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JUDICIAL CENTRE OF CALGARY
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Jan 6, 2026

COURT FILE NUMBER	B301 - 223290
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	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 CATALX CTS LTD.
APPLICANT	ALBERTA SECURITIES COMMISSION
RESPONDENTS	CATALX CTS LTD and HYUK JAE PARK
DOCUMENT	**BOOK OF AUTHORITIES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 525-8th Avenue SW, 43rd Floor Calgary, AB, Canada T2P 1G1 Attention: James W. Reid Telephone: 403-298-2418 Email: jwreid@millerthomson.com File No. 0291254.0001

TABLE OF AUTHORITIES

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1	*Re CatalX Ltd*, 2025 ABASC 98
2	*Securities Act, RSA 2000, c S-4,* excerpts of
3	*Re CatalX CTS Ltd*, 2024 ABASC 23
4	*Bankruptcy and Insolvency Act, RSC 1985, c B-3*, excerpts of
5	*Delta 9 Cannabis Inc (Re)*, 2024 ABKB 657
6	*Der v Hlookoff*, 2025 BCCA 193
7	*Arrangement relatif à 9526-1624 Québec inc*, 2025 QCCS 3490
8	*Re Green Relief Inc*, 2020 ONSC 6837
9	*House of Commons, Standing Committee on Industry, Evidence, 35-2, No 25 (3 October 1996)*
10	*Companies' Creditors Arrangement Act, RSC 1985, c C-36*, excerpts of
11	*Re Pope & Talbot Ltd*, 2009 BCSC 1552
12	*Allen-Vanguard Corporation (Re)*, 2011 ONSC 5017
13	*Morin, Luc and Arad Mojtahedi, "Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act,"* 2021 19 Annual Review of Insolvency Law, 2021 CanLIIDocs 13544
14	*9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10
15	*Century Services Inc v Canada (Attorney General)*, 2010 SCC 60
16	*BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22678 (ON SC)
17	*Chartered Professional Accountants of Alberta v Neilson*, 2018 ABQB 170
18	*Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67
19	*Peters v Remington*, 2004 ABCA 5
20	*Alberta (Attorney General) v Moloney*, 2015 SCC 51
21	*Re CatalX CTS Ltd,* 2023 ABASC 167
22	*Re CatalX CTS Ltd*, 2024 ABASC 178

23	Section 47 Order to Hold Funds dated December 28, 2023, Alberta Securities Commission Docket ENF-013419
24	*Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5
25	*Chambre de la sécurité financière c Thibault*, 2016 QCCA 1691
26	*Thow (Re),* 2009 BCSC 1176
27	*Wing (Re),* 2019 ONSC 4063
28	*James Bankruptcy (Re),* 2017 SKQB 370
29	*Taber Water Disposal Inc (Re)*, 2024 ABKB 680
30	*Poonian v British Columbia (Securities Commission)*, 2024 SCC 28
31	*Arrangement relatif à 9550-1714 Québec inc*, 2025 QCCS 3840
32	*Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41
33	*R v Bird*, 2019 SCC 7
34	*R v Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 SCR 333

TAB 1

ALBERTA SECURITIES COMMISSION

File No.: ENF-013419
Citation: Re CatalX Ltd., 2025 ABASC 98 **Date: 20250711**

NOTICE OF HEARING

To: **CatalX CTS Ltd. (operating as Catalyx), Jae Ho Lee, Hyuk Jae Park (Respondents)**

Notice: The Alberta Securities Commission (the **Commission**) will convene at 1:00 p.m. on Monday, September 15, 2025, or as otherwise directed (the **Set Date Hearing**), at Calgary, Alberta, to set a date or dates for the conduct of a hearing regarding the allegations in this Notice (the **Merits Hearing**). At the Merits Hearing, the Commission will consider whether the allegations have been proven. If so, the Commission will subsequently consider whether it is in the public interest to make orders against you under sections 198, 199, and 202 of the *Securities Act,* RSA 2000, c. S-4, as amended (the ***Act***).

Location: Alberta Securities Commission, 5th Floor, 250 – 5 Street S.W., Calgary, Alberta.

Procedure:

1. You may obtain disclosure and further information about particulars of the allegations in this Notice from Justin Dunphy, c/o Alberta Securities Commission, 600, 250 - 5 Street S.W., Calgary, Alberta, T2P 0R4, telephone: 403.355.1507, email: justin.dunphy@asc.ca.

2. You may be represented by legal counsel or represent yourself. You or your legal counsel may make representations at the Set Date Hearing as part of the process for scheduling the Merits Hearing and the hearing management sessions that will take place between the Set Date Hearing and the Merits Hearing. At the Merits Hearing, you or your legal counsel may make representations and introduce relevant evidence regarding the allegations in this Notice.

3. If you or your legal counsel fail to attend the Set Date Hearing, the scheduling of the Merits Hearing and the hearing management sessions may proceed in your absence without further notice, and the Merits Hearing itself may proceed in your absence without further notice, following which orders may be made against you.

See attached sections 29, 93(1), 93.2, 198, 199 and 202 of the Act*, and Commission Rule 15-501 – Rules of Practice and Procedure for Commission Proceedings.*

Reciprocation: Take notice that orders or settlements made by the Commission may form the basis for parallel orders in other jurisdictions in Canada. The securities laws of some other Canadian jurisdictions may allow orders made in this matter to take effect in those other jurisdictions automatically, without further notice to you. If an order is made or a settlement agreement is reached in relation to this Notice, you should contact the securities regulator of any other jurisdiction in which you may intend to engage in any securities related activities.

Allegations

Respondents and Relevant Corporations

1. CatalX CTS Ltd. (**Catalyx**) is a company incorporated in British Columbia on February 5, 2018 under a predecessor name and continued in Alberta on September 10, 2019. Catalyx operated a crypto asset trading platform (**CTP**) at https://catalyx.io (the **Platform**) from February 2019 to January 2024 (**Relevant Period**).

2. Jae Ho Lee (**Lee**) is an individual whose last known address was Surrey, British Columbia. During the Relevant Period, Lee was a shareholder, director, chief financial officer and chief operating officer of Catalyx.

3. Hyuk Jae Park (**Park**) is an individual who resides in Vancouver, British Columbia. During the Relevant Period, Park was a director, shareholder and chief executive officer (**CEO**) of Catalyx.

4. Catalx Management Ltd. (**Catalyx Management**) is a company incorporated in British Columbia on August 28, 2018. Both Lee and Park were directors of Catalx Management during the Relevant Period. Catalx Management was responsible for funding the day-to-day operations of Catalyx, including payroll and operational expenses.

5. 56 Financials Inc. (**56 Financials**) is a company incorporated in Alberta on August 7, 2012. During the Relevant Period, Catalyx was its sole shareholder and Lee was its sole director.

6. Remote Bittax Services Ltd. (**Remote Bittax**) is a company incorporated in British Columbia on December 15, 2020. During the Relevant Period, Lee was Remote Bittax's sole director.

7. Bittrex Global GmbH (**Bittrex**), a Lichtenstein-based corporation licensed under the Lichtenstein *Token and Trusted Technology Service Provider Act* as a Token Depository and regulated by the Lichtenstein Financial Market Authority, acted as the third-party custodian for Catalyx.

Circumstances

8. During the Relevant Period, Catalyx offered CTP services to clients on the Platform that included the ability to deposit, buy, sell, hold, withdraw and transfer crypto assets.

9. During the Relevant Period, Catalyx made representations to clients on its website and in its terms of service (**Terms of Service**) about the CTP services it provided, including that:

   9.1 clients could fund their accounts by transferring crypto assets to a wallet address provided by Catalyx or by depositing fiat currency into bank accounts controlled by Catalyx;

   9.2 crypto assets transferred, and fiat currency deposited, to client accounts on the Platform would be held in trust for clients; and

   9.3 clients could trade fiat currency for crypto assets, as well as crypto assets for other crypto assets, by placing orders on the Platform.

   (the **Representations**)

10. During the Relevant Period, Lee was responsible for the day-to-day operations of Catalyx. Lee also had signing authority over bank accounts held by Catalyx, Catalyx Management, 56 Financials and Remote Bittax. Crypto assets belonging to Catalyx's clients on the Platform were custodied by Bittrex, and Lee had unrestricted access to Catalyx's account at Bittrex.

11. As of September 30, 2023, Catalyx reported to the Commission that it held approximately $12,900,000 USD worth of clients' crypto assets on the Platform.

12. By the end of 2023, clients were unable to trade or otherwise withdraw and transfer their fiat currency or crypto assets purportedly held in trust for clients on the Platform.

13. On January 19, 2024, Deloitte Restructuring Inc. (the **Receiver**) was appointed by the Court of King's Bench of Alberta as receiver for Catalyx and Catalyx Management under section 13(2) of the *Judicature Act*, RSA 2000, c J-2 and section 99(a) of the *Business Corporations Act*, RSA 2000, c B-9.

14. As of January 19, 2024, the Receiver reported that Catalyx's books and records showed approximately $13,958,000 USD in crypto assets held on the Platform, but that the actual value of the crypto assets was approximately $151,000 USD.

Lee's Fraudulent Course of Conduct

15. The agreement between clients, who acknowledged the Terms of Service upon creating accounts on the Platform through Catalyx's website, and Catalyx, were securities within the meaning of section 1(ggg) of the *Act* or derivatives within the meaning of section 1(n.01) of the *Act*.

16. During the Relevant Period, and contrary to the Representations, Lee misappropriated clients' crypto assets and deposits of fiat currency and used them for unauthorized purposes.

17. Beginning in February 2019, Lee withdrew at least $14,030,000 CAD worth of clients' crypto assets from the Platform and transferred them to his own accounts at other CTPs as well as accounts under his direction and control with Remote Bittax at other CTPs. Lee returned approximately $6,350,000 worth of crypto assets to the Platform.

18. Lee engaged in unauthorized uses of clients' crypto assets, including by:

    18.1 trading clients' crypto assets at the other CTPs;

    18.2 redeeming clients' crypto assets into fiat currency and depositing the proceeds into bank accounts held by Lee or Remote Bittax; and

    18.3 using clients' crypto assets purportedly to pay Catalyx's operational expenses.

19. In addition, during the Relevant Period, clients deposited fiat currency, mainly via e-transfer, into a bank account held by 56 Financials, which was intended to be transferred by Catalyx to Bittrex in order to allow clients to trade on the Platform.

20. Between June 2022 and June 2023, Lee, who had access and control over the 56 Financials bank account that held clients' fiat currency, as well as client fiat currency held at Bittrex, misappropriated those monies to Catalyx Management bank accounts for unauthorized purposes, including by:

    20.1 purportedly paying Catalyx's operating expenses; and

    20.2 transferring monies to personal bank accounts related to Lee, as well as individuals or entities associated with him.

21. The acts, practices or courses of conduct described in paragraphs 16, 17, 18 and 20 were acts of deceit, falsehood or other fraudulent means (the **Prohibited Acts**).

The Prohibited Acts Caused Deprivation

22. The Prohibited Acts caused deprivation, including by:

    22.1 depriving, or increasing the risk of deprivation to Catalyx users by removing the crypto assets custodied at Bittrex and held on the Platform in trust on their behalf; and

    22.2 depriving, or increasing the risk of deprivation to Catalyx users by removing their fiat currency held in the 56 Financials bank account in trust on their behalf, as well as the fiat currency custodied at Bittrex and held on the Platform.

Lee had Knowledge of Prohibited Acts and Deprivation

23. Lee had subjective knowledge of Prohibited Acts and had knowledge that the Prohibited Acts could put the pecuniary interests of clients at risk or cause them to suffer an actual loss.

24. In carrying out the Prohibited Acts, Lee engaged or participated directly or indirectly in an act, practice or course of conduct relating to a security or derivative that he knew or ought to have known may perpetrate a fraud on clients.

Catalyx's Written Undertaking to the Commission

25. On February 22, 2023, the Canadian Securities Administrators (**CSA**) issued CSA Staff Notice 21-332, indicating that all CTPs were required to file a pre-registration undertaking with the relevant CSA jurisdiction to permit them to continue operating in Canada while they seek registration and related exemptive relief with their respective securities regulator.

26. On March 24, 2023, Park, as CEO and on behalf of Catalyx, signed a pre-registration undertaking (the **Catalyx PRU**) with the Commission. Pursuant to the Catalyx PRU Catalyx undertook, among other things, to:

    26.1 promptly inform the Commission in writing of any material breach or failure of Catalyx or any of its third-party custodian's system of control or supervision, and what steps had been taken by Catalyx to address each such breach or failure;

    26.2 ensure it was proficient and experienced in holding crypto assets and had established and would maintain and apply policies and procedures that manage and mitigate custodial risks.

27. Any loss of clients' crypto assets was a material breach within the meaning of the Catalyx PRU described in subparagraph 26.1 that Catalyx was required to promptly required report to the Commission.

28. The Catalyx PRU was a written undertaking to the Commission under section 93.2 of the *Act*.

Failure to Report a Material Breach

29. No later than November 24, 2023, Park was aware that Lee engaged in the Prohibited Acts and that clients had suffered the losses.

30. The loss described in paragraph 22 was a material breach within the meaning of the PRU, and despite discovery of the material breach on November 24, 2023, Catalyx failed to promptly inform the Commission of the material breach. On December 5, 2023 Catalyx informed the Commission that it was withdrawing from the Catalyx PRU, but failed to inform the Commission about the material breach.

31. Catalyx failed to inform the Commission about the material breach until December 21, 2023.

Failure to Maintain System of Controls

32. From March 24, 2023 until January 2024, Catalyx failed to establish and maintain and apply policies and procedures to manage and mitigate custodial risks, specifically, the risk that an employee would remove clients' fiat currency and crypto assets that were meant to be held in trust for clients. In particular, Catalyx failed to:

32.1 ensure proper financial controls existed to:

32.1.1 detect the removal of clients' crypto assets that were not authorized by the clients themselves;

32.1.2 detect the improper removal and use of clients' fiat currency deposits for operational expenses; and

32.2 ensure proper controls existed regarding the segregation of duties to prevent an individual employee from having unrestricted access to bank accounts under Catalyx's control and Catalyx accounts associated with Bittrex.

Park Authorized, Permitted or Acquiesced to the Failure to Comply with PRU

33. Park authorized, permitted or acquiesced in the breaches of undertakings of the Catalyx PRU as described in paragraphs 29 to 32 of this Notice.

Breaches

34. As a result of the above, Staff allege that:

34.1 Lee breached section 93(1)(b) of the *Act* by directly or indirectly engaging or participating in an act, practice or course of conduct relating to a security or a derivative that he knew or ought to have perpetrated a fraud on clients;

34.2 Catalyx breached section 93.2 of the *Act* by failing to comply with a written undertaking to the Commission to promptly report a material breach of the PRU to the Commission; and

34.3 Catalyx breached section 93.2 of the *Act* by failing to comply with a written undertaking to the Commission to establish and maintain and apply policies and procedures that managed and mitigated custodial risks, including but not limited to, an effective system of controls and supervision to safeguard clients' crypto assets.

35. Park authorized, permitted or acquiesced to the breaches of undertaking as set out in subparagraphs 34.2 and 34.3.

	)	ALBERTA SECURITIES COMMISSION
Calgary, Alberta, 11 July, 2025.	)	
	)	
	)	*"Original Signed By"*
	)	Samir Sabharwal
	)	Executive Director

TAB 2

Province of Alberta

SECURITIES ACT

Revised Statutes of Alberta 2000
Chapter S-4

Current as of June 11, 2025

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

Copyright and Permission Statement

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Securities Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Securities Act		
Securities	115/95	*10/97, 204/2003, 236/2005, 204/2006, 66/2008, 240/2009, 47/2013, 184/2013, 99/2014, 155/2016, 8/2019*

Duty to comply with undertaking

93.2 A person or company that gives a written undertaking to the Commission or the Executive Director shall comply with the undertaking.

2005 c18 s17

Front running

93.3(1) In this section, "material order information" means information that relates to

(a) the intention of a person or company responsible for making decisions about an investment portfolio to trade a security or derivative on behalf of the investment portfolio,

(b) the intention of a registrant trading on behalf of an investment portfolio to trade a security or derivative on behalf of the investment portfolio, or

(c) an unexecuted order, or the intention of any person or company to place an order, to trade a security or derivative,

and that, if disclosed, would reasonably be expected to affect the market price of the security or derivative.

(2) A person or company that knows of material order information shall not, and shall not recommend or encourage another person to,

(a) purchase or sell the securities or derivatives to which the material order information relates,

(b) acquire, dispose of, or exercise a put or call option or other right or obligation to purchase or sell the securities or derivatives,

(c) enter into a related financial instrument or acquire or dispose of rights or obligations under a related financial instrument, or

(d) change that person's

(i) direct or indirect beneficial ownership of, or control or direction over,

(A) the securities or derivatives, or

(B) a put or call option or other right or obligation to purchase or sell the securities or derivatives,

or

Administrative penalty

199(1) If the Commission, after a hearing,

(a) determines that

(i) a person or company has contravened or failed to comply with any provision of Alberta securities laws, or

(ii) a person or company authorized, permitted or acquiesced in a contravention or failure to comply with any provision of Alberta securities laws by another person or company,

and

(b) considers it to be in the public interest to make the order,

the Commission may order the person or company to pay an administrative penalty of not more than $1 000 000 for each contravention or failure to comply.

(2) The Commission may make an order pursuant to this section notwithstanding the imposition of any other penalty or sanction on the person or company or the making of any other order by the Commission related to the same matter.

RSA 2000 cS-4 s199;2005 c18 s26;2006 c30 s45;2014 c17 s35

Filing decision with Court

200(1) Where the Commission has made a decision after conducting a hearing, the Commission may at any time file a certified copy of that decision with the clerk of the Court of King's Bench, and on being filed with the clerk of the Court of King's Bench that decision has the same force and effect as if it were a judgment of the Court of King's Bench.

(2) Where a decision filed under subsection (1) includes an administrative penalty levied pursuant to section 199, the administrative penalty in the amount specified in the decision may be collected as a judgment of the Court of King's Bench for the recovery of debt.

(3) Where a decision filed under subsection (1) includes an order to pay an amount pursuant to section 198(1)(i), the amount specified in the decision may be collected as a judgment of the Court of King's Bench for the recovery of debt.

RSA 2000 cS-4 s200;2014 c17 s36;AR 217/2022

Limitation period

201(1) No proceedings under this Part shall be commenced in a court or before the Commission more than 6 years from the day of the occurrence of the last event on which the proceeding is based.

