end of the interim financing and the closing of the Transaction, as well as the absence of contestation of the requested Orders, the Court concluded that it was appropriate to order execution notwithstanding appeal.

CONCLUSION

[54] For all of these reasons, the Court granted the Debtors' Application.

JANET MICHELIN, J.S.C.

Me Hugo Anthony Babos-Marchand
Me François Alexandre Toupin
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Me Sandra Abitan

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For the Monitor, Ernst & Young Inc.

Me Noah Zucker
Me Charlotte Dion
NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., S.R.L.
For the Interested Party, Atai Life Sciences Ag

Me Kim Sheppard
For the Attorney General of Canada

Me Adam Spiro
SPIEGEL, SOHMER, INC.
For other Party, Gensco Laboratories Llc

Hearing date: September 30, 2024

TAB 12

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittreer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appellants*

c.

Zittreer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «LNE») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40a de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40a sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words “terminated by an employer” must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer’s bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40a of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l’historique législatif pour déterminer l’intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l’*Employment Standards Amendment Act, 1981*, étaient exemptés de l’obligation de verser des indemnités de cessation d’emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l’obligation de verser une indemnité de cessation d’emploi. Si tel n’était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l’ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40a sont examinés dans leur contexte global, les termes «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inequitable. Une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. La cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40a de la *LNE*. Il était inutile d’examiner la question de l’applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d’avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. *ibid.*, s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. n° 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et Kathleen Martin, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

³ Pursuant to the receiving order, the respondent, Zitrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zitrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

⁴ In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately \$2.6 million and for severance pay totalling \$14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 \$). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

⁵ The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

- (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
- (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «LF») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «LNE»).

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7... .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi*.

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

- a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;
- b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

- (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
 - (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
 - (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
 - (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
 - (g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
 - (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,
- and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

- (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

- (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
- (b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

- c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;
 - d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;
 - e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;
 - f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;
 - g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;
 - h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,
- et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

- a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40a . . .

[TRANSLATION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

- a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;
- b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

- (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

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

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRANSDUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

- (3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date de la faillite, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the “*ESAA*”), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo’s former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

n’avaient pas soutenu que les indemnités de licenciement et de cessation d’emploi devaient être prioritaires dans la distribution de l’actif, mais tout simplement qu’elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu’il ne convenait pas d’invoquer la jurisprudence et la doctrine portant sur l’interprétation des dispositions relatives à la priorité de la *LF*.

Même si la faillite ne met pas fin à la relation entre l’employeur et l’employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNF*, le juge Farley était d’avis que les employés en l’espèce avaient néanmoins droit à ces indemnités, car il s’agissait d’engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d’une part qu’aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d’une indemnité de licenciement et d’une indemnité de cessation d’emploi au moment de la cessation d’emploi et d’autre part que l’employeur en faillite est assujéti à l’obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l’employeur et l’employé, soit bien avant la faillite.

Le juge Farley a également examiné le par. 2(3) de l’*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l’*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l’indemnité de cessation d’emploi jusqu’à ce que les modifications aient reçu la sanction royale. Il était d’avis que cette disposition n’aurait pas été nécessaire si le législateur n’avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d’un licenciement s’appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d’obtenir des indemnités de licenciement et de cessation d’emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l’appel formé contre la décision du syndic.

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B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

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Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as “[n]o employer shall terminate the employment of an employee” (s. 40(1)), “the notice required by an employer to terminate the employment” (s. 40(2)), and “[a]n employer who has terminated or who proposes to terminate the employment of employees” (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase “employees have their employment terminated by an employer”. Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

Au nom d’une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s’arrêtant sur le libellé des dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l’indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu’un employeur donne pour licencier» (par. 40(2)) et les «employés qu’un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l’indemnité de cessation d’emploi, il a cité l’al. 40a(1)a), à la p. 391, lequel contient l’expression «l’employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l’obligation d’accorder une indemnité de licenciement et une indemnité de cessation d’emploi aux cas où l’employeur licencie des employés. Selon lui, la cessation d’emploi résultant de l’effet de la loi, notamment de la faillite, n’entraîne pas l’application de la *LNE*.

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In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

À l’appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d’appel) a statué que les dispositions relatives à l’indemnité de licenciement de la *LNE* n’étaient pas conçues pour s’appliquer à l’employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l’appui de la proposition selon laquelle la faillite d’une compagnie à la demande d’un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

[TRADUCTION] Le libellé clair des art. 40 et 40a ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d’emploi que si l’employeur licencie l’employé. En l’espèce, la cessation d’emploi n’est pas le fait de l’employeur, elle résulte d’une ordonnance de séquestre rendue à l’encontre de Rizzo le 14 avril 1989, à la suite d’une pétition présentée par l’un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40a.

Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40a de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

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the words, “Where . . . fifty or more employees have their employment terminated by an employer. . . .” Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated “by an employer”.

licencier un employé . . . » Le paragraphe 40a(1a) contient également les mots: «si [. . .] l’employeur licencie cinquante employés ou plus . . . » Par conséquent, la question dans le présent pourvoi est de savoir si l’on peut dire que l’employeur qui fait faillite a licencié ses employés.

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated “by an employer”, but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase “terminated by an employer” is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee’s employment is involuntarily terminated by reason of their employer’s bankruptcy, this constitutes termination “by an employer” for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

La Cour d’appel a répondu à cette question par la négative, statuant que, lorsqu’un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l’employeur mais par l’effet de la loi. La Cour d’appel a donc estimé que, dans les circonstances de l’espèce, les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNE* n’étaient pas applicables et qu’aucune obligation n’avait pris naissance. Les appelants répliquent que les mots «l’employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d’emploi volontaire et la cessation d’emploi forcée. Ils soutiennent que ce libellé visait à décharger l’employeur de son obligation de verser des indemnités de licenciement et de cessation d’emploi lorsque l’employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d’emploi forcée résultant de la faillite de l’employeur est assimilable au licenciement effectué par l’employeur pour l’exercice du droit à une indemnité de licenciement et à une indemnité de cessation d’emploi prévu par la *LNE*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

Une question d’interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d’appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l’obligation de verser une indemnité de licenciement et une indemnité de cessation d’emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legisla-*

Bien que l’interprétation législative ait fait couler beaucoup d’encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2^e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act “shall be deemed to be remedial” and directs that every Act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”.

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of “...the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2^e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l’interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

[TRADUCTION] Aujourd’hui il n’y a qu’un seul principe ou solution: il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l’approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

Je m’appuie également sur l’art. 10 de la *Loi d’interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s’interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Bien que la Cour d’appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n’a pas accordé suffisamment d’attention à l’économie de la *LNE*, à son objet ni à l’intention du législateur; le contexte des mots en cause n’a pas non plus été pris en compte adéquatement. Je passe maintenant à l’analyse de ces questions.

Dans l’arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l’importance que notre société accorde à l’emploi et le rôle fondamental qu’il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C’est dans ce contexte que les juges majoritaires dans l’arrêt *Machtinger* ont défini, à la p. 1003, l’objet de la *LNE* comme étant la protection «...[d]es intérêts des employés en exigeant que

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certain minimum standards, including minimum periods of notice of termination”. Accordingly, the majority concluded, at p. 1003, that, “. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not”.

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu’« . . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d’employés possible est à préférer à une interprétation qui n’a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to “cushion” employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L’objet des dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L’article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L’une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s’ensuit que l’al. 40(7)a, qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu’un employeur n’a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l’absence d’une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2^e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer’s business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l’art. 40a, qui prévoit l’indemnité de cessation d’emploi, vient indemniser les employés ayant beaucoup d’années de service pour ces années investies dans l’entreprise de l’employeur et pour les pertes spéciales qu’ils subissent lorsqu’ils sont licenciés. Dans l’arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d’une décision rendue en matière de normes d’emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l’indemnité de cessation d’emploi:

Severance pay recognizes that an employee does make an investment in his employer’s business — the extent of this investment being directly related to the length of

[TRADUCTION] L’indemnité de cessation d’emploi reconnaît qu’un employé fait un investissement dans l’entreprise de son employeur — l’importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40a de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

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until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40a, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40a, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1^{er} janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

2. . . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

(3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

... any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *E.S.A.* ... it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

This interpretation is also consistent with statements made by the Minister of Labour at the time

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40a, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

[TRADUCTION] ... tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la *L.N.E.* [...] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

Cette interprétation est également compatible avec les déclarations faites par le ministre du

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he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . . .

. . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

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Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

. . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the “intent” of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

[TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.

. . . .

. . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1^{er} janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

[TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

. . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40a de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

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amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats, supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

démnité de licenciement de l'ESA de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'ESA de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'ESA de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40a of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40a de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words “terminated by the employer” must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer’s bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer’s bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40a of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

mots «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Adoptant l’interprétation libérale et généreuse qui convient aux lois conférant des avantages, j’estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l’intention du législateur, qui ressort du par. 2(3) de l’*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d’emploi en application de la *LNE* lorsque la cessation d’emploi résulte de la faillite de leur employeur serait aller à l’encontre des fins visées par les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi et minerait l’objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d’employés possible.

À mon avis, les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inequitable. De plus, je pense qu’une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40a de la *LNE*. En raison de cette conclusion, j’estime inutile d’examiner l’autre conclusion tirée par le juge de première instance quant à l’applicabilité du par. 7(5) de la *LNE*.

Je fais remarquer qu’après la faillite de Rizzo, les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, “[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law”. As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

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I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo’s former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l’emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d’emploi résulte de l’effet de la loi à la suite de la faillite de l’employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l’art. 17 de la *Loi d’interprétation* dispose que «[l]’abrogation ou la modification d’une loi n’est pas réputée constituer ou impliquer une déclaration portant sur l’état antérieur du droit», je précise que la modification apportée subséquemment à la loi n’a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Dispositif et dépens

Je suis d’avis d’accueillir le pourvoi et d’annuler le premier paragraphe de l’ordonnance de la Cour d’appel. Je suis d’avis d’y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d’indemnité de licenciement (y compris la paie de vacances due) et d’indemnité de cessation d’emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n’ayant produit aucun élément de preuve concernant les efforts qu’il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d’autorisation de pourvoi auprès de notre Cour en leur nom, je suis d’avis d’ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d’avis de ne pas modifier les ordonnances des juridictions inférieures à l’égard des dépens.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l’intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d’Ontario, Direction des normes d’emploi: Le procureur général de l’Ontario, Toronto.

TAB 13



Court File No. CV-23-711401-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE

)

WEDNESDAY, THE 17TH DAY

JUSTICE W.D. BLACK

)

OF APRIL, 2024

)

**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 CONTRACT PHARMACEUTICALS
LIMITED, CPL CANADA HOLDCO LIMITED,
CONTRACT PHARMACEUTICALS LIMITED CANADA,
GLASSHOUSE PHARMACEUTICALS LIMITED CANADA,
AND GLASSHOUSE PHARMACEUTICALS LLC**

(the "**Applicants**")

ANCILLARY RELIEF ORDER

THIS MOTION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), was heard this day by videoconference.

ON READING the Motion Record and Supplementary Motion Records of the Applicants, including the affidavits of Jan Sahai sworn April 3, April 9 and April 12, 2024 (together with the Affidavit of Jan Sahai sworn December 14, 2023, the "**Sahai Affidavits**"), the Third and Fourth Reports of KSV Restructuring Inc. ("**KSV**"), in its capacity as Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**"), dated April 9 (the "**Third Report**") and April 15, 2024 (the "**Fourth Report**"), respectively, and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for Deerfield Private Design Fund IV, L.P. and Deerfield Private Design Fund III, L.P. ("**Deerfield**"), counsel for Royal Bank of Canada ("**RBC**"), and counsel for Export Development Canada ("**EDC**"), and such other counsel as were present, no one else appearing although duly served.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein 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: (i) capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Sahai Affidavits; and (ii) all references to Applicants herein shall be deemed to include reference to 1000834899 Ontario Inc. (“**ResidualCo**”) for the period from and after the Effective Time (as such term is defined in the Approval and Reverse Vesting Order made in these proceedings of even date herewith and issued in connection with the Share Purchase Agreement dated March 30, 2024 (as amended and as may be further amended, the “**Agreement**”) between Contract Pharmaceuticals Limited (“**CPL**”), as seller, and AIP Elixir Buyer Inc., as buyer (the transaction contemplated thereby being, the “**Transaction**”)).

EXTENSION OF THE STAY PERIOD

3. **THIS COURT ORDERS** that the Stay Period (as defined in the Amended and Restated Initial Order of this Court dated December 22, 2023 (the “**ARIO**”)) be and is hereby extended to and including June 17, 2024.

WAGE EARNER PROTECTION PROGRAM ACT

4. **THIS COURT ORDERS AND DECLARES** that ResidualCo shall be deemed to be the former employer of any former employees of the Applicants who were (or are) terminated between June 15, 2023, and the Effective Time, provided that such deeming: (i) shall be effective immediately after the Effective Time; and (ii) shall be solely for the purposes of termination pay

and severance pay pursuant to the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1, and not for any other purpose.

MONITOR'S ENHANCED POWERS

5. **THIS COURT ORDERS AND DECLARES** that upon the Effective Time, in addition to the powers and duties of the Monitor set out in the ARIO, the Approval and Reverse Vesting Order, any other Order of this Court granted in these CCAA proceedings, the CCAA and applicable law, and without altering in any way the obligations of CPL, Glasshouse Pharmaceuticals LLC and ResidualCo (collectively, the “**Remaining Applicants**”) in these CCAA proceedings, the Monitor be and is hereby authorized and empowered, but not required, to exercise any powers which may be properly exercised by the board of directors of each of the Remaining Applicants, including, without limitation, to:

- (a) cause the Remaining Applicants to take any and all actions and steps, and execute all agreements, documents and writings, on behalf of, and in the name of, the Remaining Applicants, in order to facilitate the performance of any of their powers or obligations, including, without limitation, as contemplated by the Agreement and the Transaction (or as otherwise may be considered necessary or desirable in connection therewith) or any Order of this Court;
- (b) cause the Remaining Applicants to exercise any rights of the Remaining Applicants under or in connection with the Agreement or any agreement or other document related thereto;
- (c) cause any of the Remaining Applicants to retain the services of any person as an employee, consultant or other similar capacity, including, without limitation, a

wind-down officer, all under the supervision and direction of the Monitor and on the terms as agreed with the Monitor;

- (d) cause the Remaining Applicants to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the winding-down of the Remaining Applicants, the distribution of the proceeds of their property, or any other related activities;
- (e) open one or more new accounts (the “**Remaining Applicants Accounts**”) into which all funds, monies, cheques, instruments and other forms of payment payable to the Remaining Applicants shall be deposited to and after the making of this Order from any source whatsoever and to operate and control as applicable, on behalf of the Remaining Applicants, the Remaining Applicants Accounts in such a manner as the Monitor, in its sole discretion, deems necessary or appropriate to assist with the exercise of the Monitor’s powers and duties;
- (f) conduct, supervise and direct the continuation or commencement of any process or effort to recover any property or other assets of the Remaining Applicants (including any accounts receivable or cash);
- (g) engage, deal, communicate, negotiate, agree and settle with any creditor or other stakeholder of the Remaining Applicants (including any governmental authority) in the name of or on behalf of the Remaining Applicants;
- (h) claim or cause the Remaining Applicants to claim any and all insurance refunds or tax refunds to which the Remaining Applicants are entitled;

- (i) have access to all books and records that are the property of or in the possession or control of the Remaining Applicants;
- (j) facilitate or assist the Remaining Applicants with accounting, tax and financial reporting functions, including the preparation of cash flow forecasts, employee-related remittances, T4 statements and records of employment, in each case based solely upon the information provided to the Monitor and on the basis that the Monitor shall incur no liability or obligation to any person with respect to such reporting, remittances, statements and records;
- (k) exercise any shareholder rights of the Remaining Applicants for the period after the Effective Time;
- (l) assign any of the Remaining Applicants, or cause any of the Remaining Applicants to be assigned, into bankruptcy, and KSV shall hereby be entitled but not obligated to act as a trustee of ResidualCo in any bankruptcy thereof;
- (m) cause the dissolution or winding-up of the Remaining Applicants;
- (n) act as an authorized representative of the Remaining Applicants in respect of dealings with the Canada Revenue Agency (the “**CRA**”) or any other taxation authority, and the Monitor shall hereby be entitled to execute any appointment or authorization form on behalf of the Remaining Applicants that the CRA or any other taxation authority may require in order to confirm the Monitor’s appointment as an authorized representative for such purposes;
- (o) apply to this Court for advice and directions or any further orders necessary or advisable to carry out its powers and obligations under this Order or any other Order

granted by this Court, including for advice and directions with respect to any matter; and

- (p) take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

6. **THIS COURT ORDERS** that, upon the Effective Time, the banks and/or financial institutions which maintain the Cash Management System of each of the Remaining Applicants (which includes, for the avoidance of doubt, each of the Remaining Applicants' bank accounts) are directed to recognize and permit the Monitor and its representatives to complete any and all transactions on behalf of the Remaining Applicants in connection with such Cash Management System and for such purpose, the Monitor and its representatives are empowered and shall be permitted to execute documents for, or on behalf of and in the name of the Remaining Applicants, and shall be empowered and permitted to add and remove persons having signing authority with respect to the Cash Management System of the Remaining Applicants. The financial institutions maintaining such Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken in accordance with the instructions of the Monitor for and on behalf of the Remaining Applicants, and/or as to the use or application of funds transferred, paid, collected or otherwise dealt with in accordance with such instructions and such financial institutions shall be authorized to act in accordance with and in reliance upon such instructions without any liability in respect thereof to any person. The Monitor shall assist the Company and the Remaining Applicants in the disengagement of the Remaining Applicants from the Cash Management System.

7. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order, the Monitor is not, and shall not be or be deemed to be, a director, officer or employee of any of the Remaining Applicants.

8. **THIS COURT ORDERS** that, without limiting the provisions of the ARIO, the Remaining Applicants shall remain in possession and control of their respective Property and the Monitor shall not take, or be deemed to have taken, possession or control of such Property, or any part thereof.

9. **THIS COURT ORDERS** that the Monitor shall not be liable for any employee-related liabilities of the Remaining Applicants, if any, other than amounts the Monitor may specifically agree in writing to pay. Nothing in this Order shall, in and of itself, cause the Monitor to be liable for any employee-related liabilities of the Remaining Applicants, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts.

10. **THIS COURT ORDERS** that: (i) in addition to the rights and protections afforded to the Monitor under the CCAA or as an officer of this Court, the Monitor and its legal counsel shall continue to have the benefit of all of the indemnities, charges, protections and priorities as set out in the ARIO and any other Order of this Court, and all such indemnities, charges, protections and priorities shall apply and extend to the Monitor in carrying out of the provisions of this Order and exercising any powers granted to it hereunder; and (ii) the Monitor shall incur no liability or obligation as a result of exercising any powers granted to it hereunder, save and except for any gross negligence or wilful misconduct on its part.

11. **THIS COURT ORDERS** that nothing in this Order shall constitute or be deemed to constitute the Monitor as receiver, assignee, liquidator, administrator, receiver-manager, agent of

the creditors or legal representative of the Remaining Applicants within the meaning of any relevant legislation and that any distributions to creditors of the Applicants by the Monitor will be deemed to have been made by the Applicants.

12. **THIS COURT ORDERS** that the powers and authority granted to the Monitor by virtue of this Order shall, if exercised in any case, be paramount to the power and authority of the Remaining Applicants with respect to such matters and, in the event of a conflict between the terms of this Order and those of the ARIO or any other Order of this Court, the provisions of this Order shall govern.

DISTRIBUTIONS

13. **THIS COURT ORDERS** that, upon the Effective Time, the Applicants and the Monitor are hereby authorized, without further order of this Court, to forthwith following the Effective Time make distributions from the net proceeds resulting from the closing of the Transaction to:

- (a) RBC of the full amount of the obligations outstanding under the RBC Loan Agreement, to the account or accounts specified by RBC in writing prior to the Effective Time;
- (b) EDC of the full amount of the obligations outstanding under the EDC Loan Agreement, to the account or accounts specified by EDC in writing prior to the Effective Time;
- (c) Deerfield of the full amount of the obligations outstanding under the DIP Term Sheet (including, for greater certainty, amounts drawn to pay the KERP and the Transaction Fee) (the “**DIP Distribution**”), to the account or accounts specified by Deerfield in writing prior to the Effective Time; and

- (d) Deerfield of the full amount of the obligations under the Deerfield Facility Agreement, minus US\$8,000,000, to the account or accounts specified by Deerfield in writing prior to the Effective Time.

14. **THIS COURT ORDERS** that the Applicants and the Monitor shall be entitled to deduct and withhold from any such distribution to RBC, EDC or Deerfield such amounts as may be required to be deducted or withheld under any applicable law, and to remit such amounts to the appropriate governmental authority or other person entitled thereto as may be required by such law. 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.

15. **THIS COURT ORDERS** that the Monitor is hereby authorized and empowered to cause the Applicants to make the distributions contemplated hereby and take any further steps that it deems necessary or desirable to complete the distributions described in this Order.

16. **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), R.S.C. 1985 c. B-3, as amended (the “**BIA**”), the United States Bankruptcy Code, or any other applicable legislation in respect of any of the Applicants or their respective Property and any bankruptcy or receivership order issued pursuant to any such application; or
- (c) any assignment in bankruptcy made in respect of any of the Applicants,

any distributions made pursuant to this Order are final and irreversible and shall be binding upon any trustee in bankruptcy or receiver that may be appointed in respect of any of the Applicants, or their respective Property, and shall not be void or voidable by creditors of any of the Applicants, nor shall any such distributions constitute or be deemed to be fraudulent preferences, assignments, fraudulent conveyances, transfers-at-undervalue or other reviewable transactions under the CCAA, the BIA or any other applicable federal or provincial law or the United States Bankruptcy Code, nor shall they constitute conduct which is oppressive, unfairly prejudicial to or which unfairly disregards the interests of any person, and shall, upon the receipt thereof, be free of all claims, liens, security interests, charges or other encumbrances granted by or relating to any of the Applicants or their respective Property.

17. **THIS COURT ORDERS** that the Monitor shall not incur any liability in connection with the distributions contemplated herein, whether in its personal capacity or in its capacity as the Monitor, except for wilful misconduct or gross negligence.

18. **THIS COURT ORDERS AND DECLARES** that the distributions contemplated herein shall not constitute a “distribution” by the Monitor and the Monitor shall not constitute a “legal representative”, “representative” or a “responsible representative” of any of the Applicants or “other person” for the purposes of Section 159 of the *Income Tax Act* (Canada), section 117 of the *Taxation Act*, 2007 (Ontario), Section 270 of the *Excise Tax Act* (Canada), Sections 46 and 86 of the *Employment Insurance Act* (Canada), Section 22 of the *Retail Sales Tax Act* (Ontario), Section 107 of the *Corporations Tax Act* (Ontario), or any other similar federal, provincial or territorial tax legislation (collectively, the “**Statutes**”), and the Monitor, in causing or assisting the Applicants to make any distribution in accordance with this Order is not “distributing”, nor shall it be considered to have “distributed”, such funds for the purposes of the Statutes, and the Monitor

shall not incur any liability under the Statutes for causing or assisting the Applicants in making any distributions in accordance with this Order or failing to withhold amounts ordered or permitted hereunder, and the Monitor shall not have any liability for any of the Applicants' tax liabilities regardless of how or when such liabilities may have arisen, and is hereby forever released, remised and discharged from any claims against the Monitor under or pursuant to the Statutes or otherwise at law arising as a result of the distributions contemplated in this Order, and any claims of such nature are hereby forever barred.

CHARGES

19. **THIS COURT ORDERS** that, following payment to the beneficiaries of the KERP of all amounts payable thereunder in accordance with its terms and conditions, the KERP Charge granted in the ARIO shall be automatically released and terminated without any further action.

20. **THIS COURT ORDERS** that upon payment of the Transaction Fee, the Financial Advisor Charge granted in the ARIO shall be automatically released and terminated without any further action.

21. **THIS COURT ORDERS** that, following making of the DIP Distribution in accordance with paragraph 13(c) of this Order such that all obligations owing under the DIP Term Sheet are repaid in full, the DIP Lender's Charge shall be automatically released and terminated without any further action.

APPROVAL OF MONITOR'S ACTIVITIES

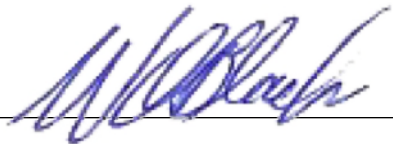
22. **THIS COURT ORDERS** that the First Report of the Monitor dated December 20, 2023, the Second Report of the Monitor dated March 19, 2024, the Third Report and the Fourth Report are hereby approved, and the activities and conduct of the Monitor prior to or on the date hereof

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 approval.

GENERAL

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal and regulatory or administrative bodies having jurisdiction in Canada, the United States or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicants and the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and 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.

24. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. (Toronto time) on the date hereof and is enforceable without any need for entry and filing.



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

**AND IN THE MATTER OF AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF CONTRACT PHARMACEUTICALS LIMITED, CPL
CANADA HOLDCO LIMITED, CONTRACT PHARMACEUTICALS LIMITED
CANADA, GLASSHOUSE PHARMACEUTICALS LIMITED CANADA, AND
GLASSHOUSE PHARMACEUTICALS LLC**

Applicants

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

Proceeding commenced at Toronto

ANCILLARY RELIEF ORDER

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Lawyers for the Applicants

TAB 14

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.	)	THURSDAY, THE 3 RD
	)	
JUSTICE MCEWEN	)	DAY OF NOVEMBER

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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

APPROVAL AND VESTING ORDER

THIS MOTION, made by the Applicants (together, the Applicants and the partnerships listed on **Schedule “A”** hereto, the “**Just Energy Entities**”), pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”), for an order, *inter alia*, (i) approving the Transaction Agreement (as amended, the “**Transaction Agreement**”) between Just Energy Group Inc. (“**Just Energy**”) and LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the “**Sponsor**”)

dated as of August 4, 2022 and attached as Exhibit “A” to the affidavit of Emily Paplawski sworn October 31, 2022 (the “**Paplawski Affidavit**”) and the transactions contemplated therein (collectively, the “**Transactions**”), including the Implementation Steps (as defined in the Transaction Agreement), (ii) adding 14487893 Canada Inc. (“**Residual Co. 1**”) and 11368, LLC (“**Residual Co. 2**”) as Applicants to these CCAA proceedings, (iii) vesting in and to Residual Co. 1 and/or Residual Co. 2, as applicable, absolutely and exclusively, all of the right, title and interest of the Just Energy Entities not listed on Schedule 2.2(f) of the Transaction Agreement (the “**Acquired Entities**”) in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities (each as defined in the Transaction Agreement), (iv) discharging Claims and Encumbrances, other than the Permitted Encumbrances, against the Acquired Entities and the Retained Assets (each as hereinafter defined), (v) authorizing and directing Just Energy (U.S.) Corp. (“**JEUS**”) to issue the Purchased Interests (as defined in the Transaction Agreement), and vesting all of the right, title and interest in and to the Purchased Interests absolutely and exclusively in and to the Sponsor, free and clear of any Encumbrances, (vi) authorizing and directing Just Energy to file the Articles of Reorganization (as defined in the Transaction Agreement), (vii) terminating and cancelling or redeeming the Subject Interests (as hereinafter defined) for no consideration (as provided for in the Implementation Steps), and (viii) granting certain related relief, was heard this day by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the Notice of Motion of the Applicants, the affidavit of Michael Carter sworn October 17, 2022, the Paplawski Affidavit, the Twelfth Report of FTI Consulting Canada Inc. (“**FTI**”), in its capacity as monitor (the “**Monitor**”), dated October 27, 2022, and on hearing the submissions of counsel for the Just Energy Entities, the Monitor, the Sponsor, the Credit Facility Agent, as administrative agent for the Credit Facility Lenders, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Emily Paplawski, sworn October 17, 2022; the affidavit of service of Matthew Eliseo Cressatti, sworn October 18, 2022; the affidavit of service of Emily Paplawski, sworn October 20, 2022; and the affidavit of service of Elena Pratt, sworn October 31, 2022:

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein 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 all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Second Amended and Restated Initial Order of this Court dated May 26, 2021 (the “**Initial Order**”), that certain support agreement approved by this Court pursuant to the SISP Approval Order (as hereinafter defined) (the “**Support Agreement**”), or the Transaction Agreement, as applicable.

APPROVAL AND VESTING

3. **THIS COURT ORDERS AND DECLARES** that, without derogating in any way from the relief contained in the SISP Approval Order of this Court dated August 18, 2022 (the “**SISP Approval Order**”), the Transaction Agreement and the Transactions (including the Implementation Steps) are hereby approved and the execution of the Transaction Agreement by Just Energy is hereby authorized and approved, with such minor amendments as Just Energy and the Sponsor may deem necessary, with the approval of the Monitor and subject to the terms of the Support Agreement. The Just Energy Entities are hereby authorized and directed to perform their obligations under the Transaction Agreement, including the filing of the Articles of Reorganization, the issuance of the Purchased Interests and the termination and cancellation or redemption of the Subject Interests (as provided for in the Implementation Steps), and to take such additional steps and execute such additional documents (including the Closing Documents) as may be necessary or desirable for the completion of the Transactions.

4. **THIS COURT ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Just Energy Entities to proceed with the Transactions and that no shareholder or other approval shall be required in connection therewith.

5. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of the Monitor's certificate (the "**Monitor's Certificate**") to the Sponsor, substantially in the form attached as **Schedule "B"** hereto, the following shall occur and shall be deemed to have occurred in the sequence set out in the Implementation Steps:

- (a) the Just Energy Entities shall be and are hereby forever released and discharged from the BP Commodity/ISO Services Claim, including all amounts and obligations owing by the Just Energy Entities in connection therewith, and all related Claims and Encumbrances are hereby expunged and discharged;
- (b) (i) with respect to the Acquired Entities not formed or incorporated under the laws of the United States (the "**Non-US Acquired Entities**"), all of the Non-US Acquired Entities' right, title and interest in and to their respective Excluded Assets shall vest absolutely and exclusively in Residual Co. 1, and (ii) with respect to the Acquired Entities formed or incorporated under the laws of the United States (the "**US Acquired Entities**"), all of the US Acquired Entities' right, title and interest in and to their respective Excluded Assets shall vest absolutely and exclusively in Residual Co. 2, and, in each case, all applicable Claims and Encumbrances shall continue to attach to such Excluded Assets with the same nature and priority as they had immediately prior to their transfer; provided that, for certainty, the Excluded Assets transferred hereby shall not include the Priority Payments Amount, which

shall be used to satisfy the Priority Payments (as hereinafter defined) in accordance with paragraph 18 hereof;

- (c) all Excluded Contracts and Excluded Liabilities (which, for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature 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) of the Non-US Acquired Entities and the US Acquired Entities (in each case, other than the Assumed Liabilities) shall be transferred to, assumed by and vest absolutely and exclusively in, Residual Co. 1 and Residual Co. 2, respectively, such that all Excluded Contracts and Excluded Liabilities shall become obligations of Residual Co. 1 and Residual Co. 2, as applicable, and shall no longer be obligations of any of the Acquired Entities, and the Acquired Entities and all of their remaining assets, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate (collectively, the “**Retained Assets**”) shall be and are hereby forever released and discharged from all Excluded Contracts and Excluded Liabilities, and all related Claims and Encumbrances, other than the permitted encumbrances, easements and restrictive covenants affecting or relating to the Retained Assets listed on **Schedule “C”** (the “**Permitted Encumbrances**”), are hereby expunged and discharged as against the Retained Assets; provided that, for certainty, the Excluded Liabilities transferred hereby shall not include the obligations of the Just Energy Entities in respect of the Priority Payments, which shall be satisfied pursuant to paragraph 18 hereof;

- (d) all right, title and interest in and to the Purchased Interests issued by JEUS to the Sponsor shall vest absolutely and exclusively in the Sponsor free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (x) any encumbrances or charges created by the Initial Order, the SISP Approval Order, or any other Order of this Court, and (y) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the “**Encumbrances**”, which term shall not include the Permitted Encumbrances) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Interests are hereby expunged and discharged as against the Purchased Interests;
- (e) all equity interests of Just Energy and JEUS existing prior to the commencement of the Implementation Steps (for greater certainty, other than the Purchased Interests), as well as all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (as hereinafter defined) and are convertible or exchangeable for any securities of Just Energy or JEUS or which require the issuance, sale or transfer by Just Energy or JEUS, of any shares or other securities of Just Energy or JEUS, as applicable, or otherwise evidencing a right to

acquire the Purchased Interests and/or the share capital of Just Energy or JEUS, or otherwise relating thereto (collectively, the “**Subject Interests**”), shall be deemed terminated and cancelled or redeemed as provided in the Implementation Steps and the Articles of Reorganization, as applicable; and

- (f) the Acquired Entities shall and shall be deemed to cease to be Applicants in these CCAA proceedings, and the Acquired Entities shall be deemed to be released from the purview of the Initial Order and all other Orders of this Court granted in respect of these CCAA proceedings, save and except for this Order the provisions of which (as they relate to the Acquired Entities) shall continue to apply in all respects.

6. **THIS COURT ORDERS AND DIRECTS** the Monitor to (a) provide a copy of the Monitor’s Certificate to the parties to the Support Agreement at the same time as its delivery to the Sponsor; and (b) file with this Court a copy of the Monitor’s Certificate forthwith after delivery thereof in connection with the Transactions as well as a copy of the final form of Transaction Agreement and all related schedules.

7. **THIS COURT ORDERS** that the Monitor may rely on written notice from Just Energy and the Sponsor regarding the satisfaction or waiver of conditions to closing under the Transaction Agreement and shall have no liability with respect to delivery of the Monitor’s Certificate.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, from and after the Effective Time (as defined in the Monitor’s Certificate), subject to the payment of the Priority Payments and the funding of the Administrative Expense Amount, all Claims and Encumbrances released, expunged and discharged pursuant to paragraph 5 hereof, including as against the Acquired Entities, the Retained Assets and the Purchased Interests, shall

attach to (a) the net proceeds remaining (the “**Remaining Proceeds**”), if any, realized from the Cash Purchase Price and transferred to Residual Co. 1 or Residual Co. 2 and (b) the Excluded Assets, in each case, with the same nature and priority as they had immediately prior to the Transactions, as if the Transactions had not occurred.

9. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Just Energy Entities or the Monitor, as the case may be, are authorized, permitted and directed to, at the Effective Time, disclose to the Sponsor all human resources and payroll information in the Acquired Entities’ records pertaining to past and current employees of the Acquired Entities. The Sponsor shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Just Energy Entities prior to the Effective Time.

10. **THIS COURT ORDERS AND DECLARES** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, the Sponsor and the Acquired Entities shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes (including penalties and interest thereon) of, or that relate to, the Just Energy Entities (provided, as it relates to the Sponsor and the Acquired Entities, such release shall not apply to (a) Taxes in respect of the business and operations conducted by the Acquired Entities after the Effective Time; or (b) Taxes expressly assumed as Assumed Liabilities pursuant to the Transaction Agreement), including, without limiting the generality of the foregoing, all Taxes that could be assessed against the Sponsor or the Acquired Entities (including its affiliates and any predecessor corporations) pursuant to section 160 of the *Income Tax Act* (Canada) (the “**Tax Act**”), or proposed section 160.01 of the Tax Act, including as a result of any

future amendments or proposed amendments to such provisions or related provisions, or any provincial equivalent, in connection with the Just Energy Entities.

11. **THIS COURT ORDERS** that (a) to the extent Electric Reliability Council of Texas, Inc. (“ERCOT”) has a valid claim, cause of action, right, or remedy against the Just Energy Entities or the Acquired Entities, whether in connection with, or as a result of, any final order in the litigation commenced by the Just Energy Entities against ERCOT in the United States Bankruptcy Court for the Southern District of Texas under the caption *Just Energy Texas LP, et al. v. Electric Reliability Council of Texas, Inc. and the Public Utility Commission of Texas Inc.*, Adv. Pro. No. 21-04399 (“**ERCOT Claim**”), nothing in this Order or in any document in connection with the Transactions shall be deemed to preclude ERCOT from being paid on account of, or enforcing its rights with respect to, such ERCOT Claim from the applicable Just Energy Entities or Acquired Entities following the closing of the Transactions, and any rights, remedies and defenses of the Just Energy Entities, the Acquired Entities, and ERCOT with respect to any such ERCOT Claim, including, but not limited to, the validity, amount and priority of any such ERCOT Claim, are fully preserved and reserved; (b) nothing in this Order or the Transaction Agreement shall be deemed to impact, alter or impair ERCOT’s rights and remedies with respect to obligations of the Just Energy Entities or the Acquired Entities, or the rights and remedies of the Just Energy Entities or the Acquired Entities with respect to obligations of ERCOT, pursuant to the ERCOT Protocols or the operative Standard Form Market Participant Agreement by and between ERCOT and the applicable Just Energy Entities or Acquired Entities; and (c) to the extent there is any market repricing or other reduction in the amount due from the Just Energy Entities or the Acquired Entities to ERCOT as a result of, without limitation, the litigation pending in Texas state court under the caption *Luminant Energy Co. LLC v. Public Utility Commission of Texas Inc.*, Case No.

03-21-00098-CV, or any other litigation in the Texas state or federal courts, nothing contained herein shall preclude (i) the applicable Just Energy Entities or Acquired Entities from seeking an adjustment of any amounts paid to ERCOT by the Just Energy Entities or the Acquired Entities, or (ii) any rights, remedies and defenses of ERCOT in connection thereto.

12. **THIS COURT ORDERS** that, except to the extent expressly contemplated by the Transaction Agreement (and, for greater clarity, excluding Continuing Contracts relating to Assumed Liabilities, including the Credit Facility Documents), all Continuing Contracts to which any of the Acquired Entities are a party upon delivery of the Monitor's Certificate will be and remain in full force and effect upon and following delivery of the Monitor's Certificate and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

- (a) any event that occurred on or prior to the Effective Time and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of any Just Energy Entity);
- (b) the insolvency of any Just Energy Entity or the fact that the Just Energy Entities sought or obtained relief under the CCAA;

- (c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Transaction Agreement, the Transactions or the provisions of this Order, or any other Order of this Court in these CCAA proceedings; or
- (d) any transfer or assignment, or any change of control of the Acquired Entities arising from the implementation of the Transaction Agreement, the Transactions or the provisions of this Order.

13. **THIS COURT ORDERS**, for greater certainty, that (a) nothing in paragraph 12 hereof shall waive, compromise or discharge any obligations of the Acquired Entities or the Sponsor in respect of any Assumed Liabilities; (b) the designation of any Claim as an Assumed Liability is without prejudice to the Acquired Entities' and the Sponsor's right to dispute the existence, validity or quantum of any such Assumed Liability; and (c) nothing in this Order or the Transaction Agreement shall affect or waive the Acquired Entities' or Sponsor's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

14. **THIS COURT ORDERS** that, from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of any Just Energy Entity then existing or previously committed by any Just Energy Entity, or caused by any Just Energy Entity, directly or indirectly, or noncompliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Continuing Contract, existing between such Person and any Acquired Entity directly or indirectly from the filing by the Applicants under the CCAA and the implementation of the Transactions, including without

limitation any of the matters or events listed in paragraph 12 hereof, and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under a Continuing Contract shall be deemed to have been rescinded and of no further force or effect; provided that, nothing herein shall be deemed to excuse the Sponsor or the Just Energy Entities from performing their obligations under, or be a waiver of defaults by the Sponsor or Just Energy under, the Transaction Agreement and the related agreements and documents, or affect the validity of the Implementation Steps.

15. **THIS COURT ORDERS** that, from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessment, commenced, taken or proceeded with or that may be commenced, taken or proceeded with against the Sponsor or the Acquired Entities relating in any way to or in respect of any Excluded Assets, Excluded Contracts or Excluded Liabilities and any other claims, obligations and other matters which are waived, released, expunged or discharged pursuant to this Order; provided that, nothing herein shall affect the validity of the Implementation Steps.

16. **THIS COURT ORDERS** that, from and after the Effective Time:

- (a) the nature of the Assumed Liabilities assumed by the Sponsor or retained by the Acquired Entities, including, without limitation, their amount and their secured or

unsecured status, shall not be affected or altered as a result of the Transactions or this Order;

- (b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Residual Co. 1 and Residual Co. 2, as applicable;
- (c) any Person that prior to the Effective Time had a valid right or claim against the Acquired Entities under or in respect of any Excluded Contract or Excluded Liability (each an “**Excluded Liability Claim**”) shall no longer have such right or claim against the Acquired Entities but will have an equivalent Excluded Liability Claim against Residual Co. 1 or Residual Co. 2, as applicable, in respect of the Excluded Contract and Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against Residual Co. 1 and/or Residual Co. 2; and
- (d) the Excluded Liability Claim of any Person against Residual Co. 1 and/or Residual Co. 2 following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against the applicable Acquired Entities prior to the Effective Time.

17. **THIS COURT ORDERS AND DECLARES** that, as of the Effective Time:

- (a) Residual Co. 1 and Residual Co. 2 shall be companies to which the CCAA applies; and

- (b) Residual Co. 1 and Residual Co. 2 shall be added as Applicants in these CCAA proceedings and all references in any Order of this Court in respect of these CCAA proceedings to (i) an “Applicant” or the “Applicants” shall refer to and include Residual Co. 1 and Residual Co. 2, *mutatis mutandis*, and (ii) “Property” shall include the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, of Residual Co. 1 and Residual Co. 2, including the Remaining Proceeds (the “**Residual Co. Property**”), and, for greater certainty, each of the Charges, shall constitute charges on the Residual Co. Property.

PRIORITY PAYMENTS

18. **THIS COURT ORDERS AND DIRECTS** that the Priority Payments Amount and the Cash Purchase Price, as necessary and as permitted by the Transaction Agreement, shall be distributed by Just Energy, on behalf of one or more of the Just Energy Entities, on the Closing Date consistent with the Implementation Steps, to satisfy the following obligations (collectively, the “**Priority Payments**”):

- (a) first, to the beneficiaries of the Administration Charge and the FA Charge, the amounts necessary to satisfy the Just Energy Entities’ obligations secured thereby up to the maximum respective amounts secured by such charges, in full and final satisfaction thereof;
- (b) second, to the beneficiaries of the KERP Charge, the amounts necessary to satisfy the Just Energy Entities’ obligations secured thereby (if any) up to the maximum amount secured by such charge, in full and final satisfaction thereof;

- (c) third, on a *pari passu* basis:
 - (i) to the DIP Agent, for the benefit of the beneficiaries of the DIP Lenders' Charge, an amount necessary to satisfy the Just Energy Entities' obligations secured by such charge, in full and final satisfaction thereof, and
 - (ii) to each Commodity Supplier, an amount necessary to satisfy such Commodity Supplier's Commodity Supplier Claim that is an Accepted Claim (as defined in the Claims Procedure Order), in full and final satisfaction thereof;
- (d) fourth, to each Government Entity, an amount necessary to satisfy such Government Entity's Government Priority Claim, in full and final satisfaction thereof; and
- (e) fifth, to the Credit Facility Agent, in the currency that such Credit Facility Claim was originally denominated, an amount equal to the Credit Facility Claim (less the Credit Facility Remaining Debt, if any), in full and final satisfaction thereof.

19. **THIS COURT ORDERS** that, subject to completion of the Priority Payments set out in paragraph 18 hereof, the FA Charge, the Directors' Charge, the KERP Charge, the DIP Lenders' Charge, the Priority Commodity/ISO Charge, the Cash Management Charge and the Bid Protections Charge shall be and are hereby terminated, released and discharged.

20. **THIS COURT ORDERS** that the Administrative Expense Amount held by the Monitor shall be subject to the Administration Charge, and any remaining portion thereof after payment of the Administrative Expense Costs shall be paid to Just Energy in accordance with the terms of the Transaction Agreement.

RELEASES AND OTHER PROTECTIONS

21. **THIS COURT ORDERS** that, effective as of the Effective Time, (a) the current and former directors, officers, employees, legal counsel and advisors of the Just Energy Entities, Residual Co. 1 and Residual Co. 2 (or any of them); (b) the Monitor and its legal counsel; (c) the Sponsor and their respective current and former directors, officers, employees, legal counsel and advisors; and (d) the Credit Facility Agent and the Credit Facility Lenders, and their respective current and former directors, officers, employees, legal counsel and advisors (in such capacities, collectively, the “**Released Parties**”) shall be deemed to be forever irrevocably released by the Releasing Parties (as hereinafter defined) 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, taxes, recoveries, and obligations of any 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 on or prior to the Effective Time or undertaken or completed in connection with or pursuant to the terms of this Order in respect of, relating to, or arising out of (i) the Just Energy Entities, the business, operations, assets, property and affairs of the Just Energy Entities wherever or however conducted or governed, the administration and/or management of the Just Energy Entities, these CCAA proceedings and/or the Chapter 15 Cases, or (ii) the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents (when used in this Order, as defined in the Support Agreement), any agreement, document, instrument, matter or transaction

involving the Just Energy Entities arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transactions (collectively, subject to the excluded matters below, the “**Released Claims**”), which Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties; provided that, nothing in this paragraph shall waive, discharge, release, cancel or bar (x) any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA or claim with respect to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence, or (y) any obligations of any of the Released Parties under or in connection with the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents, and/or any agreement, document, instrument, matter or transaction involving the Just Energy Entities arising in connection with or pursuant to any of the foregoing. “**Releasing Parties**” means any and all Persons (besides the Just Energy Entities and their respective current and former affiliates), and their current and former affiliates’ current and former members, directors, managers, officers, investment committee members, special committee members, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, participants, subsidiaries, affiliates, partners, limited partners, general partners, affiliated investment funds or investment vehicles, managed accounts or funds, and each of their respective current and former members, equity holders, officers, directors, managers, principals, members, management companies, advisory board members, investment fund advisors or managers, employees, agents, trustees, investment managers, financial advisors, partners, legal counsel, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

22. **THIS COURT ORDERS** that, effective as of the Effective Time, the Released Parties shall be deemed to be forever irrevocably released by each of the Just Energy Entities and their respective current and former affiliates, and discharged from, any and all Released Claims held by the Just Energy Entities and such current and former affiliates as of the Effective Time, which Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties; provided that, nothing in this paragraph shall waive, discharge, release, cancel or bar (a) any claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA or claim with respect to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence; or (b) any obligations of any of the Released Parties under or in connection with the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents, and/or any agreement, document, instrument, matter or transaction involving the Just Energy Entities arising in connection with or pursuant to any of the foregoing; provided further that, the releases set forth in this paragraph shall not include, nor limit or modify in any way, any claim (or any defenses) which any of the Just Energy Entities may hold or be entitled to assert against any Released Party as of the Effective Time relating to any contracts, leases, agreements, licenses, bank accounts or banking relationships, accounts receivable, invoices, or other ordinary course obligations which are remaining in effect following the Effective Time.