(2) If an application, motion or notice is filed with a court or with the Commission in respect of an investigation under section 41 or an examination under section 58, the limitation period established by subsection (1) is suspended on the date the application, motion or notice is filed and resumes running on the date

(a) the court or Commission decides the matter that is the subject of the application, motion or notice and

(i) all appeals have been exhausted, or

(ii) the time for an appeal has expired without an appeal being filed,

or

(b) the application, motion or notice is abandoned or discontinued.

(3) The limitation period established by subsection (1) may be suspended by express agreement of the Executive Director and the person or company against whom the proceeding could be commenced.

RSA 2000 cS-4 s201;2014 c17 s37;2023 c3 s17

Payment of costs

202(1) If, after conducting a hearing in respect of the affairs of a person or company, the Commission or the Executive Director, as the case may be, is satisfied that the person or company has contravened Alberta securities laws or acted contrary to the public interest, the Commission or the Executive Director, as the case may be, may order the person or company to pay, subject to the regulations, costs of or related to the hearing or the investigation that led to the hearing, or both.

(2) Repealed 2010 c10 s19.

(3) Where a person or company is guilty of an offence under Alberta securities laws, the Executive Director may order the person or company to pay, subject to the regulations, the costs of any investigation carried out in respect of that offence, including any costs incurred in respect of services provided by persons appointed or engaged under section 28, 41 or 43 and the appearance of any witnesses under this Act.

(4) The Executive Director may prepare and file with the clerk of the Court of King's Bench a certificate certifying the amount of the costs that the person or company is required to pay under subsection (1) or (3).

(5) A certificate filed under subsection (4) with the clerk of the Court of King's Bench has the same force and effect as if it were a judgment of the Court of King's Bench for the recovery of debt in the amount specified in the certificate together with costs of filing.

(6) The *Alberta Rules of Court* with respect to costs and the review and assessment of costs do not apply to costs referred to in this section.

RSA 2000 cS-4 s202;2008 c26 s19;2009 c53 s169;2010 c10 s19;
AR 217/2022

Part 17
Civil Liability

Civil liability — prospectus

203(0.1) In this Part, "expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including an entity that is a designated rating organization.

(1) If a prospectus contains a misrepresentation, a purchaser who purchases a security offered by it during the period of distribution has, without regard to whether the purchaser relied on the misrepresentation, a right of action for damages against

(a) the issuer or a selling security holder on whose behalf the distribution is made,

(b) each underwriter of the securities that is in a contractual relationship with the issuer or selling security holder on whose behalf the distribution is made,

(c) every director of the issuer at the time the prospectus was filed,

(d) every person or company whose consent to disclosure of information in the prospectus has been filed but only with respect to reports, opinions or statements that have been made by them, and

(e) every person or company who signed the prospectus.

TAB 3

ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re CatalX CTS Ltd., 2024 ABASC 23 **Date: 20240209**

CatalX CTS Ltd. (operating as Catalyx) and Jae Ho Lee

Panel:	Tom Cotter Kari Horn
Representation:	Justin Dunphy Matthew Bobawsky for Commission Staff James W. Reid John-David D'Souza for CatalX CTS Ltd. Andrew Wilson, KC for Jae Ho Lee
Submissions Completed:	January 5, 2024
Decision:	February 9, 2024

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I. OVERVIEW

[1] On December 21, 2023, we issued an Interim Order (the **Interim Order**, cited as *Re CatalX CTS Ltd.*, 2023 ABASC 167) against CatalX CTS Ltd. operating as Catalyx (**Catalyx**) and Jae Ho Lee (**Lee,** and together with Catalyx, the **Respondents**). The Interim Order was issued pursuant to ss. 33 and 198 of the *Securities Act* (Alberta) (the **Act**) and prohibited the Respondents from trading in or purchasing any securities or derivatives. The Interim Order was to expire on January 5, 2024 unless extended by the Alberta Securities Commission (the **ASC**).

[2] On January 3, 2024, staff (**Staff**) of the ASC issued a notice of hearing (the **Application**, cited as *Re CatalX CTS Ltd.*, 2024 ABASC 1) seeking to extend the Interim Order against the Respondents for a period of 12 months. The Application also sought an order that the evidence provided in support of it remain confidential and not be divulged except in accordance with s. 45 of the Act, a provision that was also included in the Interim Order.

[3] In the Application, Staff alleged that the Respondents had, on a *prima facie* basis, contravened section 93.2 of the Act by, in the case of Catalyx, failing to abide by a Pre-Registration Activities Undertaking given to the ASC on March 24, 2023 (the **PRU**), and in the case of Lee, authorizing, permitting, or acquiescing in Catalyx's contraventions. Staff sought an order extending the Interim Order in the public interest while Staff's investigation continues.

[4] We heard the Application on January 5, 2024 (the **Hearing**). The Application record was comprised of the following:

- the Application;
- materials from the Interim Order application heard December 21, 2023;
- Affidavit of Stuart Mills sworn January 2, 2024;
- Hearing transcripts, which included submissions of the parties and *viva voce* testimony from Stuart Mills; and
- an electronic exhibit.

[5] At the Hearing, Catalyx advised through counsel that it consented to an extension of the Interim Order being made on a public interest basis, but contested the allegations that Catalyx breached section 93.2 of the Act. Lee took no position on the Application. After hearing from the parties and considering the evidence and submissions of counsel, we granted the orders sought in a brief oral ruling with written reasons to follow. These are our reasons.

II. BACKGROUND

[6] The following facts are undisputed. Catalyx operated an internet-based platform for the trading of cryptocurrency (**crypto**) contracts that enabled clients to buy, sell, hold, deposit, and withdraw crypto assets. Catalyx was winding up and ceased its trading operations as of December 4, 2023.

[7] Catalyx entered into the PRU with the ASC as its principal regulator. Catalyx had applied to the ASC for registration as a restricted dealer and for exemptions from certain regulatory requirements. Catalyx undertook certain commitments and obligations in the PRU so that Catalyx

would be permitted to carry on business pending registration approval. Among other things, Catalyx undertook:

- that it had designated an individual as Chief Compliance Officer who was responsible for the maintenance and application of policies and procedures for assessing compliance by Catalyx and individuals acting on behalf of Catalyx, with securities legislation (PRU at para. 5(a));

- to promptly inform the ASC in writing of any material breach or failure of Catalyx's or its third party custodian's system of controls or supervision, and what steps had been taken by Catalyx to address each such breach or failure (PRU at para. 7(a));

- to establish, maintain and apply written policies and procedures that established a system of controls and supervision sufficient to provide reasonable assurance that Catalyx and each individual acting on its behalf complied with securities legislation (PRU, Schedule I at para. 2(a)); and

- that it was proficient and experienced in holding crypto assets and had established and would maintain and apply policies and procedures that managed and mitigated custodial risks, including but not limited to an effective system of controls and supervision to safeguard the crypto assets and a mechanism for the return of the crypto assets to clients in the event of Catalyx's bankruptcy or insolvency (PRU, Schedule I at para. 39)

(collectively, the **Undertakings**).

[8] As of September 30, 2023, Catalyx reported that it held an aggregate value $12,896,380 of crypto assets on behalf of its clients.

[9] On December 21, 2023, counsel for Catalyx wrote to the ASC (the **Miller Thomson Letter**) to advise that:

- In early- to mid-December, Catalyx's Chief Executive Officer (**CEO**), Hyuk Jae Park, and the Board of Directors became aware that Catalyx had ceased allowing its clients to withdraw crypto assets from their accounts and ceased paying employees.

- Catalyx's Chief Financial Officer (**CFO**), Lee, was the only individual that held the keys or otherwise had access to the digital wallets and accounts that held the crypto assets. In addition, Lee was the only person with access to the bank accounts that were used to pay employees and fund operations.

- On December 12, 2023, the CEO requested from Lee the login information for the accounts and access to the digital wallets.

- On December 14, 2023, Catalyx's counsel requested from Lee's counsel the login information for the accounts and access to the digital wallets.

- On December 19, 2023, Catalyx's counsel made another urgent demand to Lee's counsel for the login information.

- Staff of Catalyx were able to see that all the balances of customer funds in Catalyx digital wallets had been withdrawn or transferred out of the accounts.

- Catalyx was retaining Deloitte LLP to conduct an investigation into the transactions that took place and was seeking to have Deloitte LLP court-appointed as receiver and manager of Catalyx.

[10] On December 21, 2023, Lee's counsel wrote to Catalyx's counsel (the **Lee Letter**) to advise that:

- Lee was not the only person who had access to Catalyx's digital wallets or accounts.

- Multiple employees had or have access to Catalyx's trading history.

- Bittrex, an entity that acted as a third-party custodian for Catalyx's digital assets, suspended Catalyx's trading accounts and, as of December 21, 2023, there was approximately US$69,000 worth of digital assets remaining in the accounts.

- The login information for the trading accounts required two factor authentication and a verification code from Lee would be required to access the accounts.

[11] The Lee Letter included Catalyx's operating bank account information, which as of December 11, 2023, held a balance of $46,075.69.

[12] On December 28, 2023, Catalyx issued a news release announcing a recently discovered security breach on its trading platform in connection with the holding of crypto assets on behalf of its clients, which it said may have involved an employee and resulted in the loss of a portion of the crypto assets held by Catalyx on behalf of its clients.

[13] At the time of the Hearing, there was no explanation for the apparent disappearance of more than $12,800,000 from Catalyx's trading account.

III. LAW

[14] Section 33 of the Act authorizes an ASC panel to issue an interim order for preventative and protective measures under s. 198 of the Act where it finds that the length of time required to conduct an enforcement hearing and render a decision could be prejudicial to the public interest. While an interim order is an extraordinary remedy and should not be granted lightly, it is an important tool that allows the ASC to protect Alberta investors and the capital market where circumstances warrant. As described in *Re Workum and Hennig*, 2008 ABASC 719 (at para. 130),

interim orders are not sanctions, but are ". . . interim protective measures to forestall the continuation of *prima facie* improprieties while an investigation and hearing proceed".

[15] On an application for an interim order under ss. 33 and 198, Staff must generally establish, on a *prima facie* basis, that Alberta securities laws have been contravened as alleged. A *prima facie* case arises where the available evidence supports the material parts of one or more of Staff's allegations and the evidence appears credible and reliable, having regard to all of the circumstances including its source, detail, and the presence or absence of any explanations or evidence that may contradict it (*Re Omega Securities Inc.*, 2017 ONSEC 42 at para. 25). However, an ASC panel is not required to find actual misconduct when considering whether there is a *prima facie* case. *Prima facie* means "at first sight" or "upon initial examination", and does not include a thorough examination and consideration of all the evidence as would be necessary in a merits hearing (*Magneson v. Alberta Securities Commission*, 2023 ABCA 348 at para. 54).

[16] Staff's extension application was brought under s. 33(4) of the Act. That section authorizes an ASC panel to extend an interim order prior to its expiration so long as (a) the person or company named in the order has been provided with an opportunity to be heard, and (b) the panel considers that the length of time required to conduct a hearing and render a decision could be prejudicial to the public interest.

IV. ANALYSIS

[17] Some of the requisite elements for an order under s. 33(4) of the Act were not in dispute. In particular, the Interim Order had not expired and the Respondents were provided with an opportunity to be heard. Our focus was therefore on whether there was a *prima facie* case that the Respondents had contravened the Act or engaged in conduct contrary to the public interest based on the allegations described in the Application.

A. *Prima Facie* Contravention of s. 93.2

[18] Staff alleged a *prima facie* breach of s. 93.2, which provides that "[a] person or company that gives a written undertaking to the [ASC] or the Executive Director shall comply with the undertaking." The contravention, Staff said, resulted from Catalyx failing to comply with the Undertakings. We will deal with each of the Undertakings in turn.

1. Role of Designated Chief Compliance Officer

[19] Catalyx undertook that it had designated an individual as Chief Compliance Officer who was responsible for the maintenance and application of policies and procedures for assessing compliance with securities legislation by Catalyx and individuals acting on its behalf. The Miller Thomson Letter referred to Peter Fang (**Fang**) as the named Chief Compliance Officer. We received no additional evidence about the responsibilities assigned to Fang, and were unable to reach any conclusion as to whether he maintained and applied policies and procedures as required.

[20] Counsel for Catalyx asserted that the company had a policies and procedures manual in place that had been reviewed by ASC market regulation staff, however Staff's witness disclaimed any knowledge of its existence. A document entitled "CatalX CTS Ltd. Policies and Procedures Manual" was given to Staff's witness on cross-examination, and he acknowledged the document's title and certain provisions in the document. We were satisfied that there was evidence of Catalyx

having in place a policies and procedures manual, but again there was no evidence of what Fang had done in maintaining and applying the manual for assessing compliance with securities legislation.

2. Promptly Reporting Material Breach

[21] Catalyx undertook that it would promptly inform the ASC of a material breach or failure of its system of controls or supervision. This undertaking stated expressly that the loss of any crypto assets impacting clients would be considered a material breach or failure requiring prompt reporting to the ASC.

[22] Staff argued that Catalyx ought to have reported the material breach or failure of its systems immediately upon becoming aware of any such failure, which, on the basis of the Miller Thomson Letter, would have been no later than December 14, 2023.

[23] By December 12, 2023, Catalyx understood that Lee was the only person with access to the crypto assets and asked Lee for the account information since employees were not getting paid and customers were not able to make withdrawals from their accounts. On December 14, 2023, Catalyx's counsel wrote to Lee's counsel:

> We understand that recently, CatalX has ceased allowing the withdrawals of deposits made by its customers. We understand that this is at least in part due to there being a shortfall in the crypto currency deposited with CatalX and held by CatalX on behalf of its customers.

On December 19, 2023, Catalyx's counsel wrote to Lee's counsel:

> CatalX's Client Experience Manager and FINTRAC Compliance Officer, Lois Cusker, who can view the balances in the CatalX Wallets, advised today that in the past two to three weeks, all balances that were in the CatalX Wallets were withdrawn or transferred out of the accounts. Ms. Cusker has also advised of other suspicious transactions that need to be immediately reviewed.
>
> In this regard, CatalX is in the process of retaining Deloitte LLP to assist it with reviewing the accounts and records of the businesses. We hereby demand that Mr. Lee provide the following. . .
>
> . . .
>
> Finally, given Ms. Cusker's reporting of potentially improper transactions in the CatalX Wallets and CatalX Accounts, please advise Mr. Lee that he is to maintain all records and communications in his possession, including cell phone and other digital correspondences, for Deloitte LLP to conduct its investigation.
>
> Given the gravity of the situation, we require that all other requests in this letter be provided by no later than 4:00 pm (Calgary time) on December 21, 2023. Should we not get a positive response by this time, CatalX and Deloitte will need to take urgent steps to protect its assets and records, including by seeking relief from the Court.

Catalyx reported its circumstances and provided the foregoing letters to the ASC on December 21, 2023, which led to Staff seeking an immediate and urgent interim order that evening.

[24] Staff argued that at the latest, Catalyx was aware of a failure of its or its custodian's system of controls on December 14, 2023, and probably earlier when there were reported instances of customers unable to withdraw funds. As of December 14, 2023 there was an assertion from Catalyx's counsel that the customer complaints were attributable at least in part to there being a "shortfall" in the crypto assets held by Catalyx for customers. Staff contended that the undertaking to promptly inform the ASC in these circumstances should be construed as immediate notice.

[25] Counsel for Catalyx argued that prompt notice was given to the ASC after it had learned of customers being unable to make withdrawals and had made appropriate inquiries internally. They had no "concrete evidence", which was why they were engaging Deloitte LLP to locate the assets. Counsel for Lee did not make any submissions on this issue.

[26] We agree with Staff that the evidence establishes on a *prima facie* basis that this undertaking was breached by Catalyx. The undertaking deems the loss of "**any amount** of Crypto Assets" (emphasis added) to be a material breach or failure, thus requiring prompt notice to the ASC. On December 14, 2023, Catalyx asserted that there was a shortfall in customer crypto currency which was causally connected to the company disallowing the withdrawal of customer deposits. The company later determined that all balances of crypto assets in its wallets had been withdrawn or transferred in suspicious circumstances, which was reported to Lee's counsel on December 19, 2023. The ASC received notice of these events on December 21, 2023. In our view, notice given a full week after knowledge of a loss of crypto assets was not prompt.

[27] On February 22, 2023, the Canadian Securities Administrators published CSA Staff Notice 21-332 *Crypto Asset Trading Platforms: Pre-Registration Undertakings – Changes to Enhance Canadian Investor Protection* (**CSA Notice 21-332**). This followed the well-publicized insolvencies of several crypto asset trading platforms, including Voyager Digital, Celsius Network, the FTX group of companies, BlockFi, and Genesis Global. CSA Notice 21-332 stated that new investor protection measures were being added to the standard form PRU, central to which were "enhanced commitments in relation to the custody and segregation of crypto assets held on behalf of Canadian clients" (at p. 1). The Catalyx PRU included these new measures, and Catalyx could not have been in any doubt about the seriousness with which Canadian securities regulators were treating the safe custody of customer crypto assets. In light of that background, we agree with Staff that the undertaking to give prompt notice of a loss of crypto assets should be construed as nearly synonymous with immediate notice.

[28] Accordingly, we find that there was a *prima facie* breach of s. 93.2 of the Act by Catalyx in relation to the undertaking given in paragraph 7 of the PRU.

3. Policies and Procedures to Ensure Compliance with Securities Legislation

[29] Staff alleged that Catalyx breached its undertaking to establish, maintain and apply written policies and procedures that established a system of controls and supervision sufficient to provide reasonable assurance that it and each individual acting on its behalf complied with securities legislation. As mentioned, we were satisfied that Catalyx had a policies and procedures manual in place, however there was no evidence on what if anything was done to maintain and apply the policies and procedures. Staff did not make submissions about this alleged breach and, given our conclusions below, we did not find it necessary to consider this allegation.

4. Policies and Procedures to Mitigate Custodial Risks

[30] Catalyx undertook to maintain and apply policies and procedures that managed and mitigated custodial risks of clients' crypto assets, including but not limited to having an effective system of controls and supervision in place to safeguard the crypto assets.

[31] Catalyx reported to the ASC that, as at September 30, 2023, it held $12,896,380 in crypto assets on behalf of clients. Since reporting that value in early November 2023, Catalyx learned that the balance had been reduced to approximately US$69,000 through a number of withdrawals and transfers that occurred over the course of two to three weeks in early- to mid-December. Catalyx itself had no explanation for the disappearance of the funds and was retaining Deloitte LLP to investigate. According to Catalyx, it was unable to access the trading accounts because Lee was the only person with access.

[32] Lee did not give any evidence at the Hearing. The Lee Letter named the individuals who had signing authority or online banking access to the Catalyx bank accounts with Bank of Montreal and Servus Credit Union. However, while the Lee Letter denied that Lee had sole access to the trading accounts, it did not identify any other Catalyx employee or director who also had access. Even if another individual had access to the trading accounts, Lee held the two factor authorization key for the trading accounts, necessitating his cooperation for anyone else to access the accounts. Based on the information that was before us, Lee appeared to be the only Catalyx director or employee with true access to the trading accounts that held the clients' crypto assets.

[33] We were not provided with any policies or procedures that Catalyx had in place to manage or mitigate custodial risks. However, in light of the unexplained disappearance of almost all of the clients' crypto assets and the evidence before us, we are left with three possible inferences. Either:

(1) Catalyx had not put a system of controls in place to manage or mitigate custodial risks;

(2) the system of controls that Catalyx had in place was inadequate to manage or mitigate custodial risks; or

(3) there was a catastrophic failure to follow the polices or procedures that would have managed or mitigated custodial risks.

[34] All three possible inferences led us to conclude, on the face of the evidence before us, that Catalyx did not maintain or apply policies or procedures that managed and mitigated custodial risks of clients' crypto assets in accordance with the Undertakings. Therefore, the available evidence supported a finding that there was a *prima facie* breach of s. 93.2 of the Act by Catalyx in relation to the undertaking given in paragraph 39 of Schedule I of the PRU.

B. Authorize, Permit, or Acquiesce

[35] Section 198(1.2) of the Act gives an ASC panel authority to make orders against a director or officer of a company who authorizes, permits, or acquiesces in the contravention of Alberta securities laws or conduct contrary to the public interest. Staff argued that the evidence showed on

a *prima facie* basis that Lee authorized, permitted, or acquiesced in Catalyx's breach of s. 93.2 of the Act. We agree.

[36] In Re *Aurora*, 2011 ABASC 501, a panel of the ASC found that (at para. 199):

> [a]uthority over the acts of a corporation generally rests, ultimately with its directors and officers – who in consequence will bear responsibility for having approved or condoned (authorized, permitted or acquiesced in) those acts. (See also *Re Aitkens*, 2018 ABASC 27 at paras. 40-41.)

[37] Lee was both a director and officer of Catalyx. As CFO, he was responsible for the financial management of Catalyx, had signing authority on the company bank accounts, and through the two factor authorization, controlled Catalyx's access to the trading accounts. We conclude that Lee was in a position to explain where the clients' crypto assets were transferred. He should have knowledge of when, and for what purpose, the clients' assets were depleted in December 2023. However, the Lee Letter did not provide any particulars in that regard.

[38] At the Hearing, Lee's counsel pointed out that Lee did not sign the PRU. Regardless of whether he signed the PRU, by virtue of Lee's position as CFO and his access to the relevant accounts, we find on a *prima facie* basis that he authorized, permitted, or acquiesced in Catalyx's contraventions of s. 93.2 of the Act.

C. Public Interest Jurisdiction

[39] Catalyx consented to the extension of the Interim Order in the public interest. Staff submitted that we had the authority to extend the order under ss. 33(4) and 198 – even if we did not find a *prima facie* contravention of the Act – provided that we were satisfied it was in the public interest to do so. As noted, we have found *prima facie* breaches of s. 93.2 of the Act. Although it was not necessary in view of those findings, if we had not found those contraventions, we would have extended the Interim Order on the *prima facie* basis that the Respondents acted contrary to the public interest.

[40] The ASC has broad, discretionary powers to act protectively and preventively in the public interest, even in the absence of a contravention of Alberta securities laws. Our public interest jurisdiction is limited by the goals of securities legislation: protecting the investing public, capital market efficiency, and ensuring public confidence in the system (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45).

[41] We considered the scope of the ASC's public interest jurisdiction in *Re PointNorth Capital Inc.*, 2017 ABASC 121 (at paras. 20-33). The public interest jurisdiction has been exercised by securities commissions absent a breach of the Act when impugned conduct was found to be abusive of investors and of the capital market (see *Perpetual Energy Inc.*, 2016 ABASC 2 at paras. 67-69), the market conduct engaged the animating principles of the Act (see *Point North* at paras. 26-33), or both (see *Re Daley,* 2021 ONSEC 27 at paras. 55-73). It may also be appropriate to exercise the public interest jurisdiction if a transaction is of a novel nature or involves a new principle (see *Re ARC Equity Management (Fund 4) Ltd*., 2009 ABASC 390 at para. 66). In *Point North*, a panel found that "the appropriate test is 'clearly abusive' when securities laws articulate 'specific acts

which constitute misconduct'" (at para. 36). Because the public interest jurisdiction is broad and powerful, it must be exercised with caution and restraint.

[42] Regulation of crypto asset trading platforms is a relatively new part of securities regulation. While there is not yet a complete code in the Act that governs these market participants, enhanced pre-registration undertakings are intended to ensure that, among other things, crypto asset dealers are controlling custodial risks of managing clients' assets. The undertakings are aimed at ensuring investor assets are protected by proper systems of controls so that they will not be improperly diverted or lost. In our view, this foundational principle directly supports the ASC's public interest aim to protect investors and ensure confidence in the market.

[43] Catalyx operated a crypto asset trading platform that allowed investors to hold and trade crypto assets. In the PRU, Catalyx undertook to ensure that a system of controls was in place to address the risks of holding customers' crypto assets. Lee was the CFO of the company, appeared to control access to the trading accounts, and gave no explanation for the disappearance of virtually all customer assets. Catalyx was unable to account for the disappearance either. Clearly, the failure of Catalyx's system of controls and the consequent unexplained disappearance of investors' assets undermines confidence in the market and is antithetical to the principle of appropriately controlling and mitigating custodial risk, as set out in CSA Notice 21-332. We had no hesitation in concluding that Staff established a *prima facie* case that the Respondents' conduct was clearly abusive of investors and of the capital market.

[44] We therefore found, on a *prima facie* basis, that the conduct of the Respondents was contrary to the public interest. We exercised our discretion to issue a protective and preventative order and extend the Interim Order for a period of 12 months, and we would have done so even in the absence of a *prima facie* breach of s. 93.2 of the Act.

V. CONCLUSION

[45] Staff demonstrated on a *prima facie* basis that the Respondents contravened the Act. The Respondents had an opportunity to be heard. Staff have not issued a Notice of Hearing relating to the merits of this case and require time to complete their investigation. Given the nascent stage of Staff's investigation and the evidence adduced on the Application, we found that the length of time required to conduct a hearing and render a decision could be prejudicial to the public interest. In our view, it was in the public interest that we extend the Interim Order for 12 months.

February 9, 2024

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn

TAB 4

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l’insolvabilité

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

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

Current to October 28, 2025

Last amended on December 12, 2024

À jour au 28 octobre 2025

Dernière modification le 12 décembre 2024

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n’y figurant qu’à titre de repère ou d’information.

NOTE

This consolidation is current to October 28, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of October 28, 2025 are set out at the end of this document under the heading “Amendments Not in Force”.

NOTE

Cette codification est à jour au 28 octobre 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 28 octobre 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Effect of declaration

(12.1) If the court declares that the proposal is deemed to have been refused by the creditors, paragraphs 57(a) to (c) apply.

Effet de la déclaration

(12.1) Si le tribunal déclare que la proposition est réputée avoir été refusée par les créanciers, les alinéas 57a) à c) s'appliquent.

Claims against directors — compromise

(13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

Transaction — réclamations contre les administrateurs

(13) La proposition visant une personne morale peut comporter, au profit de ses créanciers, des dispositions relatives à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Exception

(14) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

(b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

Restriction

(14) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou plusieurs créanciers à l'égard de contrats conclus avec un ou plusieurs administrateurs, ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Powers of court

(15) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.

Pouvoir du tribunal

(15) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Application of other provisions

(16) Subsection 62(2) and section 122 apply, with such modifications as the circumstances require, in respect of claims against directors compromised under a proposal of a debtor corporation.

Application

(16) Le paragraphe 62(2) et l'article 122 s'appliquent, avec les adaptations nécessaires, aux réclamations visées au paragraphe (13).

Determination of classes of claims

(17) The court, on application made at any time after a proposal is filed, may determine the classes of claims of claimants against directors and the class into which any particular claimant's claim falls.

Détermination des catégories de réclamations

(17) Le tribunal peut, sur demande faite après le dépôt de la proposition, déterminer les catégories de réclamations contre les administrateurs et indiquer la catégorie à laquelle appartient une réclamation donnée.

Resignation or removal of directors

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

R.S., 1985, c. B-3, s. 50; 1992, c. 27, s. 18; 1997, c. 12, s. 30; 2001, c. 4, s. 27(E); 2004, c. 25, s. 32; 2005, c. 47, s. 34; 2007, c. 36, s. 16.

Démission ou destitution des administrateurs

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

L.R. (1985), ch. B-3, art. 50; 1992, ch. 27, art. 18; 1997, ch. 12, art. 30; 2001, ch. 4, art. 27(A); 2004, ch. 25, art. 32; 2005, ch. 47, art. 34; 2007, ch. 36, art. 16.

time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

de l'actif, examinent ses comptes, s'enquièrent de la suffisance de la garantie fournie par le syndic et, sous réserve du paragraphe (4), approuvent l'état définitif des recettes et des débours préparé par le syndic, le bordereau de dividende et la disposition des biens non réalisés.

Approval of trustee's final statement by inspectors

(4) Before approving the final statement of receipts and disbursements of the trustee, the inspectors shall satisfy themselves that all the property has been accounted for and that the administration of the estate has been completed as far as can reasonably be done and shall determine whether or not the disbursements and expenses incurred are proper and have been duly authorized, and the fees and remuneration just and reasonable in the circumstances.

Approbation par les inspecteurs de l'état définitif préparé par le syndic

(4) Avant d'approuver l'état définitif des recettes et des débours du syndic, les inspecteurs doivent s'assurer eux-mêmes qu'il a été rendu compte de tous les biens et que l'administration de l'actif a été complétée, dans la mesure où il est raisonnablement possible de le faire, et doivent établir si les débours et dépenses subis sont appropriés ou non et ont été dûment autorisés et si les honoraires et la rémunération sont justes et raisonnables en l'occurrence.

inspector's expenses and fees

(5) Each inspector

(a) may be repaid actual and necessary travel expenses incurred in relation to the performance of the inspector's duties; and

(b) may be paid such fees per meeting as are prescribed.

Frais et honoraires

(5) Chaque inspecteur peut être remboursé des frais de déplacement réels et nécessaires engagés dans le cadre de ses fonctions et il peut aussi recevoir les honoraires prescrits pour chaque assemblée.

Special services

(6) An inspector duly authorized by the creditors or by the other inspectors to perform special services for the estate may be allowed a special fee for those services, subject to approval of the court, which may vary that fee as it deems proper having regard to the nature of the services rendered in relation to the obligations of the inspector to the estate to act in good faith for the general interests of the administration of the estate.

R.S., 1985, c. B-3, s. 120; 1992, c. 27, s. 49; 2001, c. 4, s. 30; 2004, c. 25, s. 65(F); 2005, c. 47, s. 85.

Services spéciaux

(6) Un inspecteur régulièrement autorisé par les créanciers ou par les autres inspecteurs à exécuter des services spéciaux pour le compte de l'actif peut avoir droit à des honoraires spéciaux pour ces services, sous réserve de l'approbation du tribunal qui peut modifier ces honoraires comme il le juge à propos eu égard à la nature des services rendus par rapport à l'obligation qu'a l'inspecteur d'agir de bonne foi en vue de l'intérêt général de l'administration de l'actif.

L.R. (1985), ch. B-3, art. 120; 1992, ch. 27, art. 49; 2001, ch. 4, art. 30; 2004, ch. 25, art. 65(F); 2005, ch. 47, art. 85.

Claims Provable

Claims provable

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Réclamations prouvables

Réclamations prouvables

121 (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

Family support claims

(4) A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

R.S., 1985, c. B-3, s. 121; 1992, c. 27, s. 50; 1997, c. 12, s. 87; 2000, c. 12, s. 14.

Claims provable in bankruptcy following proposal

122 (1) The claims of creditors under a proposal are, in the event of the debtor subsequently becoming bankrupt, provable in the bankruptcy for the full amount of the claims less any dividends paid thereon pursuant to the proposal.

Interest

(2) If interest on any debt or sum certain is provable under this Act but the rate of interest has not been agreed on, the creditor may prove interest at a rate not exceeding five per cent per annum to the date of the bankruptcy from the time the debt or sum was payable, if evidenced by a written document, or, if not so evidenced, from the time notice has been given the debtor of the interest claimed.

R.S., 1985, c. B-3, s. 122; 2004, c. 25, s. 66(E).

Proof in respect of distinct contracts

123 Where a bankrupt was, at the date of the bankruptcy, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals,

Décision

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l’article 135.

Créances payables à une date future

(3) Un créancier peut établir la preuve d’une créance qui n’est pas échue à la date de la faillite, et recevoir des dividendes tout comme les autres créanciers, en en déduisant seulement un rabais d’intérêt au taux de cinq pour cent par an calculé à compter de la déclaration d’un dividende jusqu’à la date où la créance devait échoir selon les conditions auxquelles elle a été contractée.

Réclamations alimentaires

(4) Constitue une réclamation prouvable la réclamation pour une dette ou une obligation mentionnée aux alinéas 178(1)b) ou c) découlant d’une ordonnance judiciaire rendue ou d’une entente conclue avant l’ouverture de la faillite et à un moment où l’époux, l’ex-époux ou ancien conjoint de fait ou l’enfant ne vivait pas avec le failli, que l’ordonnance ou l’entente prévoie une somme forfaitaire ou payable périodiquement.

L.R. (1985), ch. B-3, art. 121; 1992, ch. 27, art. 50; 1997, ch. 12, art. 87; 2000, ch. 12, art. 14.

Réclamations prouvables en faillite à la suite d’une proposition

122 (1) Les réclamations des créanciers aux termes d’une proposition sont, dans le cas où le débiteur deviendrait subséquemment en faillite, prouvables dans la faillite pour le plein montant des réclamations moins tout dividende payé à cet égard en conformité avec la proposition.

Intérêts

(2) Lorsque l’intérêt sur toute créance ou somme déterminée est prouvable sous le régime de la présente loi, mais qu’il n’a pas été convenu du taux d’intérêt, le créancier peut établir la preuve d’un intérêt à un taux maximal de cinq pour cent par an jusqu’à la date de la faillite à compter de la date où la créance ou somme était exigible, si elle est attestée par un document écrit, ou, si elle n’est pas ainsi attestée, à compter de la date où il a été donné au débiteur avis de la réclamation d’intérêt.

L.R. (1985), ch. B-3, art. 122; 2004, ch. 25, art. 66(A).

Preuve à l’égard de contrats distincts

123 Lorsqu’un failli était, à la date de la faillite, responsable à l’égard de contrats distincts, en qualité de membre de plusieurs firmes distinctes, ou en qualité de signataire individuel des contrats et aussi à titre de membre d’une firme, le fait que les firmes sont

Report to persons concerned

(2) A separate report containing only the information to be given to the Superintendent pursuant to paragraphs (1)(a) and (b) shall be immediately prepared in the prescribed form by the trustee and a copy thereof shall be sent, by prepaid registered or certified mail in an envelope marked “private and confidential”, to each of the persons named pursuant to paragraphs (1)(a) and (b) in the report to the Superintendent.

Report to official receiver

(3) After the expiration of two months from the date of filing the report with the Superintendent and not later than three months after that date, the trustee shall file with the official receiver the report prepared pursuant to subsection (2).

Application to court regarding report

(4) Notwithstanding subsection (3), where before he has filed his report with the official receiver pursuant to that subsection, the trustee is served with a copy of an application to the court, by any of the persons named pursuant to paragraphs (1)(a) and (b) in the report prepared pursuant to subsection (2), to have that report altered in any manner or to dispense with the requirements of subsection (3), the trustee shall not file the report under subsection (3) except as may be directed by the court.

Altering report to Superintendent

(5) Where the report to be filed under subsection (3) has been altered in any respect on the direction of the court, the trustee shall inform the Superintendent of any alteration so made, and the Superintendent shall alter the report made to him by the trustee accordingly.

Exoneration from liability

(6) The trustee is not liable for any statements made or opinions expressed by him in good faith and made or purporting to be made by him pursuant to this section, nor is any person liable for publishing, or referring to any matters contained in, the report of the trustee to the official receiver if the publication or reference is made after the filing of the report with the official receiver.

R.S., 1985, c. B-3, s. 171; 1992, c. 1, s. 20, c. 27, s. 63; 1997, c. 12, s. 102.

Court may grant or refuse discharge

172 (1) On the hearing of an application of a bankrupt for a discharge, other than a bankrupt referred to in section 172.1, the court may

Rapports aux personnes intéressées

(2) Un rapport distinct ne renfermant que les renseignements à fournir au surintendant selon les alinéas (1)a) et b) est immédiatement préparé, en la forme prescrite, par le syndic et copie en est adressée, par courrier recommandé ou certifié, dans une enveloppe portant la mention : « personnel et confidentiel », à chacune des personnes nommées en conformité avec les alinéas (1)a) et b) dans le rapport au surintendant.

Rapport au séquestre officiel

(3) Le syndic remet le rapport visé au paragraphe (2) au séquestre officiel au plus tôt deux mois et au plus tard trois mois suivant la date de production de son rapport au surintendant.

Demande au tribunal au sujet du rapport

(4) Nonobstant le paragraphe (3), lorsque, avant d’avoir produit son rapport au séquestre officiel en conformité avec ce paragraphe, le syndic reçoit, de l’une des personnes nommées en conformité avec les alinéas (1)a) et b) dans le rapport préparé conformément au paragraphe (2), notification d’une copie de demande au tribunal visant à faire modifier de quelque façon le rapport ou à se faire dispenser de satisfaire aux exigences du paragraphe (3), le syndic ne peut produire le rapport en vertu du paragraphe (3) sauf selon les instructions que peut donner le tribunal.

Modification du rapport au surintendant

(5) Lorsque le rapport à produire aux termes du paragraphe (3) a été modifié à quelque point de vue sur les instructions du tribunal, le syndic informe le surintendant de toute modification ainsi apportée et le surintendant modifie en conséquence le rapport qui lui est fait par le syndic.