23. **THIS COURT ORDERS** that, without affecting or limiting the releases set forth in paragraphs 21 and 22 hereof, effective as of the Effective Time, none of (a) the current and former directors, officers, employees, legal counsel and advisors of the Just Energy Entities, Residual Co. 1 and Residual Co. 2 (or any of them); (b) the Monitor and its legal counsel; (c) the Sponsor and

their respective current and former directors, officers, employees, legal counsel and advisors; and (d) the Credit Facility Agent and the Credit Facility Lenders, and their respective current and former directors, officers, employees, legal counsel and advisors (in such capacities, collectively, the “**Exculpated Parties**”), shall have or incur, and each Exculpated Party is released and exculpated from, any Causes of Action (as hereinafter defined) against such Exculpated Party for any act or omission in respect of, relating to, or arising out of the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents and/or the consummation of the Transactions, these CCAA proceedings, the Chapter 15 Cases, the formulation, preparation, dissemination, negotiation, filing or consummation of the Transaction Agreement, the Closing Documents, the Support Agreement, the Definitive Documents and all related agreements and documents, any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Transactions, the pursuit of approval and consummation of the Transactions or the recognition thereof in the United States, and/or the transfer of assets and liabilities pursuant to this Order, except for Causes of Action related to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence. “**Causes of Action**” means any action, claim, cross-claim, third-party claim, damage, judgment, cause of action, controversy, demand, right, action, suit, obligation, liability, debt, account, defense, offset, power, privilege, license, lien, indemnity, interest, guaranty, or franchise of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, matured or unmatured, suspected or unsuspected, in contract or in tort, at law or in equity, or pursuant to any other theory of law or otherwise.

24. **THIS COURT ORDERS** that all Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all claims or Cause of Actions released pursuant to this Order (including but not limited to the Released Claims), from (a) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any of the Released Parties or Exculpated Parties; (b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against any of the Released Parties, the Exculpated Parties, or their respective property; (c) commencing, conducting, continuing or making in any manner, directly or indirectly, any action, suit, claim, demand or other proceeding of any nature or kind whatsoever (including any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes a claim or might reasonably be expected to make a claim, in any manner or forum, including by way of contribution or indemnity or other relief, against one or more of the Released Parties or the Exculpated Parties; (d) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Encumbrance of any kind against the Released Parties, the Exculpated Parties, or their respective property; or (e) taking any actions to interfere with the consummation of the Transactions; and any such proceedings will be deemed to have no further effect against such parties and will be released, discharged or vacated without cost.

25. **THIS COURT ORDERS** that, without affecting or limiting the releases set forth in paragraphs 21 and 22 hereof, effective as of the Effective Time, each Consenting Party (as hereinafter defined) shall be deemed to have consented and agreed to paragraphs 21 through 25

hereof. “**Consenting Parties**” means any Person who is, at the Effective Time, a party to the Support Agreement.

26. **THIS COURT ORDERS** that, notwithstanding paragraphs 5, 21 and 22 hereof but subject to paragraphs 27 to 31 hereof, neither Just Energy, Just Energy Corp. nor Just Energy Ontario L.P. (collectively, the “**Specified JE Entities**”), nor any of their current or former officers and/or directors, shall be released from any claim or potential claim, whether at law or in equity, known or unknown, existing up to the Effective Time, in any way connected with, arising out of or relating to the matters raised, or which might have been raised, in the action commenced in the Ontario Superior Court of Justice on May 4, 2015 titled *Haidar Omarali v Just Energy Group Inc., Just Energy Corp. and Just Energy Ontario L.P.*, Court File No. CV-15-52749300 CP, against the Specified JE Entities or any of their current or former officers and/or directors, including, without limitation, the claims filed by Haidar Omarali, as representative plaintiff, in the Claims Process (as defined in the Claims Procedure Order) conducted by the Just Energy Entities in these CCAA proceedings, being (a) a Proof of Claim (as defined in the Claims Procedure Order) for CAD\$108,854,794.52 against the Specified JE Entities; and (b) a D&O Proof of Claim for CAD\$108,854,794.52 against the Directors (each as defined in the Claims Procedure Order) of Just Energy and Just Energy Corp. listed in schedules A and B to such D&O Proof of Claim (collectively, such claims, the “**Class Action Claim**”), solely to the extent it is necessary with respect to maintaining any claims as against the insurance policies of the Specified JE Entities that may be available to pay insured claims in respect of the Specified JE Entities or their current or former directors and officers (such policies set forth in **Schedule “D”** hereto, the “**Insurance Policies**”) and, solely for the purpose of recovery against the Insurance Policies, such Class Action Claim shall be deemed not to be transferred to Residual Co. 1 or Residual Co. 2.

27. **THIS COURT ORDERS** that, from and after the Effective Time, any Person having a Class Action Claim (a “**Class Action Claimant**”) shall only be entitled to recover from proceeds under the Insurance Policies, to the extent available in respect of any such Class Action Claim, and the recovery of such Class Action Claimants shall be solely limited to such proceeds, without any additional rights of enforcement or recovery as against the Just Energy Entities (including, for certainty, the Acquired Entities) or the current and former directors, officers, employees, legal counsel and advisors of the Just Energy Entities (or any of them) (in such capacities, collectively, the “**Protected JE Parties**”). The Specified JE Entities will not be required to incur any costs or expenses or to participate in the proceeding with respect to the Class Action Claim, except to the extent reasonably necessary to provide information or evidence reasonably necessary for the determination of such claim solely to seek recovery from proceeds under the Insurance Policies.

28. **THIS COURT ORDERS** that all Class Action Claimants shall be irrevocably and forever limited solely to recovery from the proceeds of the Insurance Policies payable on behalf of the Specified JE Entities or their directors and officers in respect of any such Class Action Claim, and such Class Action Claimants shall have no right to, and shall not, directly or indirectly, make any claim or seek any recoveries from any of the Protected JE Parties in respect of any Class Action Claim, other than enforcing their rights to be paid from the proceeds of the applicable Insurance Policies available to the Specified JE Entities.

29. **THIS COURT ORDERS** that nothing contained in this Order prejudices, compromises, releases or otherwise affects (a) any right, defence or obligation of any insurer in respect of an Insurance Policy; or (b) any Class Action Claimant from recovering against the Specified JE Entities’ current and former directors and officers for any liabilities or claims attributable to any such director or officer’s fraud, wilful misconduct, criminal act or criminal omission, as

determined by the final, non-appealable judgment of a court of competent jurisdiction; provided that, there shall be no claim over against any other Protected JE Party. Notwithstanding any other provision of this Order, nothing in this Order shall restrict, release or in any way compromise any Class Action Claim or recovery thereunder against any Person other than the Protected JE Parties.

30. **THIS COURT ORDERS** that any proceedings with respect to the Class Action Claim, including with respect to any recovery sought by the Class Action Claimants as against the Insurance Policies, may continue in these CCAA proceedings following the closing of the Transactions (notwithstanding the fact that the Acquired Entities will be released from the purview of these CCAA proceedings at that point in time pursuant to paragraph 5(f) hereof).

31. **THIS COURT ORDERS** that any approval required, including pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (“CPA”), to give effect to the inclusion of provisions 26 to 30 hereto in this Order is hereby granted, and any notice that may be required pursuant to the CPA is dispensed with.

32. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these CCAA proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of the Just Energy Entities, Residual Co. 1 or Residual Co. 2, and any bankruptcy order issued pursuant to any such applications;
- (c) any assignment in bankruptcy made in respect of any of the Just Energy Entities, Residual Co. 1 or Residual Co. 2; or

(d) any foreign law equivalent of (b) or (c).

the Transaction Agreement, the Closing Documents, the consummation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, the Excluded Contracts and the Excluded Liabilities in and to Residual Co. 1 and Residual Co. 2, as applicable, the transfer and vesting of the Purchased Interests in and to the Sponsor, the payment of the Priority Payments, and any payments by or to the Sponsor, the Just Energy Entities or the Monitor authorized herein or pursuant to the Transaction Agreement and the Closing Documents) shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Just Energy Entities, Residual Co. 1 and/or Residual Co. 2, and shall not be void or voidable by creditors of the Just Energy Entities, Residual Co. 1 or Residual Co. 2, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, 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.

33. **THIS COURT ORDERS** that nothing in this Order, including the release of the Acquired Entities from the purview of these CCAA proceedings pursuant to paragraph 5(f) hereof and the addition of Residual Co. 1 and Residual Co. 2 as Applicants in these CCAA proceedings, shall affect, vary, derogate from, limit or amend, and FTI shall continue to have the benefit of, any and all rights and approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, this Order, any other Orders in these CCAA proceedings or otherwise, including all approvals, protections and stays of proceedings in favour of FTI in its capacity as Monitor, all of which are expressly continued and confirmed.

EMPLOYEES

34. **THIS COURT ORDERS** that Residual Co. 1 shall be deemed to be the former employer of any former employees of the Just Energy Entities who were terminated between September 9, 2020 and the Effective Time whose claims against the Just Energy Entities are transferred to Residual Co. 1 pursuant to this Order, provided that such deeming: (i) shall be effective immediately after the Effective Time; and (ii) will solely be for the purposes of termination pay and severance pay pursuant to the *Wage Earners Protection Program*.

GENERAL

35. **THIS COURT ORDERS** that, having been advised of the provisions of Multilateral Instrument 61-101 “Protection of Minority Security Holders in Special Transactions” relating to the requirement for “minority” shareholder approval in certain circumstances, no meeting of shareholders or other holders of Equity Claims (as defined in the CCAA) in the Just Energy Entities is required to be held in respect of the Transactions and accordingly, there is no requirement to send any disclosure document related to the Transactions to such holders.

36. **THIS COURT ORDERS** that, following the Effective Time, the Sponsor shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances (other than the Permitted Encumbrances) as against the Purchased Interests, the Acquired Entities and the Retained Assets.

37. **THIS COURT ORDERS** that, following the Effective Time, the title of these proceedings shall be hereby changed by removing the current Applicants that are not Excluded Entities and adding Residual Co. 1 and Residual Co. 2.

38. **THIS COURT DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

39. **THIS COURT DECLARES** that the Just Energy Entities shall be authorized to apply as they may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States or elsewhere, for orders which aid and complement this Order. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Just Energy Entities and the Monitor as may be deemed necessary or appropriate for that purpose.

40. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, having jurisdiction in Canada or in the United States of America, including the United States Bankruptcy Court for the Southern District of Texas overseeing the Just Energy Entities' proceedings under Chapter 15 of the Bankruptcy Code in Case No. 21-30823 (MI), to give effect to this Order and to assist the Just Energy Entities, 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 Just Energy Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Just Energy Entities and the Monitor and their respective agents in carrying out the terms of this Order.

41. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Prevailing Eastern Time on the date hereof; provided that, the transaction steps set out in

paragraph 5 hereof shall be deemed to have occurred in the order set out in the Implementation Steps.



A handwritten signature in black ink, appearing to read "M. C. E. T.", is positioned above a solid horizontal line.

**SCHEDULE “A”
PARTNERSHIPS**

- JUST ENERGY ONTARIO L.P.
- JUST ENERGY MANITOBA L.P.
- JUST ENERGY (B.C.) LIMITED PARTNERSHIP
- JUST ENERGY QUÉBEC L.P.
- JUST ENERGY TRADING L.P.
- JUST ENERGY ALBERTA L.P.
- JUST GREEN L.P.
- JUST ENERGY PRAIRIES L.P.
- JEBPO SERVICES LLP
- JUST ENERGY TEXAS LP

**SCHEDULE “B”
FORM OF MONITOR’S CERTIFICATE**

Court File No. CV-21-00658423-00CL

**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 JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

(each, an “**Applicant**”, and collectively, the “**Applicants**”)

MONITOR’S CERTIFICATE

RECITALS

1. Pursuant to the Initial Order of the Honourable Justice Koehnen of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated March 9, 2021, the Applicants were granted protection from their creditors pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, and FTI Consulting Canada Inc. was appointed as the monitor (the “**Monitor**”).

2. Pursuant to an Approval and Vesting Order of the Court dated ●, 2022 (the “**Order**”), the Court approved the transactions (collectively, the “**Transactions**”) contemplated by the Transaction Agreement (as amended, the “**Transaction Agreement**”) between Just Energy Group Inc. (“**Just Energy**”) and LVS III SPE XV LP, TOCU XVII LLC, HVS XVI LLC, OC II LVS XIV LP, OC III LFE I LP, and CBHT Energy I LLC (collectively, the “**Sponsor**”) dated as of August 4, 2022, and ordered, *inter alia*, (a) that all of the Acquired Entities’ right, title and interest in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities shall vest absolutely and exclusively in and to Residual Co. 1 and/or Residual Co. 2, as applicable; (b) Just Energy (U.S.) Corp. to issue the Purchased Interests, and the vesting of all of the right, title and interest in and to the Purchased Interests absolutely and exclusively in and to the Sponsor, free and clear of any Encumbrances; (c) Just Energy to file the Articles of Reorganization; and (d) the termination and cancellation or redemption of the Subject Interests for no consideration (as provided for in the Implementation Steps).

3. Capitalized terms used but not defined herein have the meanings ascribed to them in the Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has received written confirmation from Just Energy, in form and substance satisfactory to the Monitor, that it has received the Cash Purchase Price from the Sponsor.
2. The Monitor has received written confirmation from the Sponsor and Just Energy, in form and substance satisfactory to the Monitor, that all conditions to closing have been satisfied or waived by the parties to the Transaction Agreement.

3. This Monitor's Certificate was delivered by the Monitor at _____ on _____, 202●
(the "Effective Time").

**FTI CONSULTING CANADA INC., in its
capacity as Monitor of the Just Energy
Entities, and not in its personal capacity**

Per: _____

Name:

Title:

SCHEDULE “C”
PERMITTED ENCUMBRANCES

- Encumbrances securing Assumed Liabilities to the extent that such Assumed Liabilities are secured by Encumbrances as of the Closing Time
- Encumbrances securing obligations under the New Credit Agreement
- Encumbrances which are the subject of the New Intercreditor Agreement
- “Permitted Encumbrances” as defined in the Credit Agreement, subject to those amendments to such definition provided for in Exhibit 1 of the Stalking Horse Term Sheet, except to the extent that they relate to an Excluded Liability or Excluded Asset

Capitalized terms in this Schedule “C” shall have the meanings ascribed thereto in the Transaction Agreement or, where expressly indicated, the Credit Agreement.

**SCHEDULE “D”
INSURANCE POLICIES**

- Policy Term April 1 2020 – April 1, 2021:
 - XL Special Insurance Company – Policy No. B0146ERINT2000452
 - Hiscox – Policy No. B0146ERINT2000453
 - Sampo – Policy No. B0146ERINT2000454
 - AWAC & Starr – Policy No. B0146ERINT2000455
 - Tokio Marine – Policy No. 34-MGU-20-A49117/20G19646000
 - (Lloyds Syndicate) – Policy No. B0146ERINT2000768
 - CNA Canada Continental Casualty Company – Policy No. MEX 665412022
 - Beazley – Policy No. B0146ERINT2000774
 - XL Catlin – Policy No. B0146ERINT2000775

- Policy Term March 9, 2021-March 9, 2022:
 - XL Special Insurance Company – Policy No. ELU173707-21
 - Tokio Marine HCC – Policy No. 21G196460101
 - Hiscox - Policy No. B0146ERINT2100865

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

Court File No: CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., et al.

3 Nov 22

Order to go as per the draft filed and signed.
Reasons will shortly follow.



Ontario
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

OSLER, HOSKIN & HARCOURT, LLP

P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Marc Wasserman (LSO# 44066M)
Michael De Lellis (LSO# 48038U)
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Lawyers for the Just Energy Entities

TAB 15

**COUR SUPÉRIEURE
(Chambre Commerciale)**

C A N A D A

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

No. : 500-11-064357-243

DATE : 18 décembre 2024

SOUS LA PRÉSIDENTE DE L'HONORABLE DAVID R. COLLIER, J.C.S.

**DANS L'AFFAIRE DE LA LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS
DES COMPAGNIES, LRC 1985, c C-36, TELLE QU'AMENDÉE DE:**

9526-1624 QUÉBEC INC.

Débitrice

-et-

RESTRUCTURATION DELOITTE INC.

Contrôleur

ORDONNANCE RELATIVE AU PROGRAMME DE PROTECTION DES SALARIÉS

- [1] **CONSIDÉRANT** la Demande pour (i) une prolongation de la période de suspension et (ii) une ordonnance en vertu de la *Loi sur le programme de protection des salariés* (la « Demande ») et la déclaration assermentée déposée à l'appui de cette Demande;
- [2] **CONSIDÉRANT** le Quatrième rapport du Contrôleur daté du 11 décembre 2024;
- [3] **CONSIDÉRANT** les représentations des avocats, l'absence de contestation et la décision du Tribunal de rendre une ordonnance sur le vu du dossier;
- [4] **CONSIDÉRANT** l'Ordonnance initiale rendue le 10 juillet 2024, l'Ordonnance initiale amendée et reformulée rendue le 18 juillet 2024 et la Deuxième Ordonnance initiale amendée et reformulée rendue le 10 octobre 2024, et l'ordonnance de prolongation rendue ce jour;

- [5] **CONSIDÉRANT** les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, RSC 1985, c. C-36, telle qu'amendée, de la *Loi sur le Programme de protection des salariés*, L.C. 2005, ch. 47 (la « **Loi PPS** ») et du *Règlement sur le Programme de protection des salariés*, DORS/2008-222 (le « **Règlement PPS** »);

POUR CES MOTIFS, LE TRIBUNAL :

- [6] **ACCUEILLE** la Demande;
- [7] **DÉCLARE** que conformément aux articles 5(5) de la Loi PPS, Taiga Motors Inc. est un ancien employeur qui satisfait au critère de l'article 3.2 du Règlement PPS et que tous les employés au Canada qui ont été licenciés sont des individus à qui la Loi PPS s'applique;
- [8] **ORDONNE ET DÉCLARE** que le Restructuration Deloitte Inc. est un « syndic » au sens de l'article 2(1.2) de la Loi PPS, et, qu'en cette qualité, ce dernier est autorisé à remplir les fonctions et obligations prévues à la Loi PPS (incluant à l'article 21 de la Loi PPS), et à entreprendre toute action nécessaire en lien avec ce qui précède, le tout à l'exclusion et sans interférence de toute personne;
- [9] **ORDONNE ET DÉCLARE** qu'en conformité avec l'article 22 de la Loi PPS, les honoraires et dépenses entraînées par l'accomplissement des fonctions et obligations du Contrôleur en application de la Loi PPS devront être payées par la Débitrice ou à même ses actifs, au même titre et selon la même priorité que les autres honoraires et dépenses du Contrôleur garantis par la Charge administrative ordonnée par cette Cour aux termes des ordonnances rendues en lien avec les présentes procédures;
- [10] **ORDONNE** l'exécution provisoire du jugement nonobstant appel et sans exigence quelconque de fournir une sûreté ou une provision pour frais;
- [11] **LE TOUT** sans frais.

David R.
Collier

Signature numérique
de David R. Collier
Date : 2024.12.18
16:09:25 -05'00'

L'honorable David R. Collier, J.C.S.

TAB 16

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE	)	THURSDAY, THE 4 th
	)	
JUSTICE OSBORNE	)	DAY OF JANUARY, 2024

**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 INVOLVING VALIDUS POWER CORP., IROQUOIS
FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP.,
VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC.**

APPROVAL AND VESTING ORDER

THIS MOTION, made by KSV Restructuring Inc. ("**KSV**"), in its capacity as monitor (in such capacity, the "**Monitor**") of Validus Power Corp. ("**Validus Parent**"), Iroquois Falls Power Corp. ("**IFPC**"), Bay Power Corp. ("**Bay Power**"), Kap Power Corp. ("**Kap Power**"), Validus Hosting Inc. ("**Validus Hosting**"), Kingston Cogen Limited Partnership ("**Kingston LP**") and Kingston Cogen GP Inc. ("**Kingston GP**", and collectively with each of the foregoing entities, the "**Vendors**"), for an Order, among other things, at the time and in the manner set out herein:

- (a) approving: (i) the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement (as amended and restated, and as may be further amended from time to time, the "**Transaction Agreement**", and the acceptance and execution by the Vendors thereof, each by KSV in its capacity as the Monitor, the "**Vendors' Acceptance**") that was submitted by Macquarie Equipment Finance Ltd. ("**MEFL**") and Far North Power Corp. (the "**Assignee**") along with the offer letter delivered by MEFL and the Assignee to the Monitor on October 16, 2023 (the "**Offer Letter**"); and (ii) the consummation of the transactions contemplated in the Transaction Agreement (collectively, the

“Transactions”), including the Implementation Steps, upon the satisfaction of the Offer Conditions (as defined in the terms and conditions set forth in Schedule “B” to the Offer Letter (as amended and restated, and as may be further amended from time to time, the **“Terms and Conditions”**);

- (b) adding 1000745924 Ontario Inc. (**“Residualco”**) as a Debtor Company (as defined in the Initial Order of this Court dated August 29, 2023 (the **“Initial Order”**)) to these CCAA proceedings and as a Debtor (as defined in the Appointment Order of this Court dated August 10, 2023 (the **“Appointment Order”**)) issued in the receivership proceedings in Court File No.: CV-23-00703754-00CL (the **“Receivership Proceedings”**)), effective as of the issuance of this Order;
- (c) vesting in and to Residualco, as and to the extent applicable, absolutely and exclusively, all of the right, title and interest of, and all liabilities and obligations of, IFPC, Bay Power, Kap Power, Validus Hosting, Kingston LP and Kingston GP (collectively, the **“Purchased Entities”**) in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities, as applicable;
- (d) discharging the Claims (as defined herein) and Encumbrances (as defined herein) against the Purchased Entities and the Retained Assets (as defined herein);
- (e) authorizing and directing the Vendors, by KSV in its capacity as the Monitor, to issue the IFPC Interests, and vesting all of the right, title and interest in and to the IFPC Interests absolutely and exclusively in and to the Assignee, as nominee and designated assignee of MEFL, free and clear of any Claims and Encumbrances;
- (f) vesting all of Validus Parent’s right, title and interest in and to the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests and the Kingston GP Interests absolutely and exclusively in and to the Assignee, as nominee and designated assignee of MEFL, free and clear of any Claims and Encumbrances;
- (g) vesting all of Validus Parent’s right, title and interest in and to the Purchased Validus Parent Assets absolutely and exclusively in and to the Assignee, free and clear of any Claims and Encumbrances;

- (h) authorizing and directing the Vendors, by KSV in its capacity as the Monitor, to issue the IFPC Note 1, the IFPC Note 2 and the IFPC Note 3, and vesting: (i) all of the right, title and interest in and to the IFPC Note 1 and the IFPC Note 3 in and to MEFL, free and clear of any Claims and Encumbrances; and (ii) all of the right, title and interest in and to the IFPC Note 2 absolutely and exclusively in and to the Assignee, as nominee and designated assignee of MEFL, free and clear of any Claims and Encumbrances;
- (i) redeeming, terminating and cancelling the IFPC Legacy Shares and the other Subject Interests (as defined herein) for no consideration;
- (j) granting the Priority Payments Indemnity Charge;
- (k) confirming that all Continuing Contracts and Permits and Licenses to which any of the Validus Entities (other than Validus Parent) are a party at the Effective Time will be and shall remain in full force and effect upon and following the Effective Time;
- (l) authorizing the Monitor to take all required steps to rectify the minute books of the Validus Entities including, without limitation, signing directors' and/or shareholders' resolutions on behalf of the Validus Entities;
- (m) authorizing Ryan Chua (the "**First Director**") to act as the first director of Residualco and confirming that the First Director shall have no liability as a result of becoming the First Director save and except his own gross negligence or wilful misconduct; and
- (n) granting certain related relief,

was heard this day by judicial video conference via Zoom in Toronto, Ontario.

ON READING the Monitor's Motion Record in respect of this motion, filed, the fourth report of the Monitor dated December 22, 2023 (the "**Fourth Report**") and the affidavit of Katie Parent sworn December 29, 2023, filed;

AND UPON hearing the submissions of counsel for the Monitor and for the Receiver, counsel for MEFL, counsel for the Assignee, and such other counsel who were present, no one

else appearing although duly served as appears from the affidavit of service of Katie Parent sworn December 22, 2023, filed, and the affidavits of service of Katie Parent sworn December 29, 2023, filed.

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein 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 all capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Transaction Agreement.

APPROVAL AND VESTING

3. **THIS COURT ORDERS** that, without derogating in any way from the relief contained in the SISP Approval Order of this Court dated November 2, 2023 (the “**SISP Approval Order**”), the Transaction Agreement and the Transactions (including the Implementation Steps) are hereby approved and the acceptance and execution of the Transaction Agreement by the Vendors, each by KSV in its capacity as the Monitor, is hereby authorized and approved, with such minor amendments thereto as the Monitor, MEFL and the Assignee may deem necessary. The Vendors, each by KSV in its capacity as the Monitor, are hereby authorized and directed, upon the Vendors’ Acceptance, to perform their respective obligations under the Transaction Agreement (including, for greater certainty, the Implementation Steps), including the issuance of the IFPC Interests, the IFPC Note 1, the IFPC Note 2 and the IFPC Note 3, and the redemption, termination and cancellation of the IFPC Legacy Shares, and to take such additional steps and execute such additional documents (including the Transaction Documents) as may be necessary or desirable for the completion of the Transactions.

4. **THIS COURT ORDERS** that this Order shall constitute the only authorization required by the Vendors, each by KSV in its capacity as the Monitor, to proceed with the Vendors’ Acceptance and the Transactions and that no other approval shall be required in connection therewith.

5. **THIS COURT ORDERS** that, subject to the occurrence of the Effective Time, the following shall occur and shall be deemed to have occurred in the sequence and at the effective times set out in this paragraph:

- (a) the transactions regarding Pre-Filing Intercompany Claims (as defined in the Implementation Steps) described in sections 3.2, 4.1 and 4.2 of the Implementation Steps shall, and shall be deemed to, be effected at the times set out therein;
- (b) immediately prior to the Effective Time, all of the right, title and interest in and to the Excluded Assets of IFPC, Bay Power, Kap Power, Validus Hosting, Kingston LP and Kingston GP shall vest absolutely and exclusively in Residualco, and, in each case, all applicable Claims and Encumbrances shall continue to attach to such Excluded Assets with the same nature and priority as they had immediately prior to their transfer; provided that, for certainty, the Excluded Assets transferred hereby shall not include the Administrative Expense Closing Amount, which shall be paid to and held by the Monitor in accordance with paragraph 23 hereof;
- (c) immediately prior to the Effective Time, all of the Excluded Contracts and the Excluded Liabilities (which, for certainty includes all debts, liabilities, obligations, indebtedness, contracts, leases, agreements, and undertakings of any kind or nature 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) of IFPC, Bay Power, Kap Power, Validus Hosting, Kingston LP and Kingston GP (in each case, other than the liabilities of the Purchased Entities to be retained or assumed by the Purchased Entities at the Effective Time in accordance with the Transaction Agreement (such liabilities of the Purchased Entities, together with those liabilities of Validus Parent to be assumed by the Assignee in accordance with the Transaction Agreement, collectively, the “**Assumed Liabilities**”) shall be transferred to, assumed by and vest absolutely and exclusively in Residualco, and shall no longer be obligations of any of the Purchased Entities, and the Purchased Entities and all of the Purchased Entities’ remaining assets, permits, licenses, undertakings and properties of every nature and kind whatsoever and wherever situate (collectively,

the “**Retained Assets**”) shall be and are hereby forever released and discharged from all of the Excluded Contracts and the Excluded Liabilities, and all related Claims and Encumbrances, other than the permitted encumbrances, easements and restrictive covenants affecting or relating to the Retained Assets or the Purchased Assets listed on Schedule “B” (the “**Permitted Encumbrances**”), shall be expunged and discharged as against the Retained Assets and the Purchased Assets;

- (d) at the Effective Time, concurrently with the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement, each of the following actions described under this paragraph 5(d) and those in paragraphs 5(e) and 5(f) shall occur concurrently: (i) the IFPC Interests shall be issued as fully paid and non-assessable shares; and (ii) all right, title and interest in and to the IFPC Interests and the IFPC Note 2, and all of Validus Parent’s right, title and interest in and to the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests and the Purchased Validus Parent Assets shall vest absolutely and exclusively in the Assignee, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), pledges, assignments, hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, preferential arrangements of any kind or nature whatsoever or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (x) any encumbrances or charges created by the Appointment Order, the SISP Approval Order, or any other Order of this Court; and (y) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the “**Encumbrances**”, which term shall not include the Permitted Encumbrances) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Retained Assets or the Purchased Assets (other than the IFPC Note 3) are hereby expunged and discharged as against the Retained Assets and the

Purchased Assets, as applicable (other than the IFPC Note 1 and the IFPC Note 3, which are dealt with in accordance with paragraph 5(e));

- (e) at the Effective Time, concurrently with the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement, each of the following actions described under this paragraph 5(e) and those in paragraphs 5(d) and 5(f) shall occur concurrently: all right, title and interest in and to the IFPC Note 1 and the IFPC Note 3 shall vest absolutely and exclusively in MEFL free and clear of and from any and all Claims and Encumbrances and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the IFPC Note 1 and the IFPC Note 3 are hereby expunged and discharged as against the IFPC Note 1 and the IFPC Note 3;
- (f) at the Effective Time, concurrently with the acceptance and execution by the Vendors, each by KSV in its capacity as the Monitor, of the Transaction Agreement, each of the following actions described under this paragraph 5(f) and those in paragraphs 5(d) and 5(e) shall occur concurrently: all right, title and interest in and to the Leased Property shall vest absolutely and exclusively in IFPC, free and clear of and from any and all Claims and Encumbrances and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Leased Property are hereby expunged and discharged as against the Leased Property;
- (g) upon the assignment and issuance of the Purchased Assets to MEFL and/or the Assignee, the Vendors shall be and are hereby forever released and discharged from all liabilities and obligations flowing from, or in respect of, the Participation Agreement Documents including all amounts and obligations owing by the Vendors in connection therewith, and all related Claims and Encumbrances are hereby expunged and discharged including any rights of subrogation of Validus Parent in respect of any of the payment or transfers under the Transaction Agreement;
- (h) immediately following the Effective Time, all equity interests of the Purchased Entities existing prior to the Effective Time (for greater certainty, including the

IFPC Legacy Shares), but excluding the IFPC Interests, the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests, the general partner unit(s) that Kingston GP holds in the capital of Kingston LP (the “**GP Units**”) and the Validus Hosting Interests, as well as all options, conversion privileges, equity-based awards, warrants, securities, debentures, loans, notes or other rights, agreements or commitments of any character whatsoever that are held by any Person (as defined herein) and are convertible or exchangeable for any securities of the Purchased Entities, or that require the issuance, sale or transfer by the Purchased Entities of any shares or other securities of the Purchased Entities, or otherwise evidencing a right to acquire the IFPC Interests, the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests, the Validus Hosting Interests and/or the share or unit capital of the Purchased Entities, as applicable, or otherwise relating thereto (but excluding, for greater certainty, the IFPC Interests, the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests, the GP Units, the Validus Hosting Interests, the IFPC Note 1, the IFPC Note 2 and the IFPC Note 3) (collectively, the “**Subject Interests**”), shall be deemed redeemed, terminated and cancelled; and

- (i) the Purchased Entities shall and shall be deemed to cease to be Debtor Companies in these CCAA proceedings and Debtors in the Receivership Proceedings, and the Purchased Entities shall be deemed to be released from the purview of the Appointment Order, the Initial Order and all other Orders of this Court granted in respect of these CCAA proceedings and the Receivership Proceedings, save and except for this Order, the provisions of which (as they relate to the Purchased Entities) shall continue to apply in all respects.

6. **THIS COURT ORDERS** that, for greater certainty: (i) each of the steps provided for in paragraphs 5(b) and (c) are deemed to have occurred contemporaneously with each other and immediately prior to the occurrence of the Effective Time; and (ii) each of the steps provided for in paragraphs 5(d), 5(e), and 5(f) are deemed to have occurred contemporaneously with each other and at the Effective Time.