Décharge de la responsabilité

(6) Le syndic n’encourt aucune responsabilité pour une déclaration faite, ou une opinion exprimée par lui de bonne foi et émise, ou présentée comme émise, par lui en conformité avec le présent article, et personne n’encourt de responsabilité pour avoir publié ou mentionné des sujets contenus dans le rapport du syndic au séquestre officiel, si la publication ou la mention est faite après la production du rapport au séquestre officiel.

L.R. (1985), ch. B-3, art. 171; 1992, ch. 1, art. 20, ch. 27, art. 63; 1997, ch. 12, art. 102.

Le tribunal peut accorder ou refuser la libération

172 (1) À l’audition de la demande de libération d’un failli autre que celui visé à l’article 172.1, le tribunal peut, selon le cas :

(a) grant or refuse an absolute order of discharge;

(b) suspend the operation of an absolute order of discharge for a specified time; or

(c) grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to the bankrupt's after-acquired property.

a) accorder ou refuser une ordonnance de libération absolue;

b) suspendre l'exécution de l'ordonnance pour une période déterminée;

c) accorder une ordonnance de libération subordonnée à des conditions relativement à des recettes ou à un revenu pouvant par la suite échoir au failli ou relativement aux biens qu'il a subséquemment acquis.

Powers of court to refuse or suspend discharge or grant conditional discharge

(2) The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,

(a) refuse the discharge of a bankrupt;

(b) suspend the discharge for such period as the court thinks proper; or

(c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

Le tribunal peut refuser ou suspendre la libération ou l'accorder conditionnellement

(2) Sur preuve de l'un des faits mentionnés à l'article 173, laquelle peut être faite oralement sous serment, par affidavit ou autrement, le tribunal, selon le cas :

a) refuse la libération;

b) suspend la libération pour la période qu'il juge convenable;

c) exige du failli, comme condition de sa libération, qu'il accomplisse les actes, paie les montants d'argent, consente aux jugements ou se conforme aux autres conditions que le tribunal peut ordonner.

Court may modify after year

(3) Where at any time after the expiration of one year after the date of any order made under this section the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in such manner and on such conditions as it may think fit.

Le tribunal peut, après un an, modifier les conditions

(3) Lorsque, après l'expiration d'une année à compter de la date où une ordonnance est rendue en vertu du présent article, le failli prouve au tribunal qu'il n'existe pas de probabilité raisonnable qu'il soit en état de se conformer aux conditions de cette ordonnance, le tribunal peut modifier les conditions de l'ordonnance, ou de toute ordonnance y substituée, de la manière et aux conditions qu'il estime utiles.

Power to suspend

(4) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

R.S., 1985, c. B-3, s. 172; 2005, c. 47, s. 104; 2007, c. 36, ss. 52, 101.

Pouvoir de suspendre

(4) Les pouvoirs d'imposer des conditions à la libération du failli ou de la suspendre peuvent être exercés concurremment.

L.R. (1985), ch. B-3, art. 172; 2005, ch. 47, art. 104; 2007, ch. 36, art. 52 et 101.

Exception — personal income tax debtors

172.1 (1) In the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims, the hearing of an application for a discharge may not be held before the expiry of

(a) if the bankrupt has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction,

Exception — failli ayant une dette fiscale

172.1 (1) Dans le cas d'un failli qui a une dette fiscale impayée d'un montant de deux cent mille dollars ou plus représentant soixante-quinze pour cent ou plus de la totalité des réclamations non garanties prouvées, l'audition de la demande de libération ne peut se tenir avant l'expiration :

a) s'il fait faillite pour la première fois sous le régime du droit canadien ou de tout pays prescrit :

(i) 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 9 months, or

(ii) 21 months after the date of bankruptcy, in any other case;

(b) if the bankrupt has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction,

(i) 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 24 months, or

(ii) 36 months after the date of bankruptcy, in any other case; and

(c) in the case of any other bankrupt, 36 months after the date of the bankruptcy.

Appointment to be obtained by trustee

(2) Before proceeding to the trustee's discharge and before the first day that the hearing could be held in respect of a bankrupt referred to in subsection (1), the trustee must, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge.

Powers of court to refuse or suspend discharge or grant conditional discharge

(3) On the hearing of an application for a discharge referred to in subsection (1), the court shall, subject to subsection (4),

(a) refuse the discharge;

(b) suspend the discharge for any period that the court thinks proper; or

(c) require the bankrupt, as a condition of his or her discharge, to perform any acts, pay any moneys, consent to any judgments or comply with any other terms that the court may direct.

Factors to be considered

(4) In making a decision in respect of the application, the court must take into account

(a) the circumstances of the bankrupt at the time the personal income tax debt was incurred;

(b) the efforts, if any, made by the bankrupt to pay the personal income tax debt;

(i) des neuf mois suivant la date de la faillite si, pendant ces neuf mois, il n'a pas été tenu de faire des versements à l'actif de la faillite au titre de l'article 68,

(ii) des vingt et un mois suivant la date de la faillite, dans les autres cas;

b) s'il a déjà fait faillite une fois sous le régime du droit canadien ou de tout pays prescrit :

(i) des vingt-quatre mois suivant la date de la faillite si, pendant ces vingt-quatre mois, il n'a pas été tenu de faire des versements à l'actif de la faillite au titre de l'article 68,

(ii) des trente-six mois suivant la date de la faillite, dans les autres cas;

c) dans les autres cas, des trente-six mois suivant la date de la faillite.

Le syndic doit obtenir une convocation

(2) Avant de procéder à sa propre libération et avant le premier jour où peut avoir lieu l'audition de la demande de libération du failli visé au paragraphe (1), le syndic doit, sur préavis de cinq jours au failli, demander au tribunal une convocation pour l'audition de cette demande.

Le tribunal peut refuser ou suspendre la libération ou l'accorder conditionnellement

(3) Lors de l'audition de la demande de libération, le tribunal, sous réserve du paragraphe (4), selon le cas :

a) refuse la libération;

b) suspend la libération pour la période qu'il juge convenable;

c) exige du failli, comme condition de sa libération, qu'il accomplisse les actes, paie les sommes, consente aux jugements ou se conforme aux autres conditions qu'il peut ordonner.

Éléments à prendre en considération

(4) Lorsqu'il rend sa décision sur la demande, le tribunal prend en considération :

a) la situation du failli au moment où il a contracté la dette fiscale;

b) les efforts qu'il a déployés pour la rembourser;

(c) whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and

(d) the bankrupt's financial prospects for the future.

Requirements if discharge suspended

(5) If the court makes an order suspending the discharge, the court shall, in the order, require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed.

Court may modify after year

(6) If, at any time after the expiry of one year after the day on which any order is made under this section, the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in any manner and on any conditions that it thinks fit.

Power to suspend

(7) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

Meaning of *personal income tax debt*

(8) For the purpose of this section, ***personal income tax debt*** means the amount payable, within the meaning of subsection 223(1) of the *Income Tax Act* without reference to paragraphs (b) to (c), by an individual and the amount payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, including, for greater certainty, the amount of any interest, penalties or fines imposed under the *Income Tax Act* or the provincial legislation. It does not include an amount payable by the individual if the individual is or was a director of a corporation and the amount relates to an obligation of the corporation for which the director is liable in their capacity as director.

2005, c. 47, s. 105; 2007, c. 36, s. 53.

Facts for which discharge may be refused, suspended or granted conditionally

173 (1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the

c) les versements qu'il a effectués, le cas échéant, à l'égard d'autres dettes tout en omettant de déployer les efforts voulus pour rembourser sa dette fiscale;

d) sa situation financière à venir.

Obligation en cas de suspension de la libération

(5) S'il ordonne la suspension de la libération du failli, le tribunal précise dans l'ordonnance que celui-ci est tenu, en plus de fournir mensuellement au syndic un état de ses revenus et dépenses, de produire toute déclaration de revenu exigée par la loi.

Le tribunal peut, après un an, modifier les conditions

(6) Lorsque, après l'expiration d'une année à compter de la date où une ordonnance est rendue en vertu du présent article, le failli prouve au tribunal qu'il n'existe pas de probabilité raisonnable qu'il soit en état de se conformer aux conditions de cette ordonnance, le tribunal peut modifier ces conditions, ou celles de toute ordonnance qui lui est substituée, de la manière et aux conditions qu'il estime utiles.

Pouvoir de suspendre

(7) Le pouvoir d'assujettir la libération du failli à des conditions ou de la suspendre peuvent être exercés concurremment.

Définition de *dette fiscale*

(8) Au présent article, ***dette fiscale*** s'entend du montant payable, au sens du paragraphe 223(1) de la *Loi de l'impôt sur le revenu*, compte non tenu des alinéas b) à c), par un particulier et de la somme à payer par un particulier au titre d'une loi provinciale qui prévoit 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*, y compris le montant des intérêts, sanctions et amendes imposés sous le régime de cette loi et de la loi provinciale. N'est cependant pas visée la somme relative aux obligations d'une personne morale dont un particulier peut être responsable en qualité d'administrateur ou d'ancien administrateur de celle-ci.

2005, ch. 47, art. 105; 2007, ch. 36, art. 53.

Faits motivant le refus, la suspension ou l'octroi de la libération sous conditions

173 (1) Les faits visés à l'article 172 sont les suivants :

a) la valeur des avoirs du failli n'est pas égale à cinquante cents par dollar de ses obligations non garanties, à moins que celui-ci ne prouve au tribunal que ce fait provient de circonstances dont il ne peut à bon droit être tenu responsable;

amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(b) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(c) the bankrupt has continued to trade after becoming aware of being insolvent;

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(h) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;

(i) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;

(j) the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;

(k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

b) le failli a omis de tenir les livres de comptes qui sont ordinairement et régulièrement tenus dans l'exercice de son commerce et qui révèlent suffisamment ses opérations commerciales et sa situation financière au cours de la période allant du premier jour de la troisième année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement;

c) le failli a continué son commerce après avoir pris connaissance de son insolvabilité;

d) le failli n'a pas tenu un compte satisfaisant des pertes d'avoirs ou de toute insuffisance d'avoirs pour faire face à ses obligations;

e) le failli a occasionné sa faillite, ou y a contribué, par des spéculations téméraires et hasardeuses, par une extravagance injustifiable dans son mode de vie, par le jeu ou par négligence coupable à l'égard de ses affaires commerciales;

f) le failli a occasionné à l'un de ses créanciers des frais inutiles en présentant une défense futile ou vexatoire dans toute action régulièrement intentée contre lui;

g) le failli a, au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, subi des frais injustifiables en intentant une action futile ou vexatoire;

h) le failli a, au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, alors qu'il ne pouvait pas acquitter ses dettes à leur échéance, accordé une préférence injuste à l'un de ses créanciers;

i) le failli a, au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, contracté des obligations en vue de porter ses avoirs à cinquante cents par dollar du montant de ses obligations non garanties;

j) le failli a, dans une occasion antérieure, été en faillite, ou a fait une proposition à ses créanciers;

k) le failli s'est rendu coupable de fraude ou d'abus frauduleux de confiance;

l) le failli a commis une infraction aux termes de la présente loi ou de toute autre loi à l'égard de ses biens, de sa faillite ou des procédures en l'espèce;

(l) the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;

(m) the bankrupt has failed to comply with a requirement to pay imposed under section 68;

(n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and

(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

m) le failli n'a pas fait les versements établis en application de l'article 68;

n) le failli a choisi la faillite et non la proposition comme solution à son endettement, dans le cas où il aurait pu faire une proposition viable;

o) le failli n'a pas rempli les autres obligations qui lui sont imposées au titre de la présente loi ou n'a pas observé une ordonnance du tribunal.

Application to farmers

(2) Paragraphs (1)(b) and (c) do not apply in the case of an application for discharge by a bankrupt whose principal occupation and means of livelihood on the date of the initial bankruptcy event was farming or the tillage of the soil.

R.S., 1985, c. B-3, s. 173; 1997, c. 12, s. 103.

Demande de libération faite par un cultivateur

(2) Les alinéas (1)b) et c) ne s'appliquent pas à une demande de libération présentée par un failli dont la principale activité — et la principale source de revenu — était, à l'ouverture de la faillite, l'agriculture ou la culture du sol.

L.R. (1985), ch. B-3, art. 173; 1997, ch. 12, art. 103.

Assets of bankrupt when deemed equal to fifty cents in dollar

174 For the purposes of section 173, the assets of a bankrupt shall be deemed of a value equal to fifty cents on the dollar on the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realized, is likely to realize or, with due care in realization, might have realized an amount equal to fifty cents on the dollar on his unsecured liabilities.

R.S., c. B-3, s. 144.

Avoirs d'un failli réputés équivaloir à cinquante cents par dollar

174 Pour l'application de l'article 173, les avoirs du failli sont réputés être d'une valeur égale à cinquante cents par dollar de la somme de ses obligations non garanties, lorsque le tribunal est convaincu que les biens du failli ont réalisé, réaliseront vraisemblablement ou auraient pu réaliser, si avait été exercée la prudence voulue, un chiffre égal à cinquante cents par dollar de ses obligations non garanties.

S.R., ch. B-3, art. 144.

Court may grant certificates

175 (1) A statutory disqualification on account of bankruptcy ceases when the bankrupt obtains from the court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part.

Le tribunal peut accorder certificat

175 (1) Une incapacité établie par un texte de loi quelconque, en raison de faillite, cesse lorsque le failli obtient du tribunal sa libération, ainsi qu'un certificat attestant que la faillite provient d'un malheur, sans mauvaise conduite de la part du failli.

Appeal

(2) The court may, if it thinks fit, grant a certificate mentioned in subsection (1), and a refusal to grant such a certificate is subject to appeal.

R.S., c. B-3, s. 145.

Appel

(2) Le tribunal peut, s'il le juge à propos, accorder le certificat mentionné au paragraphe (1), et appel peut être interjeté du refus d'accorder ce certificat.

S.R., ch. B-3, art. 145.

Duty of bankrupt on conditional discharge

176 (1) Where an order is granted on terms or conditions or on the bankrupt consenting to judgment, the

Obligation du failli dans le cas de libération sous conditions

176 (1) Lorsqu'une ordonnance est accordée subordonnément à des conditions, ou sur le consentement du failli bankrupt shall, until the terms, conditions or judgment is satisfied,

(a) give the trustee such information as he may require with respect to his earnings and after-acquired property and income, and

(b) not less than once a year, file in the court and with the trustee a statement verified under oath showing the particulars of any property or income he may have acquired subsequent to the order for his discharge,

and the trustee or any creditor may require the bankrupt to attend for examination under oath with respect to the facts contained in the statement or with respect to his earnings, income, after-acquired property or dealings.

Penalty for failure to comply

(2) Where the bankrupt fails to give information or to file a statement as required by subsection (1), to attend for examination when required to do so or to answer all questions fully and accurately with respect to his earnings, income, after-acquired property or dealings, the court may on the application of the trustee or of any creditor revoke the order of discharge.

Trustee to distribute funds payable under conditional discharge

(3) Where a conditional order of discharge of a bankrupt is made providing for payment of a further dividend or sum of money by the bankrupt, all payments on account thereof shall be made to the trustee for distribution to the creditors.

R.S., c. B-3, s. 146.

177 [Repealed, 2000, c. 12, s. 17]

Debts not released by order of discharge

178 (1) An order of discharge does not release the bankrupt from

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail;

(a.1) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting therefrom;

à un jugement, le failli doit, jusqu'à ce qu'il ait rempli ces conditions ou satisfait à ce jugement :

a) fournir au syndic les renseignements que ce dernier peut exiger à l'égard de ses gains et de ses biens et revenus subséquemment acquis;

b) au moins une fois chaque année, produire au tribunal et au syndic une déclaration attestée sous serment indiquant les détails de tous biens ou revenus qu'il peut avoir acquis subséquemment à sa libération.

Le syndic ou tout créancier peut exiger que le failli se présente pour être interrogé sous serment relativement aux faits contenus dans la déclaration, ou à ses gains, son revenu, ses biens postérieurement acquis ou ses opérations.

Peine en cas de manquement

(2) Lorsque le failli ne fournit pas les renseignements ou ne produit pas la déclaration qu'exige le paragraphe (1), ne se présente pas à l'examen lorsqu'il en est requis ou ne répond pas pleinement et exactement à toutes les questions qui se rapportent à ses gains, son revenu, ses biens postérieurement acquis ou ses opérations, le tribunal peut, à la demande du syndic ou d'un créancier, annuler l'ordonnance de libération.

Le syndic doit distribuer les fonds payables aux termes d'une libération conditionnelle

(3) Lorsqu'une ordonnance conditionnelle de libération d'un failli est rendue prescrivant que ce dernier paie un dividende ou une somme d'argent supplémentaire, tout versement à valoir sur ce dividende ou cette somme est fait au syndic pour distribution aux créanciers.

S.R., ch. B-3, art. 146.

177 [Abrogé, 2000, ch. 12, art. 17]

L'ordonnance de libération ne libère pas des dettes

178 (1) Une ordonnance de libération ne libère pas le failli :

a) de toute amende, pénalité, ordonnance de restitution ou toute ordonnance similaire infligée ou rendue par un tribunal, ou de toute autre dette provenant d'un engagement ou d'un cautionnement en matière pénale;

a.1) de toute indemnité accordée en justice dans une affaire civile :

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant de celles-ci;

(b) any debt or liability for alimony or alimentary pension;

(c) any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt;

(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

(e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

(f) liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim;

(g) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student;

(g.1) any debt or obligation in respect of a loan made under the *Apprentice Loans Act* where the date of bankruptcy of the bankrupt occurred

(i) before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or

(ii) within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or

(h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).

Court may order non-application of subsection (1)

(1.1) At any time after five years after the day on which a bankrupt who has a debt referred to in paragraph (1)(g)

b) de toute dette ou obligation pour pension alimentaire;

c) de toute dette ou obligation aux termes de la décision d'un tribunal en matière de filiation ou d'aliments ou aux termes d'une entente alimentaire au profit d'un époux, d'un ex-époux ou ancien conjoint de fait ou d'un enfant vivant séparé du failli;

d) de toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors qu'il agissait, dans la province de Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

e) de toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation qui découle d'une réclamation relative à des capitaux propres;

f) de l'obligation visant le dividende qu'un créancier aurait eu droit de recevoir sur toute réclamation prouvable non révélée au syndic, à moins que ce créancier n'ait été averti ou n'ait eu connaissance de la faillite et n'ait omis de prendre les mesures raisonnables pour prouver sa réclamation;

g) de toute dette ou obligation découlant d'un prêt consenti ou garanti au titre de la *Loi fédérale sur les prêts aux étudiants*, de la *Loi fédérale sur l'aide financière aux étudiants* ou de toute loi provinciale relative aux prêts aux étudiants lorsque la faillite est survenue avant la date à laquelle le failli a cessé d'être un étudiant, à temps plein ou à temps partiel, au regard de la loi applicable, ou dans les sept ans suivant cette date;

g.1) de toute dette ou obligation découlant d'un prêt octroyé au titre de la *Loi sur les prêts aux apprentis* lorsque la faillite est survenue avant la date à laquelle le failli a cessé, au regard de cette loi, d'être un apprenti admissible, au sens de cette loi, ou dans les sept ans suivant cette date;

h) de toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas a) à g.1).

Ordonnance de non-application du paragraphe (1)

(1.1) Lorsque le failli qui a une dette visée aux alinéas (1)g) ou g.1) n'est plus un étudiant à temps plein ou à

TAB 5

Court of King's Bench of Alberta

Citation: Delta 9 Cannabis Inc (Re), 2024 ABKB 657

Date: 20241108
Docket: 2401 09668
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as Amended

In the Matter of the Compromise or Arrangement of Delta 9 Cannabis Inc., Delta 9 Logistics Inc., Delta 9 Bio-Tech Inc., Delta 9 Lifestyle Cannabis Clinic Inc., and Delta 9 Cannabis Store Inc.

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction and Background

[1] On July 15, 2024, the Court granted an initial order (**Initial Order**) under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (*CCAA*) with respect to the "**Delta 9 Group**", namely Delta 9 Cannabis Inc (**Delta 9 Parent**), Delta 9 Logistics Inc (**Logistics**), Delta 9 Lifestyle Cannabis Clinic Inc (**Lifestyle**), Delta 9 Cannabis Store Inc (**Store**) and Delta 9 Bio-Tech Inc (**Bio-Tech**).

[2] On July 24, 2024, on the "comeback" application with respect to the Initial Order, the Court granted an Amended and Restated Initial Order (**ARIO**), a Claims Procedure Order and an order approving a sale and investment solicitation process (**SISP**) with respect to Bio-Tech (**Bio-Tech SISP Order**). The ARIO approved, among other things, the appointment of a Chief Restructuring Officer (**CRO**), Delta 9 Group borrowing from 2759054 Ontario Inc operating as Fika Herbal Goods (**Fika** or **Plan Sponsor**) subject to an approved an interim financing term sheet (**Interim Financing Term Sheet**), and a $1,500,000 break-fee in favour of Fika (**Break-Fee**).

[3] On September 11, 2024, the Court granted an order (**Extension Order**), among other things, extending the stay period under the ARIO to November 1, 2024 and approving an amendment to the Interim Financing Term Sheet between the Delta 9 Group and Fika.

[4] On October 22, 2024, Fika filed this application (**Application**). It seeks a creditors' meeting order:

Sheet's provision that the "Plan Sponsor shall pay out the outstanding balance of the SNDL Debt on Plan implementation".

[53] SNDL also argues that the Plan is not consistent with the Court's approval of the Restructuring Term Sheet in the ARIO. In reply oral argument, Fika's counsel suggested that the Court did not "approve" the Restructuring Term Sheet. That is a troubling argument for Fika to now make given that, in paragraph 10 of its of its Brief filed October 24, 2024, Fika stated: "This Court **approved** [the Restructuring Term Sheet] pursuant to the ARIO" (emphasis added).

[54] In any event, whether the Court formally or expressly used the words that the Restructuring Term Sheet was "approved" is not determinative. It is the substance of the Court order that prevails. Like other orders, *CCAA* orders should be interpreted by reading them as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context in which the order was made, and the intention of the court that granted the order: ***Weinrich Contracting Ltd v Wiebe***, 2022 ABCA 176 at para 25 citing ***Alberta Health Services v Alberta (Information and Privacy Commissioner)***, 2020 ABQB 263 at paras 29-31; ***Campbell v Campbell***, 2016 SKCA 39 at paras 14-17. Even template orders must be interpreted in the context of the particular litigation in which they are granted: ***Weinrich Contracting*** at para 25.

[55] In the ARIO, the Court approved the appointment of the CRO, including on these terms (emphasis added):

> Subject to the terms of this Order and authorization from the Applicants, the CRO is hereby authorized to assist the Applicants and to do all things, **carry out all actions and perform all duties described in the CRO Agreement**, and without limiting the generality of the foregoing, **the CRO is hereby empowered to do the following**:
>
> (a) assist the Applicants with the Restructuring (as defined in the CRO Agreement);
>
> [...]
>
> (d) **assist the Applicants in preparing and evaluating their projected cash flow statements** and approving the same, **in accordance with the terms** of the Interim Financing Term Sheet and the **Restructuring Term Sheet** (collectively, the "Term Sheets");
>
> (e) **assist with the proposed plan of arrangement in accordance with the terms of the Term Sheets** and the applicable orders of this Court, and any potential sale and investment solicitation process in connection with these proceedings;
>
> (f) assist the Applicants with any deliverables owed to the Plan Sponsor **pursuant to the Term Sheets**; [...]

[56] Further, the ARIO approved the Interim Financing Term Sheet, which appears to have also referenced the binding Restructuring Term Sheet. The ARIO also approved Fika's $1,500,000

TAB 6

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Der v. Hlookoff,*
2025 BCCA 193

Date: 20250612
Docket: CA50211

Between:

Hank Der

Appellant
(Claimant)

And

Lisa Marie Hlookoff also known as Lisa Marie Der

Respondent
(Respondent)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated October 4, 2024 (*Der v. Hlookoff*, Vancouver Docket E121683).

Counsel for the Appellant: D. Exel

The Respondent, appearing in person: L.M. Hlookoff

Place and Date of Hearing: Vancouver, British Columbia
April 4, 2025

Place and Date of Judgment: Vancouver, British Columbia
June 12, 2025

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Justice Edelmann

Summary:

This appeal is from an order requiring the appellant father to release RESP funds to reimburse living and educational expenses incurred by his daughter. The appellant claims the chambers judge was precluded from making the order as the expenses in question had been finally determined by a prior court order. He asserts the refusal to consider the reasons for judgment in interpreting that prior order was an error of law.

Held: Appeal allowed. Court orders are to be interpreted with regard to the context in which they are made, which includes the reasons for judgment. In this case, the reasons below made it clear that the issue before the chambers judge had already been determined by a prior court order. There was no basis on which that prior order could be varied or set aside. It was an error for the chambers judge to refuse to consider the reasons and his resulting order must be set aside.

McConnell, 2015 ONSC 2243. She says there is no palpable and overriding error in the chambers judge's assessment of the claim for payment of educational expenses in this case and it is appropriate to order that the funds be used for the purpose for which they were intended.

[28] She seeks special costs of the appeal, arguing she has suffered emotional distress as a result of the appeal and she says Mr. Der's litigious conduct must be deterred.

Analysis

New evidence

[29] The transcript of the hearing before Marzari J. is not in the appeal record. We do have the oral reasons for judgment of Marzari J., which include transcribed discussions between the judge and the litigants. That discussion was included by the judge because she was of the view it was necessary to understand her ruling. It is not necessary to apply to lead new or fresh evidence in order to put reasons for judgment before us. It is clear from the colloquy between the chambers judge in this case and Mr. Der that the reasons were available and Mr. Der wanted to refer to them in support of his argument but the judge was of the view that the reasons would not assist in interpreting the order of Marzari J. In the frequently cited judgment of the Privy Council in *Sans Souci Limited v. VRL Services Limited*, [2012] UKPC 6, Lord Sumption observed:

> [13] … [T]he construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order.

Reference to reasons for judgment

[30] The application before the chambers judge in this case required him to determine whether a prior order had finally determined what expenses could be

claimed on behalf of M as 2022/2023 Expenses. That called for an interpretation of the Marzari Order. It is settled law that in interpreting an order a court is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted: see, among others, *Yu v. Jordan*, 2012 BCCA 367; *Sutherland v. Reeves*, 2014 BCCA 222; *S.R. v. A.B.*, 2021 BCCA 28; and *MacAdams v. Grewal*, 2024 BCCA 367. In *R. v. Rajaratnam*, 2019 BCCA 209, this Court explicitly included the reasons for judgment as part of the relevant surrounding circumstances, noting “the court’s reasons, where they exist, will often be the strongest indicator of the objective meaning of the order”: at para. 156.

[31] In my view, that is so even if the order appears at first to be unambiguous. In *Re: Sharpe,* [1992] FCA 616 (Aust.), (cited with approval in *Campbell v. Campbell*, 2016 SKCA 39 and *D.B. v. I.S.*, 2019 NBCA 6) Justice Drummond held:

> [20] … even if a judgment is not ambiguous, it is nevertheless proper (if not essential) in construing it to have regard to the factual context in which the judgment was given and that this context includes the pleadings, <u>the reasons for the judgment</u> and the course of evidence at the trial.
>
> [Emphasis added.]

[32] I agree with Mr. Der’s submission that where, as here, there is a question of interpretation of a prior order, specifically what issue with respect to educational expenses was reserved for consideration in January 2024, it is a reversible error to consider the reasons for judgment to be irrelevant to the interpretative process. As the Saskatchewan Court of Appeal held in *Hertz v. Kille*, 2023 SKCA 3, an issue as to whether a court decision has been properly interpreted by a judge gives rise to a question of law. The recital of authorities in support of that proposition in that case bears repeating:

> [15] … [T]he interpretation of a judicial decision or court order is not governed by the subjective understandings of the parties … An issue as to whether a court decision has been properly interpreted by a judge gives rise to a question of law (see *Beauharnois Election Case (Loy v Poirier)* (1902), 32 SCR 111; *R v Telmosse*, [1945] 1 DLR 779 (SCC); *Pratt v Johnson*, [1959] SCR 102 [*Pratt*]; and *Letter Carrier’s Union of Canada v Canadian Union of Postal Workers*, [1975] 1 SCR 178).

TAB 7

Calgary Translation Services
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STATUTORY DECLARATION OF TRANSLATION

IN THE MATTER OF The translation of a document from French language into English language.

I, Isabel Andrada, freelance translator with Calgary Translation Services, an Alberta corporation, do SOLEMNLY AND SINCERELY DECLARE that:

1. I am sufficiently proficient in both French language and English language and can read, write, and understand both languages.
2. I have carefully prepared the attached translations:
3. I personally translated the attached documents to this my declaration, from French language into English language and I have read over the translation made by me.
4. The English translation of the attached document is in all respects, a true, correct, and faithful translation from French language into English language.

Translator's Name
Isabel Andrada

HAMODAH, RANA ABDULRAHIM
A Commissioner for Oaths
in and for the Province of Alberta
My Commission Expires October 20, 20 22

APPROVED

COUR SUPÉRIEURE
(Chambre commerciale)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-11-064357-243

DATE : 26 septembre 2025

SOUS LA PRÉSIDENCE DE L'HONORABLE PATRICK OUELLET, J.C.S.

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT ET DE COMPROMIS DE :

9526-1624 QUÉBEC INC.
Débitrice
-et-
TAIGA MOTORS CORPORATION / CORPORATION MOTEURS TAIGA
Requérante
-et-
AUTORITÉ DES MARCHÉS FINANCIERS
Défenderesse

JUGEMENT

APERÇU

[1] Une ordonnance de dévolution inversée (« **ODI** ») (en anglais, *Reverse Vesting Order*, ou RVO) rendue par la Cour supérieure, en vertu de son pouvoir général issue de l'article 11 de la *Loi sur les arrangements avec les créanciers des compagnies*[1] (« **LACC** »), peut-elle avoir pour effet de permettre à une société, qui était un émetteur assujetti[2] et dont les actions se transigeaient en bourse, de refuser toute collaboration avec l'Autorité des marchés financiers (« **AMF** »), sous prétexte que l'ordonnance de la Cour l'en décharge entièrement? Là est la question à laquelle le Tribunal doit répondre.

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1 L.R.C. (1985), ch. C-36.
2 Tel que ce terme est défini à l'article 68 de la *Loi sur les valeurs mobilières*.

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No.: 500-11-064357-243
Date: September 26, 2025

BEFORE THE HONOURABLE PATRICK OUELLET, J.C.S.

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

9526-1624 QUÉBEC INC.
Debtor

- and -
TAIGA MOTORS CORPORATION / CORPORATION MOTEURS TAIGA
Applicant

- and -
AUTORITÉ DES MARCHÉS FINANCIERS
Respondent

JUDGMENT

OVERVIEW

[1] A reverse vesting order issued by the Superior Court under its general powers derived from section 11 of the *Companies' Creditors Arrangement Act* ("**CCAA**")(1) may have the effect of allowing a corporation, which was a reporting issuer(2) and whose shares were traded on the stock exchange, to refuse any cooperation with the Autorité des marchés financiers ("**AMF**"), under the pretext that the Court's order releases it entirely. That is the question this Court must decide.

Footnotes:

1. *R.S.C. (1985), c. C-36 — Companies' Creditors Arrangement Act (CCAA).*
2. As the term is defined in section 68 of the *Securities Act.*

[2] La question à trancher se situe au carrefour de l'application de la LACC, qui encadre la restructuration des entreprises en difficulté financières, et de la *Loi sur les valeurs mobilières*[3] (« **LVM** »), qui gouverne le bon fonctionnement du marché des valeurs mobilières au Québec, par le biais de la défenderesse AMF.

[3] Le présent litige soulève la question de l'application, de l'interprétation et de la portée d'une ODI rendue par cette Cour et examine ses effets sur les obligations de la requérante (« **Taiga** ») à l'égard d'une enquête instituée par l'AMF.

[4] Pour les motifs qui suivent, le Tribunal est d'avis que le l'Ordonnance ODI (tel que défini plus loin) n'altère pas l'obligation de Taiga de coopérer avec l'AMF et de lui fournir les informations qu'elle demande, afin qu'elle puisse mener à bien son enquête.

1. Introduction – les procédures sous la LACC et l'Ordonnance ODI

[5] Taiga œuvre dans le domaine de la fabrication de véhicules électriques hors route. Au cours des dernières années, elle a fait face à des problèmes financiers majeurs et a subi des pertes importantes, ce qui l'a menée à demander la protection des tribunaux en vertu de la LACC.

[6] Le 10 juillet 2024, cette Cour rendait l'ordonnance initiale en vertu de la LACC, ordonnant notamment la suspension des procédures judiciaires à l'encontre de Taiga[4]. Le même jour, le juge Sheehan autorisait aussi le contrôleur à mettre en œuvre un processus SISP (en anglais, « *Sale and Investment Solicitation Process* ») en lien avec les affaires et les actifs de Taiga[5].

[7] Taiga était alors une société dont les actions et les bons de souscription se transigeaient sur la Bourse de Toronto[6]. En raison de son défaut de déposer certains documents financiers pour la période se terminant le 30 juin 2024, l'AMF a émis, le 19 août 2024, une ordonnance d'interdiction d'opérations sur les actions de Taiga[7].

[8] Au terme du SISP, l'offre formulée par M. Stewart Wilkinson (« **l'Acheteur** ») a été retenue.

[9] En fin de journée le 4 octobre 2024, Taiga notifiait aux parties intéressées, incluant l'AMF[8], une *Application for the issuance of a second amended and restated initial order and an approval and reverse vesting order*[9]. Les pièces au soutien de cette

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3 RLRQ, ch. V-1.1.
4 Pièce R-6.
5 Pièce R-8.
6 Pièce R-7, para. 8.
7 Voir notamment la pièce R-16, Décision no. 2024-FS-1063991, paragraphe 7.
8 Pièce R-9, voir la notification à Me Patrick Désalliers, avocat au sein du contentieux de l'AMF.
9 Pièce R-9.

[2] The issue to be decided lies at the intersection of the application of the CCAA, which governs the restructuring of financially distressed companies, and the *Securities Act* ("**LVM**")(3), which regulates the proper functioning of Québec's securities market through the respondent AMF.

[3] The present dispute raises the question of the application, interpretation, and scope of an RVO issued by this Court, and examines its effects on the obligations of the applicant (Taiga) in connection with an investigation initiated by the AMF.

[4] For the reasons that follow, the Court is of the opinion that the RVO does not alter Taiga's obligation to cooperate with the AMF and to provide it with the information it requests, so that the AMF may carry out its investigation properly.

1. Introduction – Proceedings under the CCAA and the RVO

[5] Taiga operates in the field of electric off-road vehicle manufacturing. In recent years, it has faced significant financial difficulties and incurred major losses, which led it to seek protection from the courts under the CCAA.

[6] On July 10, 2024, this Court issued an initial order under the CCAA, notably providing for the suspension of judicial proceedings against Taiga (4). On the same day, Judge Sheehan also authorized the monitor to implement the SISP (*Sale and Investment Solicitation Process*) concerning Taiga's business and assets (5).

[7] Taiga was then a company whose shares and warrants were traded on the Toronto Stock Exchange (6). Due to its failure to file certain financial documents for the period ending June 30, 2024, the AMF issued, on August 19, 2024, an order prohibiting trading in Taiga's shares (7).

[8] At the conclusion of the SISP, the offer submitted by Mr. Stewart Wilkinson (the "**Purchaser**") was accepted.

[9] Late in the day on October 4, 2024, Taiga notified the interested parties, including the AMF(8), of an *Application for the issuance of a second amended and restated initial order and an approval and reverse vesting order* (9). The documents supporting this application were filed accordingly.

Footnotes:
3. *RLRQ, ch. V-1.1.*
4. Exhibit R-6.
5. Exhibit R-8.
6. Exhibit R-7, para. 8.
7. See, in particular, Exhibit R-16, Decision No. 2024-FS-1063991, paragraph 7.
8. Exhibit R-9, see notification to Mr. Patrick Désalliers, counsel for the AMF.
9. Exhibit R-9.

demande[10] ont été notifiées le 7 octobre 2024 et la demande était présentable le 10 octobre 2024.

[10] Une ODI est une façon relativement nouvelle d'atteindre les objectifs de la LACC. Plutôt que de simplement vendre les actifs de la société débitrice, la mise en place d'une série de transactions fera en sorte que : 1) l'acheteur deviendra l'unique actionnaire de la société débitrice et 2) les dettes et obligations de la débitrice que l'acheteur ne veut pas conserver seront dévolues à une société tierce (souvent créée à cette fin spécifique). C'est cette société qui sera ensuite mise en faillite. Cette façon de faire permet à l'acheteur de ne pas hériter de ces dettes, puisqu'il devient actionnaire de la société débitrice une fois expurgée des dettes et obligations non-désirées[11].