7. **THIS COURT ORDERS** that, at or after the Effective Time, MEFL is hereby authorized to assign to the Assignee, and the Assignee is hereby authorized to assume, all of MEFL's right, title and interest in and to the Receiver's Certificates that the Receiver has, as of the Effective Time, issued pursuant to the Appointment Order; for greater certainty, upon such assignment and assumption, the Assignee shall enjoy the benefit of the Receiver's Borrowings Charge (as defined in the Appointment Order) as security for the payment of the monies borrowed pursuant to such Receiver's Certificates, together with interest, fees and charges thereon, in accordance with the Appointment Order.

8. **THIS COURT ORDERS AND DIRECTS** that upon the registration in the Land Registry Offices for the Land Titles Divisions of Cochrane (No. 6), Lennox (No. 29) and Nipissing (No. 36) (collectively, the "**LRO**") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario), together with the Monitor's Certificate, the LRO is hereby directed to delete and expunge from title to the applicable Property (as defined in the Fourth Report) all of the Claims listed in Schedule "C" hereto pertaining to the applicable Property (as defined in the Fourth Report).

9. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with this Court a copy of the Monitor's Certificate forthwith after delivery to MEFL and the Assignee thereof in connection with the Transactions as well as a copy of the final form of the Transaction Agreement and all related schedules.

10. **THIS COURT ORDERS** that the Monitor may rely on written notice from MEFL and/or the Assignee regarding the satisfaction or waiver of conditions to closing under the Transaction Agreement and shall have no liability with respect to delivery of the Monitor's Certificate.

11. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, from and after the Effective Time, subject to the retention or assumption of the Priority Payments of the Purchased Entities by the Purchased Entities or the Priority Payments of Validus Parent by the Assignee, as the case may be, and the satisfaction of the Administrative Expense Closing Amount in accordance with the Transaction Agreement and paragraph 23 hereof, all Claims and Encumbrances released, expunged and discharged pursuant to paragraph 5 hereof, including as against the Purchased Entities, the Retained Assets and the Purchased Assets, shall

attach to the Excluded Assets with the same nature and priority as they had immediately prior to the Transactions, as if the Transactions had not occurred.

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), the Vendors, by KSV in its capacity as the Monitor, are authorized, permitted and directed to, at the Effective Time, disclose to MEFL and/or the Assignee all human resources and payroll information in the Vendors' records pertaining to past and current employees of the Vendors. MEFL and the Assignee shall maintain and protect the privacy of such information in accordance with applicable law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Vendors prior to the Effective Time.

13. **THIS COURT ORDERS** that, at the Effective Time and without limiting the provisions of paragraph 5 hereof, MEFL, the Assignee and the Purchased Entities shall be deemed released from any and all claims, liabilities (direct, indirect, absolute or contingent) or obligations with respect to any Taxes or any part thereof (including penalties and interest thereon) of, or that relate to, the Vendors (provided, as it relates to the Purchased Entities, such release shall not: (a) effect a transfer or assignment to Residualco of Taxes where such transfer or assignment of such particular Taxes is prohibited by statute, but MEFL and the Assignee shall still be released therefrom; (b) apply to Taxes in respect of the business and operations conducted by the Purchased Entities concurrent with or after the Effective Time and, for greater certainty, shall not restrict or affect in any manner any right, title and interest of the Purchased Entities in and to any amounts that may become due and payable thereto from any governmental authority on or after the Effective Time as a result of Taxes paid concurrent with or after the Effective Time, notwithstanding that they relate to supplies arising prior to the Effective Time for which payment was made concurrent with or after the Effective Time and not prior thereto; or (c) apply to Taxes expressly assumed as Assumed Liabilities pursuant to the Transaction Agreement), including, without limiting the generality of the foregoing, all Taxes that could be assessed against MEFL, the Assignee or the Purchased Entities (including their affiliates or any predecessor corporations), or for which they could otherwise have joint or several liability, in respect of Taxes of Validus Parent or the Purchased Entities. For greater certainty, nothing in this paragraph shall: (i) release or discharge any Claims or Encumbrances against Residualco with respect to Taxes that are vested in or

assumed by Residualco; or (ii) affect any tax attributes of the Purchased Entities, which shall be retained by the Purchased Entities and may be used to the maximum extent possible as permitted by Applicable Laws to reduce the Purchased Entities' taxable income.

14. **THIS COURT ORDERS** that all Continuing Contracts and Permits and Licenses (as defined in the Terms and Conditions) to which any of the Purchased Entities are a party at the Effective Time will be and shall remain in full force and effect upon and following the Effective Time, except to the extent expressly contemplated by the Transaction Agreement and no individual, firm, corporation, governmental body or agency, or any other entity (all of the foregoing, collectively being “**Persons**” and each being a “**Person**”) who is a party to any such Continuing Contracts or Permits and Licenses may, as applicable, accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution or other remedy) or make any demand under or in respect of any such arrangement and no automatic termination will have any validity or effect, by reason of:

- (a) any event that occurred on or prior to the Effective Time and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of any of the Vendors);
- (b) the insolvency of any Vendor or the fact that the Receiver was appointed as receiver in respect of the Vendors or the commencement of these CCAA proceedings;
- (c) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Transaction Agreement, the Transactions or the provisions of this Order, any other Order of this Court in CCAA proceedings or any Order of this Court in the Receivership Proceedings; or
- (d) any transfer or assignment, or any change of control of the Purchased Entities arising from the implementation of the Transaction Agreement, the Transactions or the provisions of this Order.

15. **THIS COURT ORDERS**, for greater certainty, that: (a) nothing in paragraph 14 hereof shall waive, compromise or discharge any obligations of the Purchased Entities in respect of any Assumed Liabilities, including, for greater certainty, the Priority Payments of the Purchased Entities; (b) the designation of any Claim as an Assumed Liability is without prejudice to the Purchased Entities' and the Assignee's right to dispute the existence, validity or quantum of any such Assumed Liability; and (c) nothing in this Order or the Transaction Agreement shall affect or waive the Purchased Entities' or the Assignee's rights and defences, both legal and equitable, with respect to any Assumed Liability, including, but not limited to, all rights with respect to entitlements to set-offs or recoupments against such Assumed Liability.

16. **THIS COURT ORDERS** that, from and after the Effective Time, all Persons shall be deemed to have waived any and all defaults of any Vendor then existing or previously committed by any Vendor, or caused by any Vendor, directly or indirectly, or noncompliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any Continuing Contract or a Permit and License, existing between such Person and any Purchased Entity directly or indirectly from the appointment of the Receiver as receiver in the Receivership Proceedings, or the commencement of these CCAA proceedings, in respect of the Vendors and the implementation of the Transactions, including without limitation any of the matters or events listed in paragraph 14 hereof, and any and all notices of default, notice of non-compliance or similar notice, and demands for payment or any step or proceeding taken or commenced in connection therewith under a Continuing Contract or a Permit and License shall be deemed to have been rescinded and of no further force or effect; provided that, nothing herein shall be deemed to excuse MEFL, the Assignee or the Vendors from performing their obligations under, or be a waiver of defaults by MEFL, the Assignee or the Vendors under, the Transaction Agreement and the related agreements and documents, or affect the validity of the Implementation Steps.

17. **THIS COURT ORDERS** that, from and after the Effective Time, any and all Persons shall be and are hereby forever barred, estopped, stayed and enjoined from commencing, taking, applying for or issuing or continuing any and all steps or proceedings, whether directly, derivatively or otherwise, and including without limitation, administrative hearings and orders, declarations and assessment, commenced, taken or proceeded with or that may be commenced,

taken or proceeded with against MEFL, the Assignee or the Purchased Entities relating in any way to or in respect of any Excluded Assets, Excluded Contracts or Excluded Liabilities and any other claims, obligations and other matters which are waived, released, expunged or discharged pursuant to this Order; provided that, nothing herein shall affect the validity of the Implementation Steps.

18. **THIS COURT ORDERS** that, from and after the Effective Time:

- (a) the nature of the Assumed Liabilities assumed by the Assignee or retained by the Purchased Entities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of the Transactions or this Order;
- (b) the nature of the Excluded Liabilities, including, without limitation, their amount and their secured or unsecured status, shall not be affected or altered as a result of their transfer to Residualco;
- (c) any Person that prior to the Effective Time had a valid right or claim against the Purchased Entities under or in respect of any Excluded Contract or Excluded Liability (each an “**Excluded Liability Claim**”) shall no longer have such right or claim against the Purchased Entities but will have an equivalent Excluded Liability Claim against the Residualco in respect of the Excluded Contract and Excluded Liability from and after the Effective Time in its place and stead, and nothing in this Order limits, lessens or extinguishes the Excluded Liability Claim of any Person as against Residualco;
- (d) the Excluded Liability Claim of any Person against Residualco following the Effective Time shall have the same rights, priority and entitlement as such Excluded Liability Claim had against the applicable Purchased Entity prior to the Effective Time; and
- (e) the Receiver’s Charge (as defined in the Appointment Order) and the Receiver’s Borrowings Charge shall continue to apply to the Property (as defined in the Fourth Report) of Validus Parent and Residualco in accordance with the provisions of the Appointment Order, the Initial Order and paragraph 7 herein.

19. **THIS COURT ORDERS** that following the Effective Date, the Assignee may seek a further order, on notice to the Monitor and any affected party, declaring that any contract of a Purchased Entity that is not identified as a Continuing Contract is an Excluded Contract and that the provisions of paragraphs 5(b), 17 and 18 apply to such contract.

20. **THIS COURT ORDERS** that, effective as of the issuance of this Order, Residualco shall be added as a Debtor Company in these CCAA proceedings and all references in any Order of this Court in respect of these CCAA proceedings to: (i) a “Debtor Company” or the “Debtor Companies” shall refer to and include Residualco, *mutatis mutandis*, and (ii) “Property” shall be interpreted to mean the current and future assets, licenses, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, of Residualco, including the Administrative Expense Closing Amount and the Priority Payments Closing Amount (the “**Residualco Property**”).

21. **THIS COURT ORDERS** that, effective as of the issuance of this Order, Residualco shall be added as a Debtor in the Receivership Proceedings and all references in any Order of this Court in respect of the Receivership Proceedings to: (i) a “Debtor” or the “Debtors” shall refer to and include Residualco, *mutatis mutandis*, and (ii) “Property” shall be interpreted to mean the Residualco Property, and, for greater certainty, any remaining charges, shall constitute charges on the Residualco Property.

22. **THIS COURT ORDERS** that, upon the occurrence of the Effective Time, the Bid Protections Charge (as defined in the SISP Approval Order) shall be and is hereby terminated, released and discharged.

23. **THIS COURT ORDERS** that the Administrative Expense Closing Amount held by the Monitor shall be subject to the Receiver’s Charge and the Receiver’s Borrowings Charge, and any remaining portion of the Administrative Expense Amount after payment of the Administrative Expense Costs (as defined in the Transaction Agreement) shall be paid to the Assignee in accordance with the terms of the Transaction Agreement.

CHARGES

24. **THIS COURT ORDERS** that the Monitor shall be entitled to the benefit of and is hereby granted a charge (the “**Priority Payments Indemnity Charge**”) on the Bay Power Interests, the Kap Power Interests and the IFPC Interests (but excluding for greater certainty the Kingston LP Interests and the Kingston GP Interests) as security in respect of the Priority Payments Indemnity (as defined in the Transaction Agreement) in accordance with the terms of the Transaction Agreement.

25. **THIS COURT ORDERS** that the Priority Payments Indemnity Charge shall terminate automatically upon the later of (i) the payment in satisfaction of all of the Priority Payments of Validus Parent in excess of the Priority Payments Closing Amount, as determined by Canada Revenue Agency (if any), or (ii) receipt of confirmation from Canada Revenue Agency by the Assignee, on notice to the Monitor, that no Priority Payments of Validus Parent in excess of the Priority Payment Closing Amount are owing.

POST-CLOSING RESERVE

26. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to establish a cash reserve (the “**Post-Closing Reserve**”) that consists of Administrative Expense Closing Amount, which shall be held in a segregated account and shall be used to pay costs and fees reasonably incurred by the Monitor following the Effective Time in connection with completing these CCAA proceedings, the Receivership Proceedings and any BIA proceedings commenced in respect of Residualco, including payment of the Administrative Expense Costs (collectively, the “**Post-Closing Costs**”).

27. **THIS COURT ORDERS** that the Monitor is hereby authorized to pay any Post-Closing Costs as it, acting reasonably, deems necessary, appropriate or desirable.

28. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to return to the Assignee any balance remaining in the Post-Closing Reserve that is funded by the Assignee pursuant to Section 6.4 of the Transaction Agreement following payment in satisfaction of all reasonably incurred Post-Closing Costs.

RELEASES AND OTHER PROTECTIONS

29. **THIS COURT ORDERS** that, effective as of the Effective Time: (a) KSV, in its personal capacity and in its capacities both as the Receiver in the Receivership Proceedings and as the Monitor in these CCAA proceedings, and its legal counsel; (b) MEFL, the Assignee and their respective current and former directors, officers, employees, legal counsel, representatives and advisors; and (c) the First Director (in such capacities, collectively, the “**Released Parties**”) shall be deemed to be forever irrevocably released by the Releasing Parties (as defined herein) 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, taxes, recoveries, and obligations of any 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 on or prior to the Effective Time or undertaken or completed in connection with or pursuant to the terms of this Order in respect of, relating to, or arising out of: (i) the Vendors, the business, operations, assets, property and affairs of the Vendors wherever or however conducted or governed, the administration and/or management of the Vendors and/or these CCAA proceedings or the Receivership Proceedings; or (ii) the Offer Letter, the Transaction Agreement, the Transaction Documents and/or any agreement, document, instrument, matter or transaction involving the Vendors arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transactions (collectively, subject to the excluded matters below, the “**Released Claims**”), which Released Claims shall be deemed to be fully, finally, irrevocably and forever waived, discharged, released, cancelled and barred as against the Released Parties; provided that, nothing in this paragraph shall waive, discharge, release, cancel or bar: (x) any claim that is not permitted to be released pursuant to section 5.1(2) of the *Companies’ Creditors Arrangement Act* (Canada) (the “**CCAA**”) or claim with respect to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence; (y) any obligations of any of the Released Parties under or in connection with the Offer Letter, the Transaction Agreement, the Transaction Documents and/or any agreement, document, instrument, matter or transaction involving the Vendors arising

in connection with or pursuant to any of the foregoing; or (z) any obligations under or related to any agreement: (i) to which MEFL and the Assignee are both party (whether or not any of their respective affiliates are also party thereto) entered into before the Effective Time; or (ii) to which MEFL, the Assignee, the Purchased Entities or any of their respective affiliates (in any combination thereof) are party entered into on or after the Effective Time (collectively, the “**Assignee Arrangements**”). “**Releasing Parties**” means any and all Persons, and their current and former affiliates’ current and former members, directors, managers, officers, investment committee members, special committee members, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, participants, subsidiaries, affiliates, partners, limited partners, general partners, affiliated investment funds or investment vehicles, managed accounts or funds, and each of their respective current and former members, equity holders, officers, directors, managers, principals, members, management companies, advisory board members, investment fund advisors or managers, employees, agents, trustees, investment managers, financial advisors, partners, legal counsel, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such.