[11] Bien que nouvelle, les tribunaux ont confirmé que l'ODI peut être un moyen approprié pour une débitrice de vendre son entreprise lorsque les circonstances justifient une telle structure[12]. En particulier, les tribunaux ont considéré approprié d'approuver des structures ODI dans certains cas où la débitrice œuvre dans un marché hautement réglementé et où certains actifs importants de la débitrice sont des permis, licences ou autorisations, dont la valeur dépend de la capacité de l'acheteur de continuer les opérations de la débitrice. Dans plusieurs cas, ces actifs intangibles sont incessibles ou difficile à céder, ce qui explique le recours à l'ODI, qui permet d'éviter la nécessité d'une telle cession. C'est le cas ici[13].

[12] Dans le cas qui nous occupe, la débitrice 9526-1624 Québec inc. (« **9526** ») est l'entité créée spécifiquement en vue de l'ODI qui, au terme du processus, héritera des dettes et obligations non-désirées de Taiga et sera ensuite mise en faillite. Taiga continuera alors les opérations de l'entreprise, nettoyée de plusieurs dettes.

[13] Il n'est pas contesté que, malgré la notification de la demande à l'AMF, cette dernière n'a pas été représentée à la Cour lors de l'audience du 10 octobre 2024 et n'a fait aucune représentation concernant le texte de l'ordonnance proposée.

[14] Le 10 octobre 2024, cette Cour accueillait la demande et rendait *l'Approval and Reverse Vesting Order* (l'« **Ordonnance ODI** »)[14]. Pour des raisons évidentes, l'Ordonnance ODI contient des dispositions robustes dans le but de s'assurer que Taiga soit libérée de toute réclamation passée, pour ainsi repartir sur de nouvelles bases à la suite de la restructuration sous la LACC.

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10 Une des pièces au soutien de cette demande était un projet d'*Approval and Reverse Vesting Order*, pièce R-11.

11 *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828, para. 85.

12 *Id*, para. 86

13 Voir le paragraphe 17 des motifs au soutien de l'Ordonnance ODI, pièce R-2 (*Taiga Motors Corporation et Deloitte Restructuring Inc.*, 2024 QCCS 4319)

14 Pièce R-1. Les motifs soutenant l'Ordonnance ODI ont été rendus dans un jugement daté du 25 novembre 2024, *Taiga Motors Corporation et Deloitte Restructuring Inc.*, 2024 QCCS 4319, Pièce R-2.

The application was served on October 7, 2024, and the application was made on October 10, 2024.

[10] An RVO is a relatively new way of achieving the objectives of the CCAA. Rather than simply selling the debtor's assets, a series of transactions is structured so that: (A) The purchaser becomes the sole shareholder of the debtor company; and (B) The debts and obligations of the debtor that the purchaser does not wish to assume are transferred to a third company (often created specifically for that purpose). This new company is then put into bankruptcy. This method allows the purchaser to avoid inheriting those debts, since it becomes the shareholder of the debtor company only after the latter has been cleansed of its unwanted debts and obligations (11).

[11] Although relatively new, courts have confirmed that an RVO can be an appropriate means for a debtor to sell its business where circumstances justify such a structure (12). In particular, courts have deemed RVO structures appropriate in cases where the debtor operates in a highly regulated market and holds significant assets, permits, licenses, or authorizations, whose value depends on the purchaser's ability to continue the debtor's operations. In many cases, such intangible assets are difficult or impossible to transfer, which explains the use of the RVO to avoid the need for a conventional sale. That is the case here (13).

[12] In the present case, the debtor 9526-1624 Québec Inc. (*"**9526**"*) is the entity specifically created for the RVO process. At the end of this process, it will inherit Taiga's unwanted debts and obligations and will then be placed into bankruptcy. Taiga will continue the company's operations, free from several debts.

[13] It is undisputed that, despite notification of the application to the AMF, the latter did not appear before the Court at the October 10, 2024 hearing and made no representations regarding the proposed order.

[14] On October 10, 2024, this Court granted the application and issued the Approval and Reverse Vesting Order (the "**RVO**") (14) For obvious reasons, the RVO includes robust provisions to ensure that Taiga is released from all past claims, thereby enabling it to restart operations on a new financial footing under the CCAA restructuring process.

Footnotes:

10. Among the documents supporting this application was a draft *Approval and Reverse Vesting Order*, Exhibit R-11.
11. *Arrangement concerning Blackrock Metals Inc.*, 2022 QCCS 2828, para. 85.
12. Id., para. 86.
13. See paragraph 17 of the reasons supporting the RVO, Exhibit R-2 (*Taiga Motors Corporation and Deloitte Restructuring Inc.*, 2024 QCCS 4319).
14. The reasons supporting the RVO were issued in a judgment dated November 25, 2024, *Taiga Motors Corporation and Deloitte Restructuring Inc.*, 2024 QCCS 4319, Exhibit R-2.

[15] À la suite de l'Ordonnance ODI, toutes les actions émises et en circulation de Taiga ont été vendues à l'Acheteur. Pour ce faire, Taiga devait d'abord obtenir la levée de l'ordonnance d'interdiction d'opérations émise par l'AMF, ce qui a été fait le 16 octobre 2024 et le 29 octobre 2024[15].

[16] Le 30 octobre 2024, le contrôleur émettait son certificat[16], attestant du fait que toutes les étapes de la transaction prévues à l'Ordonnance ODI ont été complétées.

[17] À compter de la délivrance de ce certificat par le contrôleur, l'Ordonnance ODI a notamment pour effet de :

17.1. Transférer et faire assumer toutes les *Excluded Liabilities* (tel que défini à l'Ordonnance ODI) exclusivement par 9526[17], à l'exclusion de Taiga qui en est entièrement déchargée[18];

17.2. Décharger Taiga de toute responsabilité en lien avec les *Excluded Liabilities* et en lien avec tout *Claim* (tel que défini à l'Ordonnance ODI) se rapportant aux activités de Taiga précédant la délivrance du Certificat du Contrôleur[19];

17.3. Prohiber de manière permanente l'institution de toute poursuite contre Taiga en lien avec toutes les *Excluded Liabilities*[20]. Le Tribunal précise que les définitions de *Excluded Liabilities* et *Liabilities* sont extrêmement larges.

17.4. Quittancer les administrateurs, dirigeants et employés de Taiga[21], incluant MM. Samuel Bruneau, Gabriel Bernatchez et Paul Achard (les « **Individus quittancés** ») de « *any and all present and future claims whatsoever* […] *based in whole or in part on any act or omission* […] *or other occurrence existing or taking place prior to the [issuance of the Monitor's Certificate]* […] *in respect of [Taiga] or their assets, business or affairs,* […] *wherever or however conducted or governed, the administration and/or management of [Taiga] and these proceedings* […] » (la « **Quittance** »)[22].

17.5. La Quittance n'est toutefois pas applicable en ce qui a trait à « *any claim […] arising from fraud or willful misconduct, nor any claim against the Directors & Officers of [Taiga] that is not permitted to be released pursuant to section 5.1 (2)* » de la LACC.

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15 Pièce R-16.
16 Pièce R-14.
17 Cette société est appelée « *ParentCo* » dans l'Ordonnance ODI.
18 Para. 27 d) de l'Ordonnance ODI, pièce R-1.
19 Para. 27 i) de l'Ordonnance ODI, pièce R-1.
20 Para 27 f) de l'Ordonnance ODI, pièce R-1.
21 Définis comme les *Directors & Officers* au para. 48 de l'Ordonnance ODI, pièce R-1.
22 Para. 48 de l'Ordonnance ODI, pièce R-1.

[15] Following the RVO, all shares issued and outstanding in Taiga were sold to the Purchaser. To do this, Taiga first had to obtain the lifting of the cease-trade order issued by the AMF, which occurred between October 16 and October 29, 2024 (15).

[16] On October 30, 2024, the Monitor issued its certificate (16), confirming that all steps of the transaction provided for in the RVO had been completed.

[17] As of the issuance of that certificate by the Monitor, the RVO notably had the following effects:

17.1. Transfer and assumption of all *Excluded Liabilities* (as defined in the RVO) exclusively by 9526 (17), to the exclusion of Taiga, which is thereby completely released (18).

17.2. Release of Taiga from any responsibility related to the *Excluded Liabilities* and any related *Claim* (as defined in the RVO) concerning Taiga's activities prior to the issuance of the Monitor's Certificate (19).

17.3. Permanent prohibition on any institution from bringing legal proceedings against Taiga in connection with any of the *Excluded Liabilities* (20). The Court notes that the definitions of *Excluded Liabilities* and *Liabilities* are extremely broad.

17.4. Release of Taiga's directors, officers, and employees (21) — including Messrs. Samuel Bruneau, Gabriel Bernatchez, and Paul Achard (the "**Released Individuals**") — from "any and all present and future claims whatsoever, based in whole or in part on any act or omission, or other occurrence existing or taking place prior to the issuance of the Monitor's Certificate, in respect of [Taiga] or their assets, business, or affairs, wherever or however conducted or governed, the administration and/or management of [Taiga] and these proceedings" (the "**Release**") (22).

17.5. However, the Release does not apply to "any claim arising from fraud or willful misconduct, nor any claim against the Directors & Officers of [Taiga] that is not permitted to be released pursuant to section 5.1(2) of the CCAA."

Footnotes:

15. Exhibit R-16.
16. Exhibit R-14.
17. This company is referred to as *ParentCo* in the RVO .
18. Para. 27(d) of the RVO, Exhibit R-1.
19. Para. 27(i) of the RVO, Exhibit R-1.
20. Para. 27(j) of the RVO,Exhibit R-1.
21. Defined as *Directors & Officers* in para 48 of the RVO, Exhibit R-1.
22. Para. 48 of the RVO, Exhibit R-1.

[18] L'Ordonnance ODI n'a pas été portée en appel et a maintenant acquis l'autorité de la chose jugée[23]. Taiga n'est désormais plus un émetteur assujetti (au sens de l'article 68 de la LVM) et n'a dorénavant aucun titre coté en bourse.

2. L'enquête de l'AMF

[19] Le 11 avril 2025, l'AMF institue une enquête (l'« **Enquête** ») portant sur :

19.1. Des informations potentiellement fausses ou trompeuses qui auraient été incluses dans des documents produits par Taiga en vertu de la LVM ou ses règlements; et

19.2. Les gestes commis par les administrateurs, dirigeants, employés, associés, représentants et mandataires de Taiga, ou toute autre personne impliquée dans la préparation, présentation, transmission, attestation et/ou diffusion des informations potentiellement fausses ou trompeuses.[24]

[20] Selon les allégations de Taiga, les cibles de l'enquête sont au nombre de quatre (4) : Taiga elle-même ainsi que les trois (3) Individus quittancés[25].

[21] Le 15 avril 2025, l'AMF assigne Taiga au moyen d'une assignation[26] (« **l'Assignation** »), lui demandant notamment de remettre à ses enquêteurs une importante quantité de documentation et d'informations. Le délai accordé pour y répondre est d'environ deux (2) mois. Il n'est pas contesté que les informations demandées par l'AMF couvrent la période du 26 mars 2021 au 20 juillet 2024, soit avant l'émission du certificat du contrôleur.

3. Le litige opposant les parties

[22] C'est dans ce contexte que, le 11 juin 2025, Taiga saisit cette Cour d'une *Application of Taiga Motors Corporation to enforce conclusions of the Approval and Reverse Vesting Order dated October 10, 2024* (la « **Demande de Taiga** »). Les conclusions principales recherchées se lisent comme suit :

> « **DECLARE** that Taiga Motors Corporation has no obligation to comply with the Assignation à un témoin addressed to Corporation Moteurs Taiga dated April 15, 2025 issued by the Autorité des marchés financiers in its matter 120092-E-2025-00737 (the **Subpoena**);
>
> **DECLARE** that Taiga Motors Corporation has no obligation in respect of the investigation commenced by the Autorité des marchés on April 11, 2025 in respect of any and all potential misrepresentation made by Taiga Motors

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23 Art. 321 C.p.c.
24 Voir notamment le paragraphe 6 de la Demande de Taiga.
25 Paragraphe 7 de la Demande de Taiga.
26 L'Assignation est transmise à l'attention de MM. Stewart Wilkinson et Samuel Bruneau.

[18] The RVO was not appealed and has now acquired the authority of res judicata (23). Taiga is no longer a reporting issuer (within the meaning of section 68 of the *Securities Act*) and no longer has any securities listed on the stock exchange.

2. The AMF Investigation

[19] On April 11, 2025, the AMF initiated an investigation (the "**Investigation**") regarding:

19.1. Potentially false or misleading information that may have been included in documents produced by Taiga under the *Securities Act* and its regulations; and

19.2. Acts committed by Taiga's directors, officers, employees, associates, representatives, and agents, or by any other person involved in the preparation, presentation, transmission, certification, and/or dissemination of potentially false or misleading information (24).

[20] According to Taiga's allegations, the Investigation targets four parties: Taiga itself and the three *Released Individuals* (Messrs. Samuel Bruneau, Gabriel Bernatchez, and Paul Achard) (25).

[21] On April 15, 2025, the AMF served Taiga with a subpoena ("**Subpoena**") (26), requiring it to provide a substantial quantity of documentation and information. The period granted to respond was about two months. It is undisputed that the information requested by the AMF covered the period from March 26, 2021 to July 20, 2024, i.e., before the issuance of the Monitor's Certificate.

3. The Dispute Between the Parties

[22] In this context, on June 11, 2025, Taiga filed before this Court an Application of Taiga Motors Corporation to enforce conclusions of the Approval and Reverse Vesting Order dated October 10, 2024 ("**Taiga's Application**").

The main conclusions sought read as follows:

DECLARE that Taiga Motors Corporation has no obligation to comply with the subpoena addressed to Corporation Moteurs Taiga dated April 15, 2025, issued by the *Autorité des marchés financiers* in its matter 120092-E-2025-00737 (the "Subpoena");

DECLARE that Taiga Motors Corporation has no obligation in respect of the investigation commenced by the *Autorité des marchés financiers* on April 11, 2025, regarding any and all potential misrepresentations made by Taiga Motors... … *(sentence continues on next page)*

Footnotes:

23. *Article 321 of the Code of Civil Procedure (C.p.c.)*
24. See paragraph 6 of Taiga's Application.
25. Paragraph 7 of Taiga's Application.
26. The subpoena was addressed to Messrs. Stewart Wilkinson and Samuel Bruneau.

Corporation in its continuous disclosure record at any time prior to the issuance of the Certificate of the Monitor on October 30, 2024;

QUASH AND DECLARE the Subpoena null and void; »

[23] Le 4 juillet 2025, l'AMF réplique avec une demande en irrecevabilité à l'encontre de la Demande de Taiga. Elle prétend que cette demande est irrecevable en droit et doit être rejetée, même en tenant pour avérées les allégations y étant contenues.

3.1. La position de Taiga

[24] Taiga avance que l'Ordonnance ODI a pour effet de la libérer entièrement et sans conditions de toute responsabilité potentielle à l'égard de l'ensemble des *Excluded Liabilities* (tel que défini à l'Ordonnance ODI), ces *Excluded Liabilities* devant être assumées exclusivement par 9526 (qui est identifiée comme étant la *ParentCo* dans l'Ordonnance ODI).

[25] Plus précisément, elle soutient que l'Ordonnance ODI a pour effet de la décharger de toute responsabilité et de prohiber toute poursuite contre elle en lien avec les *Excluded Liabilities* et relativement à tout *Claim* se rapportant aux activités de Taiga précédant la délivrance du certificat du contrôleur[27].

[26] Elle réfère aux définitions des mots *Claim*, *Person* et *Governmental Authority* contenues à l'Ordonnance ODI[28] :

« **Claims** means <u>any claim of any nature or kind</u> (including any cross-claim or counterclaim), demand, <u>investigation</u>, chose in [sic] or cause of action, suit, default, assessment, litigation, <u>third party action</u>, arbitral proceeding <u>or proceeding **by** or before any Person.</u>

Person means any individual, partnership, limited partnership, limited liability company, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, executor, administrator or other legal personal representative, <u>**Governmental Authority**</u> or other entity however designated or constituted;

Governmental Authority means any domestic or foreign government, whether federal, <u>provincial</u>, state, territorial or municipal; and <u>**any governmental agency**</u>, ministry, department, <u>court (including the Court), tribunal, commission</u>, stock exchange, bureau, board or other instrumentality <u>**exercising or purporting to exercise**</u> legislative, judicial, <u>**regulatory** or administrative **functions** of, or</u> <u>**pertaining to**</u>, government or <u>**securities market regulation;**</u> »[29]

[27] Para 27 de l'Ordonnance ODI, pièce R-1.

[28] Voir la pièce R-1, Schedule I, aux pages 17 à 21, pour l'ensemble des termes définis en lien avec l'Ordonnance ODI.

[29] L'emphase est issue du plan d'argumentation de Taiga daté du 4 août 2025, au paragraphe 30.

> "Corporation in its continuous disclosure record at any time prior to the issuance of the Certificate of the Monitor on October 30, 2024;
>
> **QUASH AND DECLARE** the Subpoena null and void;"

[23] On July 4, 2025, the AMF replied with a motion to dismiss Taiga's Application, arguing that the Application is legally inadmissible and must be rejected, even if all of its factual allegations are assumed to be true.

3.1. Taiga's Position

[24] Taiga argues that the RVO had the effect of completely and unconditionally releasing it from any potential responsibility regarding all *Excluded Liabilities* (as defined in the RVO). These *Excluded Liabilities* were to be assumed exclusively by 9526 (identified as *ParentCo* in the RVO).

[25] More specifically, Taiga maintains that the RVO discharged it from all responsibility and prohibited any legal action against it in connection with any of the *Excluded Liabilities* and with any *Claim* related to Taiga's activities prior to the issuance of the Monitor's Certificate (27).

[26] Taiga refers to the definitions of the terms Claim, Person, and Governmental Authority contained in the RVO (28):

> **"Claims** means any claim of any nature or kind (including any cross-claim or counterclaim), demand, investigation, chose in action or cause of action, suit, default, assessment, litigation, third-party action, arbitral proceeding or proceeding **by** or before any Person.*
>
> **Person** means any individual, partnership, limited partnership, limited liability company, joint venture, syndicate, sole proprietorship, company or corporation with or without share capital, unincorporated association, trust, trustee, executor, administrator or other legal personal representative, **Governmental Authority** or other entity however designated or constituted.
>
> **Governmental Authority** means any domestic or foreign government, whether federal, provincial, state, territorial or municipal; and **any governmental agency**, ministry, department, court (including the Court), tribunal, commission, stock exchange, bureau, board or other instrumentality **exercising or purporting to exercise** legislative, judicial, **regulatory** or administrative **functions** of, or **pertaining to**, government or **securities market regulation."** (29)

Footnotes:

27. Paragraph 27 of the RVO, Exhibit R-1.
28. See Exhibit R-1, Schedule I, pages 17 to 21, for all defined terms related to the RVO Order..
29. Emphasis taken from Taiga's argument plan dated August 4, 2025, at paragraph 30.