30. **THIS COURT ORDERS** that, without affecting or limiting the release set forth in paragraph 29 hereof, effective as of the Effective Time, none of: (a) KSV, in its capacities both as the Receiver and as the Monitor, and its legal counsel; (b) MEFL, the Assignee and their respective current and former directors, officers, employees, legal counsel, representatives and advisors; and (c) the First Director (in such capacities, collectively, the “**Exculpated Parties**”), shall have or incur, and each Exculpated Party is released and exculpated from, any Causes of Action (as defined herein) against such Exculpated Party for any act or omission in respect of, relating to, or arising out of the Offer Letter, the Transaction Agreement, the Transaction Documents and/or the consummation of the Transactions, these CCAA proceedings, the Receivership Proceedings, the formulation, preparation, dissemination, negotiation, filing or consummation of the Offer Letter, the Transaction Agreement, the Transaction Documents and all related agreements and documents, any transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Transactions, the pursuit of approval and consummation of the Transactions and/or the transfer of assets and liabilities pursuant to this Order, except for: (x) Causes of Action related to any act or omission that is determined by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence; and (y) the

Assignee Arrangements. “**Causes of Action**” means any action, claim, cross-claim, third-party claim, damage, judgment, cause of action, controversy, demand, right, action, suit, obligation, liability, debt, account, defense, offset, power, privilege, license, lien, indemnity, interest, guaranty, or franchise of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, disputed or undisputed, secured or unsecured, assertable directly or derivatively, matured or unmatured, suspected or unsuspected, in contract or in tort, at law or in equity, or pursuant to any other theory of law or otherwise.

31. **THIS COURT ORDERS** that all Persons are permanently and forever barred, estopped, stayed and enjoined, on and after the Effective Time, with respect to any and all claims or Cause of Actions released pursuant to this Order (including but not limited to the Released Claims), from: (a) commencing, conducting or continuing in any manner, directly or indirectly, any action, suits, demands or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any of the Released Parties; (b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against any of the Released Parties or their respective property; (c) commencing, conducting, continuing or making in any manner, directly or indirectly, any action, suit, claim, demand or other proceeding of any nature or kind whatsoever (including any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes a claim or might reasonably be expected to make a claim, in any manner or forum, including by way of contribution or indemnity or other relief, against one or more of the Released Parties; (d) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any Encumbrance of any kind against the Released Parties or their respective property; or (e) taking any actions to interfere with the consummation of the Transactions; and any such proceedings will be deemed to have no further effect against the Released Parties and will be released, discharged or vacated without cost.

32. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these CCAA proceedings or the Receivership Proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of any of the Vendors or Residualco, and any bankruptcy order issued pursuant to any such applications; or

(c) any assignment in bankruptcy made in respect of any of the Vendors or Residualco,

the Offer Letter, the Transaction Agreement, the Transaction Documents, the consummation of the Transactions (including without limitation the transfer and vesting of the Excluded Assets, the Excluded Contracts and the Excluded Liabilities in and to Residualco, the transfer and vesting of the Purchased Assets in and to the Assignee or MEFL, as applicable, the transfer of title in and to the Leased Property from MEFL to IFPC, the assumption or retention of the Priority Payments of Validus Parent by the Assignee or the Priority Payments of the Purchased Entities by the Purchased Entities, as the case may be, and any payments by or to MEFL, the Assignee, the Receiver, the Monitor or the Vendors authorized herein or pursuant to the Offer Letter, the Transaction Agreement and/or the Transaction Documents) shall be binding on any trustee in bankruptcy that may be appointed in respect of Validus Parent or Residualco, and shall not be void or voidable by creditors of Validus Parent or Residualco, as applicable, nor shall they constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the CCAA, 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.

33. **THIS COURT ORDERS** that nothing in this Order, including the release and discharge of the Purchased Entities from the purview of these CCAA proceedings or the Receivership Proceedings pursuant to paragraph 5(i) hereof and the addition of Residualco as a Debtor Company in these CCAA proceedings and as a respondent in the Receivership Proceedings, shall affect, vary, derogate from, limit or amend, and KSV shall continue to have the benefit of, any and all rights and approvals and protections in favour of the Receiver and the Monitor at law or pursuant to the BIA, the Appointment Order, the Initial Order, this Order, any other Orders in these CCAA proceedings or the Receivership Proceedings or otherwise, including all approvals, protections and stays of proceedings in favour of KSV in its capacity as Receiver and in its capacity as the Monitor, as applicable, all of which are expressly continued and confirmed.

EMPLOYEES

34. **THIS COURT ORDERS** that Residualco shall be deemed to be the former employer of any former employees of the corresponding Purchased Entities who were terminated between the date of the Appointment Order and the Effective Time, if any, whose claims against the Purchased Entities are transferred to Residualco pursuant to this Order, provided that such deeming: (i) shall be effective immediately after the Effective Time; and (ii) will solely be for the purposes of termination pay and severance pay pursuant to the *Wage Earners Protection Program*.

ADDITIONAL MATTERS

35. **THIS COURT ORDERS** that in addition to the powers and authorities afforded to the Monitor pursuant to the CCAA, the Initial Order and all other orders in these proceedings (the “**CCAA Orders**”), the Monitor is hereby authorized, but not directed, to take any steps reasonably required to rectify the minute books of the Validus Entities including, without limitation, signing directors’ resolutions and/or shareholders’ resolutions on behalf of the Validus Entities and that in doing so, and without limiting the protections afforded to the Monitor pursuant to the CCAA and other CCAA Orders, the Monitor shall not incur any liability, save and except any liability or obligation incurred as a result of gross negligence or wilful misconduct on its part.

36. **THIS COURT ORDERS** that Ryan Chua (the “**First Director**”) is hereby authorized, *nunc pro tunc*, to act as a director and officer of Residualco and, in such capacity, is hereby authorized to take such steps and perform such tasks as are necessary or desirable to facilitate the Transactions.

37. **THIS COURT ORDERS** that notwithstanding Section 119 of the *Business Corporations Act* (Ontario), the First Director shall be entitled to tender his resignation as a director and officer upon the appointment of the Receiver in respect of Residualco in the Receivership and the granting and issuance of this Order.

38. **THIS COURT ORDERS** that the First Director shall not incur any liability as a result of becoming a director or officer of Residualco, save and except any liability or obligation incurred as a result of gross negligence or wilful misconduct on his part.

GENERAL

39. **THIS COURT ORDERS** that, following the Effective Time, the Assignee shall be authorized to take all steps as may be necessary to effect the discharge of the Claims and Encumbrances (other than the Permitted Encumbrances) as against the Purchased Interests, the Purchased Entities, the Retained Assets and the remainder of the Purchased Assets.

40. **THIS COURT ORDERS** that the Monitor be and is hereby authorized to distribute the Priority Payments Closing Amount to such parties as may be entitled to payment to satisfy the Priority Payments of Validus Parent known at the Effective Time and, after such obligations are paid in full, such amounts as may be required to satisfy the Priority Payments of the Purchased Entities known at the Effective Time, in accordance with the Transaction Agreement.

41. **THIS COURT ORDERS** that, following the Effective Time, the style of cause of these CCAA proceedings shall be hereby amended by being deleted and replaced in its entirety by the following:

**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 INVOLVING VALIDUS POWER CORP. and
1000745924 ONTARIO INC.**

42. **THIS COURT ORDERS** that, following the Effective Time, the style of cause of the Receivership Proceedings shall be hereby amended by being deleted and replaced in its entirety by the following:

MACQUARIE EQUIPMENT FINANCE LIMITED

Applicant

- and -

VALIDUS POWER CORP. and 1000745924 ONTARIO INC.

Respondents

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF
THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

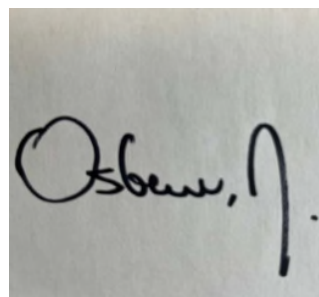
43. **THIS COURT ORDERS** that, following the Effective Time, the Appointment Order is amended by deleting Schedule “A” thereto in its entirety.

44. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

45. **THIS COURT ORDERS** that the Receiver and the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada or elsewhere, for orders that aid and complement this Order. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Receiver and/or the Monitor as may be deemed necessary or appropriate for that purpose.

46. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, having jurisdiction in Canada or elsewhere, to give effect to this Order and to assist the Receiver, the Monitor and/or its 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 Receiver and/or the Monitor, in each case as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver and/or the Monitor in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

47. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Prevailing Eastern Time on the date hereof without any need for entry and/or filing; provided that the transaction steps set out in paragraph 5 hereof shall be deemed to have occurred in the order set out therein.



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**SCHEDULE “A”
FORM OF MONITOR’S CERTIFICATE**

Court File No. CV-23-00705215-00CL

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 INVOLVING VALIDUS POWER CORP., IROQUOIS
FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP.,
VALIDUS HOSTING INC., KINGSTON COGEN LIMITED PARTNERSHIP
AND KINGSTON COGEN GP INC.**

MONITOR’S CERTIFICATE

RECITALS

1. Pursuant to the Appointment Order of Justice Osborne of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated August 10, 2023, KSV Restructuring Inc. (“**KSV**”) was appointed as receiver and manager (in such capacity, the “**Receiver**”) of the assets, property and undertaking of Validus Power Corp., Iroquois Falls Power Corp., Bay Power Corp., Kap Power Corp., Validus Hosting Inc., Kingston Cogen Limited Partnership and Kingston Cogen GP Inc. (collectively, the “**Vendors**”).
2. Pursuant to the Initial Order of Justice Osborne of the Court dated August 29, 2023, KSV was appointed as monitor (in such capacity, the “**Monitor**”) of the Vendors.
3. Pursuant to a Sale and Investment Solicitation Process Order of the Court dated November 2, 2023 (the “**SISP Order**”), the Monitor was authorized and directed to, among other things, carry out the SISP (as defined the SISP Order).
4. Pursuant to an Approval and Vesting Order of the Court dated [■], 2024 (the “**Order**”), the Court approved the transactions (collectively, the “**Transactions**”) contemplated by the

Transaction Agreement dated [■], 2024 (as may be amended from time to time, the “**Transaction Agreement**”) between the Vendors, by KSV in its capacity as the Monitor, Macquarie Equipment Finance Ltd. (“**MEFL**”) and Far North Power Corp. (the “**Assignee**”), and ordered, among other things that upon the Effective Time: (a) that all of the Purchased Entities’ right, title and interest in and to the Excluded Assets, the Excluded Contracts and the Excluded Liabilities shall vest absolutely and exclusively in and to Residualco; (b) the Vendors, by KSV in its capacity as the Monitor, shall issue the IFPC Interests, the IFPC Note 1, the IFPC Note 2 and the IFPC Note 3, and the vesting of: (i) all of the right, title and interest in and to the IFPC Interests and the IFPC Note 2; and (ii) all of Validus Parent’s right, title and interest in and to the Bay Power Interests, the Kap Power Interests, the Kingston LP Interests, the Kingston GP Interests, the Validus Hosting Interests, and the Purchased Validus Parent Assets absolutely and exclusively in and to the Assignee, free and clear of any Encumbrances; (c) the vesting of all right, title and interest in and to the IFPC Note 1 and the IFPC Note 3 absolutely and exclusively in and to MEFL, free and clear of any Encumbrances; and (d) the termination and cancellation or redemption of the Subject Interests for no consideration.

5. Capitalized terms used but not defined herein have the meanings ascribed to them in the Order.

THE MONITOR CERTIFIES the following:

1. The Monitor has received the Administrative Expense Closing Amount.
2. The Monitor has received written confirmation from MEFL, on its own behalf and on behalf of the Assignee, in form and substance satisfactory to the Monitor, that (a) all of the Offer Conditions (as defined in the Terms and Conditions) (including, for clarity, the Vendors’ Acceptance) have been satisfied or waived by MEFL, on its own behalf and on behalf of the Assignee, as applicable, and (b) the Effective Time has occurred.

3. This Monitor's Certificate was delivered by the Monitor at _____ [TIME] on _____, 2024.

**KSV RESTRUCTURING INC., in its
capacity as the Monitor of the Vendors,
and not in its personal capacity**

By: _____
Name:
Title:

SCHEDULE “B”
PERMITTED ENCUMBRANCES

Permitted Encumbrances (as such term is defined in the Transaction Agreement).

SCHEDULE “C”
ENCUMBRANCES TO BE EXPUNGED

KAP POWER CORP. (Kapuskasing)
LRO #6

PIN 65095-0051(LT)

1. CB174196 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

PIN 65095-0052(LT)

1. CB174196 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

IROQUOIS FALLS POWER CORP. (Iroquois Falls)
LRO #6

PIN 65337-0369(LT)

1. CB174195 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

2. CB184081 registered March 8, 2023 is a Lien by Her Majesty the Queen in Right of Canada as represented by The Minister of National Revenue in the amount of \$6,002,211.00.

PIN 65337-0372(LT)

1. CB174195 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

PIN 65337-0373(LT)

1. CB174195 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

PIN 65337-0456(LT)

1. CB174195 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

PIN 65337-0458(LT)

1. CB174195 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

2. CB184081 registered March 8, 2023 is a Lien by Her Majesty the Queen in Right of Canada as represented by The Minister of National Revenue in the amount of \$6,002,211.00

**KINGSTON COGEN LIMITED PARTNERSHIP/ KINGSTON COGEN GP INC.
(Kingston)
LRO #29**

PIN 45132-0362(LT)(Leasehold)

1. LX120618 registered June 6, 2023 is an Application re Charge of Sublease.

PIN 45132-0373(LT)

None

PIN 45132-0375(LT)

1. LX118878 registered March 1, 2023 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

PIN 45132-0377(LT)(Leasehold)

1. LX118878 registered March 1, 2023 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00.

PIN 45132-0379(LT)

None

**BAY POWER CORP. (North Bay)
LRO #36**

PIN 49127-0021(LT)

1. BS212204 registered April 7, 2022 is a Charge in favour of Macquarie Equipment Finance Ltd., in the amount of \$60,000,000.00

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

Court File No. CV-23-00705215-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP
POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY
THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

APPROVAL AND VESTING ORDER

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Lawyers for the Monitor

TAB 17



CANADA

House of Commons Debates

VOLUME 140



NUMBER 127



1st SESSION



38th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Wednesday, September 28, 2005



Speaker: The Honourable Peter Milliken

Government Orders

As I conclude my comments on Bill C-53, I leave members with some thoughts based on what I have been hearing from Canadians as I have travelled across Canada these past weeks as co-chairman of our party's task force on safe streets and healthy communities. Several themes have been repeated at these meetings, including dismay at the toothlessness of the Youth Criminal Justice Act, light or non-existent jail time for serious violent crimes and lax immigration rules that allow criminals to exploit the system. In addition, illegal drugs were fingered as a common denominator in most crimes, while unstable family environments were identified as the starting point for many career criminals.

• (1715)

There is much work to be done to reform the criminal justice system as my task force has reconfirmed. Again, I congratulate the Minister of Justice for adopting this important Conservative policy. I encourage all members to support this bill at second reading.

Hon. Peter Adams (Parliamentary Secretary to the Minister of Human Resources and Skills Development and Minister responsible for Democratic Renewal, Lib.): Madam Speaker, I enjoyed what my colleague had to say. I know he has been following the debate and he would have heard earlier one of his colleagues talk about the matter of where the money went. When property or whatever is forfeit and the money comes to the court, and I guess that is the way we put it because I am not a lawyer, it goes some way into the federal treasury? Then, commonly, in each province there are agreements as to how the money would be used.

Does the member have any personal thoughts as to what should be done with funds which are retrieved?

Mr. Russ Hiebert: Madam Speaker, as I have criss-crossed the country with this task force we have heard a number of times, police officers in particular, raising the question of what happens to all the money? When they raid a place and pour enormous resources and efforts into a criminal investigation, that comes out of their budget. Yet the thousands or millions of dollars in equipment or in clear cash is sent off to Ottawa. The police certainly wish that that money would come back to their particular office or location to reimburse them for those expenses.

My colleague is absolutely right, the federal government stashes that money. Then, based on some agreement, sends it back to the province which sometimes finds its way to the municipality, but often times does not.

The committee should actively investigate the possibility of rewarding the local police detachment with a greater portion of the proceeds of crime. The local police are the ones who have borne the cost during the investigation.

These are not cheap operations to function. There are huge expenses involved, yet the work has to get done. It does not seem to be appropriate, at least from my perspective, that the money gets taken away and brought to Ottawa and then some of it trickles down.

I would like to see more of it get back to the officers in question.

Mr. Stockwell Day (Okanagan—Coquihalla, CPC): Madam Speaker, in general we are supportive of this measure.

When my colleague was giving his overviews of the legislation he brought out something that was very interesting. He used a term

“ratted out”. One of the main ways in which peace officers are able to apprehend those who have committed crimes is because thieves rat out on other thieves. They only do it under certain conditions.

In consultation with senior officers in the United States, who work with our own agencies, they find that the great deficiency in the Canadian system was that there was no leverage that arresting officers or apprehending officers could apply to criminals to get them to rat out because we did not have high mandatory sentences for crime. This is reflected by other policing forces around the world.

In the United States a criminal may face 25 years mandatory for the types of crimes about which we are talking. We are not even talking about murder. We are talking about certain other types of crime. In the interrogation process those officers are able to say to people that they will go away to prison for 25 years unless they give the officers information and “rat out”. That type of information has helped the United States break not just gangs, but significant circles of organized crimes.

As important as this is, is it not necessary that the government have a companion to the legislation which is significantly higher mandatory sentencing? Then we can get the ratting out to happen. Then we can get these people and not just take away their goods, which they can accumulate quite quickly again through illegal processes, but get them behind bars where they belong.

• (1720)

Mr. Russ Hiebert: Madam Speaker, my colleague has raised an excellent point.

To use an analogy, I am from Surrey, British Columbia. There are between 4,000 and 8,000 grow ops in the Lower Mainland. The police estimate there are between 4,000 and 4,500 grow ops in Surrey. In Whatcom County, just across the border, there were less than a dozen convictions last year. A lot of people believe the reason is that the mandatory minimum sentences in Washington state are enormous. The consequences are huge.

I think the point that my colleague and many colleagues on this side of the House are trying to make is that mandatory minimum sentences are a necessary step if this kind of legislation is going to be effective.

The Acting Speaker (Hon. Jean Augustine): Is the House ready for the question?

Some hon. members: Question.

The Acting Speaker (Hon. Jean Augustine): The question is on the motion. Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

The Acting Speaker (Hon. Jean Augustine): Accordingly the bill stands referred to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

(Motion agreed to and bill referred to a committee)

* * *

• (1725)

WAGE EARNER PROTECTION PROGRAM ACT

Hon. Joe Fontana (for the Minister of Industry) moved that Bill C-55, An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, be read the second time and referred to a committee.

He said: Madam Speaker, in the time that is left today, I am pleased to speak to a very important bill, Bill C-55, which is a balanced and comprehensive reform package for insolvency legislation tabled by my hon. colleague, the Minister of Industry. The proposed changes will modernize our insolvency legislation, ensuring that the system better responds to the needs of the marketplace.

Just as important, I want to talk about how the reforms will improve the protection of workers whose employers undergo restructuring or become bankrupt. I am very passionate about this topic. Under our current system, too many workers are vulnerable when their employers enter into a restructuring or file for bankruptcy. Canadian workers suffer lost wages, reduced pension benefits and uncertainty that their collective agreements may be unilaterally changed by a court.

The government has heard from Canadian workers about the need to ensure that they are more fairly treated when their employers suffer economic hardship. The reforms introduced by my colleague will do just that.

For example, we are proposing new measures, including the wage earner protection program, for the first time in our history which will provide workers with a guaranteed payment for unpaid wages up to \$3,000. An estimated 10,000 to 15,000 workers in every workplace across the country in both federal and provincial jurisdictions are left with unpaid wages or reduced pensions due to employer bankruptcies in Canada. These workers did not agree to become lenders to their employers when they were hired. They cannot afford to bear the risk of coming up empty-handed after they have done their hard work each and every day. They need to have their paycheques to buy groceries, to pay their mortgages and to pay their car payments.

Let me explain what the program will really mean for these workers. Under the current system three-quarters of unpaid workers in a bankruptcy receive nothing for their work, zero. The average payout overall is only 13¢ on the dollar. In Canada, existing federal and provincial labour laws protect the workers who perform work but are not paid by their employers. However, these labour laws cease to be in effect when a bankruptcy or receivership occurs, because currently, bankruptcy law supersedes labour laws in these cases.

The situation facing unpaid workers in Canada exposes a clear gap in our system. Clearly, changes are needed. That is why the government is acting on behalf of the workers of Canada. The wage earner protection program will apply when an employer goes bankrupt, or is put into receivership under the Bankruptcy and

Private Members' Business

Insolvency Act. These are the employees who are unpaid. The employees can apply to the program to have their wages paid, up to \$3,000, immediately upon that occurrence.

The wage earner protection program will operate efficiently. It will be delivered seamlessly, building on the existing relationships between trustees and receivers and the employment insurance system.

This type of program is not radical or new, but it is for our country. Many countries already have a similar program to protect their workers, such as the United Kingdom and Australia. The cost of the program is only going to be \$30 million a year. In the event of a dramatic increase in the number of bankruptcies, it could go as high as \$50 million. That is not a big investment from the Canadian government to protect the working men and women of this country.

The government expects to recover up to half of the program payouts as a creditor to the employer. Under the wage earner protection program, the government will assume the workers' claims against their bankrupt employer's estate. This means that the government will recover a portion of its costs by making claims against the employer's estate and therefore, the employee does not have to do it.

The reforms will also amend the Bankruptcy and Insolvency Act to establish a limited superpriority for unpaid wage claims up to \$2,000. Under the new limited superpriority an unpaid worker will be one of the first to be paid from the current assets of the bankrupt employer.

• (1730)

The limited superpriority for unpaid wages balances the risk of bankruptcy between the employees and other creditors of the bankrupt company. Right now the burden weighs too heavily on the employees. It will assist the government in recouping its costs for the wage earner protection program by making more assets of bankrupt companies available for the employees and wage claims. That is putting the employees first.

I will have more to say about this tomorrow morning.

The Acting Speaker (Hon. Jean Augustine): The minister has 14 minutes and 46 seconds left for the continuation of this debate.

PRIVATE MEMBERS' BUSINESS

[English]

CRIMINAL CODE

The House resumed from June 22 consideration of the motion that Bill C-293, An Act to amend the Criminal Code (theft of a motor vehicle), be read the second time and referred to a committee.

The Acting Speaker (Hon. Jean Augustine): It being 5:30 p.m., the House will now proceed to the taking of the deferred recorded division on the motion at second reading of Bill C-293.

Call in the members.

Private Members' Business

● (1800)

(The House divided on the motion, which was negated on the following division:)

*(Division No. 157)***YEAS**

Members

Abbott	Ablonczy
Allison	Ambrose
Anders	Anderson (Cypress Hills—Grasslands)
Batters	Benoit
Bezan	Blaikie
Breitkreuz	Brown (Leeds—Grenville)
Carrie	Casey
Casson	Chatters
Chong	Cummins
Day	Devolin
Doyle	Epp
Finley	Fletcher
Forseth	Gallant
Goldring	Goodyear
Grewal (Newton—North Delta)	Grewal (Fleetwood—Port Kells)
Guergis	Hanger
Harris	Hiebert
Hill	Hinton
Jaffer	Jean
Johnston	Julian
Kenney (Calgary Southeast)	Kramp (Prince Edward—Hastings)
Lauzon	Lukiwski
Lunn	Lunney
MacKay (Central Nova)	MacKenzie
Mark	Martin (Winnipeg Centre)
Merrifield	Miller
Mills	Moore (Port Moody—Westwood—Port Coquitlam)
Moore (Fundy Royal)	Nicholson
O'Connor	Obhrai
Pallister	Penson
Poilievre	Prentice
Preston	Rajotte
Reid	Reynolds
Richardson	Ritz
Scheer	Schellenberger
Schmidt (Kelowna—Lake Country)	Skelton
Smith (Kildonan—St. Paul)	Solberg
Thompson (New Brunswick Southwest)	Thompson (Wild Rose)
Tilson	Toews
Tonks	Trost
Tweed	Van Loan
Vellacott	Warawa
Wasylcia-Leis	Watson
White	Yelich — 88

NAYS

Members

Adams	Alcock
André	Angus
Asselin	Augustine
Bachand	Bagnell
Bains	Bakopanos
Barnes	Bélanger
Bellavance	Bennett
Bergeron	Bevilacqua
Bigras	Blondin-Andrew
Boire	Boivin
Bonin	Bonsant
Boshcoff	Bouchard
Boudria	Boulianne
Bourgeois	Bradshaw
Brisson	Broadbent
Brown (Oakville)	Brunelle
Bulte	Byrne
Canniss	Cardin
Carr	Carrier
Carroll	Catterall
Chamberlain	Chan
Christopherson	Cleary
Comartin	Comuzzi

Côté	Cotler
Crête	Crowder
Cullen (Skeena—Bulkley Valley)	Cuzner
D'Amours	Davies
Demers	Deschamps
Desrochers	DeVillers
Dhalla	Dion
Dosanjh	Drouin
Dryden	Duceppe
Easter	Emerson
Eyking	Faillie
Folco	Fontana
Frulla	Fry
Gagnon (Québec)	Gagnon (Saint-Maurice—Champlain)
Gagnon (Jonquière—Alma)	Galloway
Gaudet	Gauthier
Godbout	Godin
Goodale	Graham
Guarnieri	Guay
Guimond	Holland
Hubbard	Ianno
Jennings	Kadis
Karetak-Lindell	Karygiannis
Kotto	Laframboise
Lalonde	Lapierre (Outremont)
Lapierre (Lévis—Bellechasse)	Lastewka
Lavallée	Layton
LeBlanc	Lemay
Lessard	Lévesque
Loubier	Macklin
Malhi	Maloney
Marceau	Marleau
Martin (Esquimalt—Juan de Fuca)	Martin (Sault Ste. Marie)
Masse	McCallum
McGuinty	McGuire
McKay (Scarborough—Guildwood)	McLellan
McTeague	Ménard (Hochelaga)
Ménard (Marc-Aurèle-Fortin)	Minna
Mitchell	Myers
Neville	Owen
Pacetti	Paquette
Paradis	Parrish
Perron	Peterson
Pettigrew	Picard (Drummond)
Pickard (Chatham-Kent—Essex)	Plamondon
Poirier-Rivard	Powers
Proulx	Ratansi
Redman	Regan
Robillard	Rodriguez
Rota	Roy
Russell	Saada
Sauvageau	Savage
Savoy	Scarpaleggia
Scott	Sgro
Siksay	Silva
Simard (Saint Boniface)	Smith (Pontiac)
St-Hilaire	St. Amand
St. Denis	Steckle
Stronach	Szabo
Telegdi	Temelkovski
Thibault (Rimouski-Neigette—Témiscouata—Les Basques)	
Thibault (West Nova)	
Torsney	Ur
Valeri	Valley
Vincent	Volpe
Zed — 175	

PAIRED

Members

Beaumier	Blais
Clavet	Cullen (Etobicoke North) — 4

The Deputy Speaker: I declare the motion lost.

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TAB 18



EVALUATION OF THE **WAGE EARNER PROTECTION PROGRAM**

Final Report

January 2022

Partners and Stakeholders

The Program is administered through the collaboration of a number of partners and stakeholders, including:

- the Labour Program; responsible for administering, monitoring and reporting on service delivery and communications activities,
- Service Canada; responsible for processing applications, issuing payments and identifying overpayments,
- the Canada Revenue Agency; responsible for collecting the debts subrogated⁸ to the Government of Canada and collecting any overpayments made to the Program's beneficiaries,
- the Canada Industrial Relations Board; responsible for rendering decisions on appeals, and
- trustees and receivers; responsible for informing eligible workers about the Program and for providing information to Service Canada to determine applicant eligibility

Program features and processes

Appointment of a trustee or receiver and their duties

When an employer formally declares bankruptcy, a licensed trustee is appointed to administer the process. When an employer becomes subject to a receivership, a receiver is appointed to administer the process. Under the Wage Earner Protection Program Act, within 45 calendar days⁹ of the date of bankruptcy or receivership, the trustee or receiver is required to:

- identify former employees who are owed eligible wages,
- determine the amounts owed to each former employee,
- inform all eligible former employees about the Program, and
- provide Service Canada with the information necessary to establish eligibility for payment

⁸ This means that the Government of Canada replaces the Wage Earner Protection Program beneficiary in the bankruptcy or receivership proceedings, up to the amount of the Program's payment made to the applicant. (<https://www.canada.ca/en/employment-social-development/services/wage-earner-protection/third-party.html>)

⁹ Trustees can apply for an extension if they cannot meet this deadline due to reasons beyond their control.

Eligibility

In order to be eligible for the Program's services, the former employee¹⁰ must meet these four criteria:

- their employment has ended,
- their former employer is bankrupt or subject to a receivership,
- they are owed eligible wages, and
- their wages were earned within the six months prior to the bankruptcy or receivership.
 - In the case of a restructuring, ending in bankruptcy or receivership, the date of the restructuring can be used to calculate the six-month period for eligible wages of former employees.

Directors, officers, certain managers and individuals with a controlling interest in the business of the former employer, or who are not dealing at arms length with any of those, are not eligible for the Program.

Eligible wages

Eligible wages under the Program include salaries, commissions, vacation pay, termination and severance pay earned in the six months before the date of the bankruptcy or receivership.

In the case of an unsuccessful restructuring ending in bankruptcy or receivership, the former employees become eligible for payment from the Program.¹¹ In these cases, to calculate eligible wages, the date of the restructuring event can be used instead of the date of bankruptcy or receivership.

A beneficiary could receive a maximum payment equal to seven weeks of the maximum insurable earnings under the *Employment Insurance Act* (\$7,579 in 2021).

¹⁰ Throughout this report, eligible former employees who applied to the Wage Earner Protection Program will be referred to as applicants. Those who applied and received payment are referred to as beneficiaries.

¹¹ In some cases of restructuring, a judge may appoint a receiver to manage some of the assets and debts of the insolvent company. Once a receiver has been appointed, the affected former employees are eligible for the Wage Earner Protection Program.

Applying for payment through the Wage Earner Protection Program

The eligible former employee must file a Proof of Claim form with the appointed trustee or receiver detailing the amount their former employer owes. The Proof of Claim form is used to fill out the Trustee Information Form, which the trustee or receiver submits to Service Canada.

The former employee must also file an application form with Service Canada within 56 days¹² of the bankruptcy or the end date of their employment. Once Service Canada receives all of the required documentation, the claim is processed. Then, a decision letter is issued to the applicant and the trustee or receiver. Service Canada aims to issue a decision letter within 35 days of receiving all necessary information.

After their employment has ended, former employees may also be eligible for Employment Insurance benefits. If a Program beneficiary also receives Employment Insurance benefits, they must report the Program payment as a part of their Employment Insurance claim.

Appeals

If an applicant is not satisfied with a Program decision, they can request a review by Service Canada. If they are not satisfied with the result of that review, they may appeal to the Canada Industrial Relations Board who is responsible for rendering decisions on appeals.

Recovery of debts

After a beneficiary receives a payment from the Program, the Government of Canada takes the beneficiary's place as creditor in the bankruptcy or receivership proceedings. The Canada Revenue Agency is responsible for attempting to recover these debts from the former employer through insolvency proceedings. There are two categories of debts recovered by the Canada Revenue Agency on behalf of the Program, including:

- super-priority claims are the first \$2,000 of debts that consist of unpaid wages and vacation pay, and the first \$1,000 of debts that consist of disbursements of a travelling salesperson.
 - These claims are collected before the claims of other creditors
- unsecured claims consist of the remainder of unpaid wages, vacation pay, and disbursements of a travelling salesperson. This also includes all termination or severance pay up to the maximum Program payment for the fiscal year the payment was issued.

¹² Employees can apply for an extension if they cannot meet this deadline due to reasons beyond their control.

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

Court File No.: CV-25-00739279-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
1001270243 ONTARIO INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at **TORONTO**

**SUPPLEMENTARY BOOK OF
AUTHORITIES OF RICHARD
GOLDGLASS AND OTHER TERMINATED
EMPLOYEES**

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