[27] Selon Taiga, il est clair que le jeu des définitions susmentionnées fait en sorte de prohiber toute enquête de l'AMF à son égard, puisque la définition du terme « Claims » englobe expressément toute enquête d'une autorité gouvernementale telle l'AMF.

[28] S'il subsistait quelques doutes au sujet de la portée de l'Ordonnance ODI, Taiga réfère à son paragraphe 27 i) qui, selon elle, dissipe tout doute potentiel :

> « i) for the avoidance of doubt, the Taiga Group, the Purchaser, and their respective Affiliates shall not retain or assume, as applicable, and shall have no liability in respect of any of the Excluded Liabilities or any Claim arising in connection with any of the foregoing; »[30]

[29] Selon Taiga, devant les termes clairs du l'Ordonnance ODI, le fait par l'AMF d'insister sur la production des documents demandés dans l'Assignation démontre que l'AMF cherche à réécrire les termes de l'Ordonnance ODI, ce qui constituerait un appel déguisé à l'encontre de ce jugement, qui a pourtant acquis l'autorité de la chose jugée.

[30] Taiga soutient aussi que l'AMF était parfaitement consciente des termes de l'Ordonnance ODI, ayant reçu notification de la Demande de Taiga avant sa présentation. Or, si l'AMF voulait que l'Ordonnance ODI ne dégage pas Taiga de toute obligation en lien avec ses enquêtes, elle n'avait qu'à intervenir auprès de la Cour supérieure et faire les représentations en conséquence. Taiga reproche donc à l'AMF de s'être « tapie dans les mauvaises herbes » (expression mieux connue dans sa forme anglaise – *lie in the weeds*), alors qu'elle aurait très bien pu négocier une modification (*carve out*) de l'Ordonnance ODI.

[31] Taiga avance finalement qu'en l'absence de l'Ordonnance ODI, incluant le fait que 9526 assume, à l'exclusion de Taiga, l'ensemble des *Excluded Liabilities*, elle n'avait aucune obligation de procéder à l'acquisition des actions de Taiga[31]. Elle soutient donc, déclarations sous serment à l'appui, qu'en l'absence de l'Ordonnance ODI telle que prononcée, elle n'aurait tout simplement pas procédé à cette acquisition[32].

3.2. La position de l'AMF

[32] L'AMF soutient que la Demande de Taiga est irrecevable en droit, même en tenant pour avérés les faits y étant allégués et ce, pour plusieurs motifs.

[33] Elle avance d'abord que le véritable objectif de la Demande de Taiga est de faire entièrement échec à l'Enquête et à l'Assignation. Selon elle, la lecture des conclusions recherchées par Taiga, notamment une déclaration à l'effet qu'elle n'a aucune

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30 L'emphase est issue du plan d'argumentation de Taiga daté du 4 août 2025, au paragraphe 29.
31 Paragraphes 25 à 31 de la Demande de Taiga. Voir aussi le *Share Purchase Agreement*, pièce R-12, aux articles 2.4, 8.1 et la Schedule C.
32 Paragraphe 32 de la Demande de Taiga, soutenu par les déclarations sous serment de MM. Samuel Bruneau et Stewart Wilkinson.

[27] According to Taiga, it is clear that the definitions mentioned above effectively prohibit any investigation by the AMF against it, since the definition of the term *"Claims"* expressly includes any investigation by a governmental authority such as the AMF.

[28] If any doubts remained about the scope of the RVO, Taiga refers to its paragraph 27(i), which, according to Taiga, dispels all such doubt: "for the avoidance of doubt, the Taiga Group, the Purchaser, and their respective Affiliates shall not retain or assume, as applicable, and shall have no liability in respect of any of the Excluded Liabilities or any Claim arising in connection with any of the foregoing;" (30)

[29] Taiga argues that, given the clear wording of the RVO, the AMF's insistence on obtaining the documents requested in the Subpoena amounts to an attempt to rewrite the terms of the RVO, which would constitute a disguised appeal against this judgment—one that has already acquired the authority of res judicata.

[30] Taiga also contends that the AMF was fully aware of the terms of the RVO, having received a copy of Taiga's Application before it was presented to the Court. Taiga claims that if the AMF had wished the RVO *not* to release Taiga from all obligations in connection with its investigations, the AMF should have intervened before the Superior Court and made its representations accordingly. Taiga accuses the AMF for having "lied in the weeds" while it could have sought a carve-out in the RVO.

[31] Finally, Taiga argues that, absent the RVO, 9526 would have assumed, to the exclusion of Taiga, all *Excluded Liabilities*, but would have had no obligation to proceed with the acquisition of Taiga's shares (31). Taiga supports this with sworn statements, asserting that without the RVO being granted, the acquisition simply would not have taken place (32).

3.2. The AMF's Position

[32] The AMF maintains that Taiga's Application is legally inadmissible, even if all the alleged facts are taken as true, for several reasons.

[33] The AMF argues, first of all, that the true objective of Taiga's Application is to derail the Investigation and the Subpoena. According to the AMF, reading Taiga's conclusions, especially its request for a declaration that it has no obligation to comply with the AMF in the Investigation, ("in respect of any and all potential misrepresentation made by [Taiga] in its continuous disclosure"... *(sentence continues on next page)*

Footnotes:
30. Emphasis drawn from Taiga's argument plan dated August 4, 2025, para. 29.
31. Paragraphs 25–31 of Taiga's Application. See also the *Share Purchase Agreement*, Exhibit R-12, Articles 2.4, 8.1 and Schedule C.
32. Paragraph 32 of Taiga's Application, supported by sworn statements of Messrs. Samuel Bruneau and Stewart Wilkinson.

obligation de collaborer avec l'AMF dans le cadre de l'Enquête *(« in respect of any and all potential misrepresentation made by [Taiga] in its continuous disclosure* »), outrepasse une enquête sur la responsabilité de Taiga uniquement.

[34] Selon l'AMF, une telle conclusion contrecarrerait aussi une enquête sur les agissements des Individus quittancés, malgré le fait que leur quittance ne soit pas applicable en ce qui concerne des agissements frauduleux, une faute intentionnelle ou toute réclamation ne pouvant pas être libérée en vertu de l'article 5.1 (2) de la LACC[33]. Le fait pour le Tribunal de prononcer les conclusions recherchées par Taiga ferait en sorte que l'Enquête serait paralysée, puisque les documents pouvant établir une conduite frauduleuse des Individus quittancés sont en possession de Taiga.

[35] L'AMF insiste sur le fait qu'elle est responsable de l'administration de diverses lois, dont la LVM, une loi d'ordre public de protection de nature réglementaire, dont l'objectif est d'assurer l'intégrité et l'efficience des marchés des valeurs mobilières, de protéger le public et de maintenir la confiance de celui-ci dans ces marchés[34].

[36] L'AMF soutient qu'elle possède de larges pouvoirs d'enquête[35] qui visent « la réalisation d'un objectif d'une grande importance pour le public, à savoir, recueillir des témoignages pour réglementer le secteur des valeurs mobilières » et que l'Assignation vise « la réalisation de l'objet prédominant »[36] de l'Enquête.

[37] Elle ajoute que, puisque la compétence de l'AMF de mener l'Enquête et de transmettre l'Assignation n'est pas remise en doute[37], le Tribunal ne peut intervenir, une telle intervention n'étant possible qu'en présence d'un excès de compétence. Elle mentionne que la Demande de Taiga est en réalité un pourvoi en contrôle judiciaire déguisé, ce qui est interdit aux termes des articles 284 et 286 de la LVM :

> « **284.** Aucun pourvoi en contrôle judiciaire prévu au *Code de procédure civile* (chapitre C-25.01) ne peut être exercé ni aucune injonction accordée contre l'Autorité, les membres de son personnel ou ses agents agissant en leur qualité officielle.
>
> **286.** Un juge de la Cour d'appel peut, sur demande, annuler sommairement toute décision rendue à l'encontre des articles 284 ou 285. »

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33 Le paragraphe 5.1 (2) de la LACC stipule que : « La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs. »

34 Voir l'article 276 de la LVM.

35 Voir les articles 237 à 242 de la LVM.

36 *British Columbia Securities Commission c. Branch*, [1995] 2 R.C.S. 3, para. 35.

37 Taiga admet dans son plan d'argumentation et à l'audience que l'AMF dispose de larges pouvoirs d'enquête et qu'elle peut délivrer des *subpoenas* et requérir la communication de documents. Voir notamment les articles 241 et 242 LVM. Voir aussi *Autorité des marchés financiers c. Fournier*, 2012 QCCA 1179, para. 28-33.

...goes beyond an investigation into Taiga's own responsibility alone.

[34] According to the AMF, such a conclusion would also interfere with the investigation into the actions of the Released Individuals, despite the fact their release does not apply in cases involving fraudulent acts or intentional misconduct, since any such claim cannot be released under section 5.1(2) of the *CCAA* (33). The AMF argues that granting Taiga's request would effectively paralyze the investigation, because the relevant documents that could prove the fraudulent conduct of those Released Individuals are currently in Taiga's possession.

[35] The AMF emphasizes that it is responsible for administering several statutes, including the *Securities Act*, a law of a regulatory nature designed to protect investors and ensure the integrity and efficiency of the securities markets, thereby protecting the public and maintaining confidence in those markets (34).

[36] The AMF adds that it possesses broad investigative powers which serve "an objective of great importance to the public, namely, to gather evidence and testimony to regulate the securities sector," and that the Subpoena in question "is aimed at achieving that overriding objective" of the Investigation.

[37] The AMF further asserts that, since its jurisdiction to conduct the Investigation and issue the Subpoena is not in doubt (37), the Court has no authority to intervene, and to do so would require jurisdictional overreach. The AMF argues that Taiga's Application is, in reality, a disguised judicial review, which is expressly prohibited under sections 284 and 286 of the *Securities Act (LVM)*:

Section 284:
"No judicial review under the *Code of Civil Procedure* (chapter C-25.01) may be exercised, nor may any injunction be granted against the Authority, its staff members or its agents acting in their official capacity."

Section 286:
"A judge of the Court of Appeal may, upon request, summarily annul a decision rendered in contravention of sections 284 or 285."

Footnotes:
33. Section 5.1(2) of the *CCAA* states: "The transaction, however, may not release any claim based on contractual rights of one or more creditors or founded on false representation or on willful or fraudulent conduct by directors."
34. See section 276 of the *Securities Act (LVM)*.
35. See sections 237 and 242 of the *Securities Act (LVM)*.
36. *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, para. 35.
37. Taiga acknowledges in its submissions and at the hearing that the AMF has broad powers of investigation and can issue subpoenas and require document production. See especially sections 241 and 242 of the *Securities Act (LVM)*. Also see *Autorité des marchés financiers v. Fournier*, 2012 QCCA 1179, paras. 28-33.

[38] Elle argue finalement que l'interprétation de la portée de l'Ordonnance ODI, telle que suggérée dans la Demande de Taiga, est incompatible avec la LACC, de sorte qu'elle est dépourvue de fondement juridique.

4. Analyse

4.1. La prudence s'impose au moment de trancher une demande en irrecevabilité

[39] La demande en irrecevabilité fondée sur l'article 168 al. 2 du *Code de procédure civile* (« **C.p.c.** ») permet de rejeter une demande si elle « n'est pas fondée en droit, quoique les faits allégués puissent être vrais. » Bien que « les *faits allégués* dans la requête doivent être tenus pour avérés […] leur *qualification juridique* ne lie pas pour autant le tribunal »[38]. Cette « disposition a pour fonction première d'éviter la tenue d'un procès lorsque le recours est dépourvu de fondement juridique, et ce, même si les faits à son soutien sont admis » [39].

[40] En telle matière, le Tribunal doit faire preuve de prudence, puisque le rejet d'une demande au stade préliminaire peut « entraîner de très sérieuses conséquences », de sorte que « seule une absence claire et manifeste de fondement juridique mènera au rejet d'une action à ce stade des procédures » [40]. Une « situation « claire et évidente » ouvrant la voie au rejet de l'action doit apparaître à la lecture des allégations de la requête introductive d'instance et des différentes pièces invoquées à son soutien » [41].

[41] Malgré la prudence qui s'impose, le Tribunal ne peut pas rejeter la demande en irrecevabilité pour le simple motif qu'elle soulève des questions complexes[42]. Pour reprendre les termes utilisés par le juge en chef du Canada, l'honorable Richard Wagner, alors qu'il siégeait à la Cour d'appel, la « prudence n'est pas synonyme d'attentisme. Rien n'empêche un juge de rejeter, même au stade préliminaire, un recours clairement voué à l'échec »[43].

4.2. La mission et le rôle de l'AMF

[42] L'AMF est instituée en vertu de la *Loi sur l'encadrement du secteur financier*[44] (« **LESF** »). Sa mission est définie à l'article 4 de cette loi, et comprend notamment la responsabilité d'assurer un « encadrement des activités de bourse » et « l'encadrement

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38 *Canada (P.G.) c. CSN*, [2014] 2 R.C.S. 477, para. 20.
39 *Id*, para. 15.
40 *Id*, para. 17.
41 *Id*, para. 19.
42 *Dostie* c. *Procureur général du Canada*, 2022 QCCA 1652, para. 20. Voir aussi *Province canadienne de la congrégation de Sainte-Croix c. Centre de services scolaire Chemin-du-Roy*, 2022 QCCA 227, para. 10; *Bohémier c. Barreau du Québec*, 2012 QCCA 308, para. 17.
43 *Beaulieu* c. *Laflamme*, 2011 QCCA 1909, para. 9.
44 RLRQ, c. E-6.1.

[38] The AMF finally argues that the interpretation of the scope of the RVO suggested in Taiga's Application is incompatible with the CCAA, and therefore legally unfounded.

4. Analysis

4.1. Caution Required When Deciding on an Inadmissibility Motion

[39] A motion for inadmissibility under article 168 paragraph 2 of the *Code of Civil Procedure* (C.p.c.) allows the Court to dismiss an application if it "is not founded in law, even if the alleged facts are true." Although "the alleged facts in the application must be taken as true […] their legal qualification does not bind the court" (38). This "provision primarily serves to prevent a trial where a claim is clearly without legal basis, even if the facts supporting it are admitted" (39).

[40] In such matters, the Court must proceed with caution, since dismissal at a preliminary stage can have "very serious consequences." Thus, only a "clear and manifest absence of legal foundation can justify dismissal at this early procedural stage" (40). A "'clear and evident' situation opening the way to dismissal must appear from the allegations in the originating application and the supporting documents submitted" (41).

[41] Nevertheless, even with this caution, the Court may dismiss a motion for inadmissibility if the claim raises complex legal questions (42). To quote Chief Justice Richard Wagner (when he sat on the Court of Appeal): "Caution is not synonymous with indecision. Nothing prevents a judge from dismissing, even at a preliminary stage, an action that is clearly bound to fail"(43).

4.2. The Mission and Role of the AMF

[42] The AMF was created under the *Act Respecting the Regulation of the Financial Sector* (**LESF**). Its mission, defined in section 4 of that law, includes ensuring "the supervision of business activities" and the "oversight of financial markets… *(sentence continues on next page)*

Footnotes:

38. *Canada (P.G.) v. CSN*, [2014] 2 S.C.R. 477, para. 20.
39. Id., para. 15.
40. Id., para. 17.
41. Id., para. 19.
42. *Dostie v. Procureur général du Canada*, 2022 QCCA 1652, para. 20; see also *Province canadienne de la Congrégation de Sainte-Croix v. Centre de services scolaire Chemin-du-Roy*, 2022 QCCA 227, para. 10; *Bohémier v. Barreau du Québec*, 2012 QCCA 308, para. 17.
43. *Beaulieu v. Laflamme*, 2011 QCCA 1909, para. 9.
44. *Revised Statutes of Quebec (RLRQ)*, ch. E-6.1.

des marchés des valeurs mobilières […] en veillant à ce que les émetteurs et les autres intervenants du secteur financier se conforment aux obligations qui leur sont applicables »[45].

[43] Pour mener à bien cette mission, l'AMF joue un rôle que les tribunaux ont qualifié de « chien de garde » notamment pour « assurer l'encadrement des activités de bourse »[46].

[44] L'AMF est responsable de l'administration de diverses lois, dont la LVM. L'article 276 LVM résume la mission de l'AMF en regard de l'administration de cette loi :

> « **276.** L'Autorité des marchés financiers instituée en vertu de l'article 1 de la Loi sur l'encadrement du secteur financier (chapitre E-6.1) est chargée de l'administration de la présente loi et exerce les fonctions et pouvoirs qui y sont prévus.
>
> L'Autorité a en outre pour mission:
>
> 1° de favoriser le bon fonctionnement du marché des valeurs mobilières;
>
> 2° d'assurer la protection des épargnants contre les pratiques déloyales, abusives et frauduleuses;
>
> 3° de régir l'information des porteurs de valeurs mobilières et du public sur les personnes qui font publiquement appel à l'épargne et sur les valeurs émises par celles-ci;
>
> 4° d'encadrer l'activité des professionnels du marché des valeurs mobilières et des organismes chargés d'assurer le fonctionnement d'un marché de valeurs mobilières. »

[45] Afin d'accomplir sa mission de protection du public, l'AMF est investie de larges pouvoirs d'enquête. Ses enquêteurs peuvent notamment exiger la communication de documents et soumettre certaines personnes à un interrogatoire sous serment.[47]

[46] Les tribunaux supérieurs reconnaissent depuis longtemps l'importance des enquêtes des autorités des valeurs mobilières de différentes provinces canadiennes pour protéger le public. En 1995, traitant de la *Loi sur les valeurs mobilières de la Colombie-Britannique*, la Cour suprême du Canada mentionnait que cette loi « vise à protéger le public contre les pratiques commerciales malhonnêtes susceptibles de frauder les investisseurs. Elle vise à assurer que le public puisse se fier à des

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[45] LESF, art. 4.

[46] *Marston c. Autorité des marchés financiers*, 2007 QCCQ 14193, para. 42. Voir aussi *Autorité des marchés financiers c. Lavoie*, 2023 QCCA 637, para. 15 pour une affirmation similaire en ce qui a trait au rôle de l'AMF en regard de l'application de la *Loi sur la distribution de produits et services financiers*, RLRQ, c. D-9.2.

[47] LVM, art. 237, 238 et 242.

...by ensuring that issuers and other participants in the financial sector comply with the obligations applicable to them." (45)

[43] To fulfill this mission, the AMF acts as what the courts have described as a “watchdog”, notably to “ensure the regulation of stock market activities.” (46)

[44] The AMF is responsible for administering various laws, including the *Securities Act (LVM)*.
Article 276 of the *LVM* summarizes the AMF’s mission regarding the administration of this law as follows:

276. The *Autorité des marchés financiers*, established under section 1 of the *Act Respecting the Regulation of the Financial Sector* (chapter E-6.1), is responsible for the administration of this Act and exercises the functions and powers provided therein.

The AMF also has the mission to:

1. Promote the proper functioning of the securities market;
2. Protect investors against unfair, abusive, or fraudulent practices;
3. Regulate the disclosure of information by security holders and by the public when they make public offerings or issue securities;
4. Supervise the activities of securities market professionals and organizations ensuring the proper functioning of the market.

[45] To carry out its public protection mission, the AMF is endowed with extensive investigative powers. Its investigators may, in particular, require the production of documents and summon persons for questioning under oath (47).

[46] Higher courts have long recognized the importance of securities regulators’ investigations across different Canadian provinces to protect the public. In 1995, concerning the *British Columbia Securities Act*, the Supreme Court of Canada stated that this law “aims to protect the public against dishonest commercial practices likely to defraud investors. It is intended to give the public confidence in honest and reputable traders who are carrying on their business... *(sentence continues on next page)*

Footnotes:
45. *LESF*, art. 4.
46. *Marston c. Autorité des marchés financiers*, 2007 QCCQ 14193, para. 42. See also *Autorité des marchés financiers c. Lavoie*, 2023 QCCA 637, para. 15.
47. *LVM*, arts. 237, 238, and 242.

négociateurs honnêtes de bonne réputation qui sont en mesure d'exploiter leur entreprise d'une façon non préjudiciable au marché ou à l'ensemble de la société. Une enquête de ce genre contraint légitimement une personne à témoigner puisque la Loi vise la réalisation d'un objectif d'une grande importance pour le public, à savoir, recueillir des témoignages pour réglementer le secteur des valeurs mobilières. […] L'enquête est du genre autorisé par notre droit puisqu'elle a une utilité sociale évidente »[48].

[47] L'importance de la mission de l'AMF justifie pleinement de tels pouvoirs d'enquête. Notre société permet à certaines personnes de jouir des fruits de leur participation au marché des valeurs mobilières, mais exige en contrepartie le respect de certaines obligations dans le but d'assurer la protection et la confiance du public. « Bon nombre de ces exigences sont essentielles au maintien d'un marché rentable et concurrentiel dans un contexte où l'information incomplète est endémique. Elles sont également essentielles pour prévenir et décourager les abus de telles asymétries sur le plan de l'information et, en conséquence, pour préserver l'intégrité du régime des valeurs mobilières et protéger l'intérêt public »[49].

[48] Compte tenu notamment de l'importance de la mission de l'AMF et de sa spécialisation dans le domaine des valeurs mobilières, le législateur québécois a prévu qu'un pourvoi en contrôle judiciaire ou une injonction ne peuvent être accordés contre l'AMF, et qu'un juge de la Cour d'appel peut sommairement annuler une décision qui irait à l'encontre de ce principe[50].

4.3. Application de la LACC de concert avec la Loi sur la faillite et l'insolvabilité (« LFI »)

[49] L'article 42 de la LACC prévoit que les dispositions de la LACC « 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 ».

[50] La Cour suprême du Canada nous enseigne que cette disposition « indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la LFI »[51], puisque ces « deux lois [font] partie d'un ensemble intégré de règles du droit de l'insolvabilité »[52]. La Cour suprême ajoute, citant le juge Laskin de la Cour d'appel de l'Ontario[53], que ces « deux lois sont liées », spécifiant qu'il « n'existe entre elles aucun « hiatus » qui permettrait d'obtenir

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48 *British Columbia Securities Commission* c. *Branch*, [1995] 2 R.C.S. 3, para. 35.
49 *Id*, para. 77.
50 LVM, art. 284 et 286.
51 *Century Services inc.* c. *Canada (P.G.)*, [2010] 3 R.C.S. 379, para. 76.
52 *Id*, para. 78.
53 *Ivaco Inc., Re*, 2006 CanLII 34551 (ON CA), para. 62-63.

in a manner that is not harmful to the market or to society as a whole. An investigation of this kind legitimately compels a person to testify since the law pursues an objective of great public importance — namely, to gather evidence and testimony to regulate the securities sector. Such an investigation is precisely the kind of measure authorized by our law because it has an obvious social utility." (48)

[47] The importance of the AMF's mission fully justifies the existence of such investigative powers. Our society allows some individuals to reap the benefits of participating in the securities market, but in return, it requires compliance with certain obligations to ensure public protection and confidence. The "good number of these requirements are essential to maintaining a profitable and competitive market in a context where incomplete information is endemic. They are also crucial for preventing and deterring abuses arising from such informational asymmetries and, consequently, for preserving the integrity of the securities regime and protecting the public interest." (49)

[48] Given the importance of the AMF's mission and its specialized expertise in the field of securities, the Quebec legislature has stipulated that no judicial review or injunction may be granted against the AMF, and that a judge of the Court of Appeal may summarily annul any decision contrary to this principle (50).

4.3. Application of the CCAA in Conjunction with the Bankruptcy and Insolvency Act (BIA)

[49] Section 42 of the CCAA provides that the provisions of the CCAA "may be applied jointly with those of any federal or provincial law authorizing or providing for the sanctioning of transactions or arrangements between a company and its shareholders or a class of them."

[50] The Supreme Court of Canada teaches us that this provision "clearly indicates that Parliament intended the CCAA to operate in conjunction with other insolvency-related statutes, such as the BIA (*Bankruptcy and Insolvency Act*)" (51), since these "two laws form part of a coherent and integrated body of insolvency law." (52) The Supreme Court further adds, quoting Justice Laskin of the Ontario Court of Appeal (53), that these "two statutes are connected", specifying that "there is no gap between them that would allow enforcement following proceedings under the CCAA… *(sentence continues on next page)*

Footnotes:
48. *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, para. 35.
49. Ibid., para. 77.
50. *Securities Act (LVM)*, arts. 284 and 286.
51. *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, para. 76.
52. Id., para. 78.
53. *Ivaco Inc.*, Re, 2006 CanLII 34551 (ON CA), paras. 62–63.

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 »[54].

[51] Tel que le mentionne la Cour d'appel de l'Ontario, compte tenu de la nature schématique (*skeletal nature*) de la LACC, cette loi ne contient pas un code complet énumérant tout ce qui est permis et tout ce qui est interdit[55]. La LACC doit donc être interprétée. C'est ainsi que les tribunaux s'inspirent souvent des dispositions de la LFI afin d'interpréter la LACC.

[52] Par exemple, dans un arrêt récent[56], la Cour suprême s'est inspirée de la jurisprudence et de la doctrine portant sur l'article 178 (1) e) LFI (traitant des dettes ne pouvant pas être libérées par la faillite, puisqu'elles résultent de l'obtention de biens ou services par fraude) pour interpréter l'article 19 (2) LACC, traitant de dettes similaires ne pouvant pas être considérées sous la LACC, sauf exception.

[53] Le Tribunal s'inspirera donc de la doctrine et de la jurisprudence en matière de LFI pour interpréter la LACC, lorsque nécessaire.

4.4. Le Tribunal peut interpréter l'Ordonnance ODI

[54] Il n'est pas contesté que le Tribunal peut interpréter l'Ordonnance ODI, lorsqu'un différend survient au niveau de son interprétation[57].

[55] L'article 657 C.p.c. prévoit que « le tribunal peut, après le jugement, rendre toute ordonnance propre à faciliter l'exécution, volontaire ou forcée, de la manière la plus conforme aux intérêts des parties et la plus avantageuse pour elles ».

[56] Comme le soulignent la Cour d'appel[58] et le ministre de la Justice dans ses commentaires[59], l'article 657 C.p.c. doit être interprété de façon large et libérale. Cet article « permet au tribunal d'interpréter ou préciser un jugement afin d'en faciliter l'exécution »[60]. La « seule limite au pouvoir du tribunal de rendre des ordonnances en vertu de cet article consiste à ne pas modifier le jugement rendu », puisqu'une décision rendue en vertu de cette disposition « doit s'inscrire dans le prolongement naturel de la décision précédente, il ne doit pas s'agir d'un moyen d'appel déguisé »[61].

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54 *Century Services inc. c. Canada (P.G.)*, [2010] 3 R.C.S. 379, para. 78.
55 *Metcalfe & Mansfield Alternative Investment II Corp., (Re)*, 2009 ONCA 587, para. 44.
56 *Montréal* c. *Deloitte Restructuring*, [2021] 3 R.C.S. 736, para. 23-25.
57 Voir par exemple *Arrangement relatif à Bloom Lake*, 2017 QCCS 5573, para. 37, où le jugement Hamilton, alors à la Cour supérieure, interprète une ordonnance de dévolution préalablement rendue par le même tribunal.
58 *Droit de la famille – 192442*, 2019 QCCA 2096, para. 8-9.
59 Ministère de la Justice du Québec, *Commentaires de la ministre de la Justice, Code de procédure civile, chapitre C-25.01*, Montréal, Wilson & Lafleur, 2015, art. 657.
60 *Air Canada c. P.A.*, 2025 QCCA 518, para. 20.
61 *Ibid.*

...of property rights that would otherwise be lost in bankruptcy. (54)

[51] As mentioned by the Ontario Court of Appeal, given the skeletal nature the CCAA, this statute does not contain a comprehensive code enumerating everything that is permitted or prohibited (55). The CCAA must therefore be interpreted, and in doing so, courts often draw guidance from the provisions of the BIA to interpret the CCAA.

[52] For example, in a recent decision (56), the Supreme Court relied on jurisprudence and doctrine concerning section 178(1) of the BIA (which deals with debts that are not dischargable in bankruptcy, such as those arising from fraud) to interpret section 19(2) of the CCAA, which concerns similar debts that cannot be released under the CCAA, except in limited circumstances.

[53] The Court will therefore be guided by doctrine and jurisprudence from the BIA when interpreting the CCAA, where necessary.

4.4. The Court's Power to Interpret the RVO Order

[54] It is undisputed that the Court may interpret the RVO Order when a disagreement arises regarding its interpretation. (57)

[55] Article 657 of the Code of Civil Procedure (C.p.c.) provides that "the court may, after judgment, make any order proper to facilitate execution, whether voluntary or forced, in the manner most consistent with the interests of the parties and the most advantageous to them."

[56] As emphasized by the Court of Appeal (58) and by the Minister of Justice in his commentaries (59), Article 657 C.p.c. must be interpreted broadly and liberally. This provision allows the court to "interpret or clarify a judgment in order to facilitate its execution." (60) The only limit to this judicial power is that it must not modify the judgment itself, since a decision rendered under this provision "must fall within the natural extension of the previous decision and cannot serve as a disguised appeal." (61)

Footnotes:

54. *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, para. 78.
55. *Metcalfe & Mansfield Alternative Investment II Corp. (Re)*, 2009 ONCA 587, para. 44.
56. *Montréal c. Deloitte Restructuring*, [2021] 3 S.C.R. 736, paras. 23–25.
57. For example, *Arrangement relatif à Bloom Lake*, 2017 QCCS 5573, para. 37.
58. *Droit de la famille – 192442*, 2019 QCCA 2096, paras. 8–9.
59. *Ministère de la Justice du Québec*, *Commentaries of the Minister of Justice, Code of Civil Procedure*, Wilson & Lafleur, 2015, art. 657.
60. *Air Canada c. P.A.*, 2025 QCCA 518, para. 20.
61. Ibid.

[57] Dans une décision récente de la Cour supérieure[62], la juge Janet Michelin mentionne que lorsque juge est appelé à interpréter une ODI à la lumière de certains faits particuliers, le juge doit appliquer la LACC et interpréter l'ordonnance de manière à exclure un résultat qui serait contraire à la LACC. Le Tribunal est en parfait accord avec ce raisonnement.

[58] Un raisonnement similaire a aussi été appliqué par la Cour supérieure pour interpréter les termes d'une proposition concordataire en vertu de la LFI. Dans cette affaire[63], le juge Michel A. Pinsonnault refuse de donner à la proposition une interprétation qui serait illégale, en ce qu'elle aurait pour effet de compromettre des créances fiscales futures alors que les Agences du revenu n'étaient pas légalement autorisées à compromettre ces créances. Le juge poursuit son raisonnement en mentionnant que la proposition doit être interprétée de façon à concilier ses dispositions ensemble « de façon à ne pas leur donner une portée illégale ou déraisonnable »[64].

[59] La *Court of King's Bench* de l'Alberta a aussi récemment été appelée à interpréter un *Share Purchase Agreement* (« **SPA** ») intervenu dans le processus d'obtention d'une ODI, qu'on demandait au tribunal d'approuver. Le juge Marion s'inspire de la règle d'interprétation contractuelle bien connue, selon laquelle on doit favoriser une interprétation qui produit un résultat légal, lorsque deux interprétations sont possibles et que l'autre mènerait à un résultat illégal. Le juge interprète donc le SPA de façon à ce qu'il soit conforme à la *Income Tax Act*[65].

[60] À la lumière de ces principes, le Tribunal est d'avis que, devant deux interprétations possibles de l'Ordonnance ODI, l'interprétation qui produit un résultat conforme aux dispositions de la LACC doit être favorisée, au détriment d'une interprétation qui produirait un résultat allant à l'encontre de la LACC. Comme le mentionne la juge Michelin, « si la structure de l'ODI offre certains avantages, il ne peut être vrai que ces avantages comprennent le fait de bafouer les choix d'ordre public »[66].

4.5. L'ordonnance ODI tire sa source de l'article 11 de la LACC

[61] L'article 11 de la LACC prévoit ce qui suit :

> « Pouvoir général du tribunal
>
> 11. Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues

[62] *Avis d'intention de Galarneau Entrepreneur général inc.*, 2025 QCCS 558, para. 131.
[63] *Proposition de Sail Plein Air inc.*, 2024 QCCS 1689.
[64] *Id*, para. 152.
[65] *Delta 9 Cannabis Inc. (Re)*, 2025 ABKB 52, para. 98-99.
[66] *Avis d'intention de Galarneau Entrepreneur général inc.*, 2025 QCCS 558, para. 135.

[57] In a recent decision of the Superior Court (62), Justice Janet Michelin stated that when a judge is called upon to interpret an RVO in light of certain specific facts, the judge must apply the CCAA and interpret the order in such a way as to avoid any result that would be contrary to the CCAA. The Court fully agrees with this reasoning.

[58] A similar reasoning was also applied by the Superior Court to interpret the terms of a proposal under the BIA. In that case (63), Justice Michel A. Pinsonnault refused to adopt an interpretation that would be illegal, since it would have had the effect of compromising tax debts at a time when the tax authorities were not legally authorized to compromise such claims. The judge continued by stating that the proposal must be interpreted in a way that reconciles its provisions as a whole "so as not to give them an illegal or unreasonable scope." (64)

[59] The King's Bench of Alberta was also recently called upon to interpret a Share Purchase Agreement **(SPA)** entered into as part of an RVO Order process submitted for court approval. Justice Marion relied on a well-known rule of contractual interpretation, according to which an interpretation that produces a lawful result should be preferred when two possible interpretations exist, one of which would lead to an unlawful outcome. He interpreted the SPA in a way that made it consistent with the Income Tax Act. (65)

[60] In light of these principles, the Court is of the opinion that, where two interpretations of the RVO are possible, the interpretation that produces a result consistent with the provisions of the CCAA must be favored, rather than one that would lead to a result contrary to it. As Justice Michelin stated, "if the structure of the RVO provides certain advantages, it cannot be said that these advantages include violating public policy choices." (66)

4.5. The RVO Derives Its Source from Section 11 of the CCAA

[61] **Section 11 of the CCAA** provides as follows:

General Powers of the Court

Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, the court may, on the application of any interested person, make any order that it considers appropriate in the circumstances with respect to a debtor company under this Act, <u>subject to such restrictions as are provided herein</u>… *(sentence continues on next page)*

Footnotes:
62. *Avis d'intention de Galarneau Entrepreneur général inc.*, 2025 QCCS 558, para. 131.
63. *Proposition de Sail Plein Air inc.*, 2024 QCCS 1689.
64. Ibid., para. 152.
65. *Delta 9 Cannabis Inc. (Re)*, 2025 ABKB 52, paras. 98–99.
66. *Avis d'intention de Galarneau Entrepreneur général inc.*, 2025 QCCS 558, para. 135.

par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée. »

[Soulignement ajouté par le Tribunal]

[62] Comme le mentionnait le juge Immer, alors à la Cour supérieure, dans l'affaire *Brunswick Health Group*[67], c'est l'article 11 de la LACC qui confère la juridiction à la Cour supérieure d'approuver une ODI. Cette juridiction n'est limitée que par les restrictions contenues dans la LACC elle-même[68] et par le fait cette ordonnance doit être « indiquée » (dans la version anglaise de l'article, l'ordonnance doit être « *appropriate in the circumstances* »)[69].

[63] Le pouvoir de rendre des ordonnances sous l'article 11 de la LACC est certes vaste[70], mais, comme le mentionne la Cour suprême dans *Callidus*, il « n'est pas sans limites »[71].

[64] Dans un arrêt rendu en 2023[72], la Cour d'appel rappelle ce qui suit, en traitant de la juridiction inhérente de la Cour supérieure en vertu de l'article 183 LFI :

> « [58] In matters of insolvency, courts have held that, as pragmatic problem solvers, they could exercise their inherent jurisdiction to effect a remedy or fill statutory gaps. The jurisprudence has evolved to include substantive law within the purview of the inherent jurisdiction, despite criticism. At the same time, the inherent jurisdiction must be used sparingly and with caution because of its broad and loosely defined nature. Inherent jurisdiction cannot be used in contravention of statutory provisions. It is also limited by the nature of the BIA:
>
> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at 480; Wasserman Arsenault Ltd. v. Sone (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th)145 (Ont. C.A.). (…)
>
> [21] Further limitations are based on the nature of the BIA - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. (…) »
>
> [Soulignements ajoutés par le Tribunal]

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67 *Proposition de Brunswick Health Group Inc.*, 2023 QCCS 4643.
68 *Id*, para. 39.6.
69 *Id*, para. 39.7.
70 Id, para. 39.6.
71 *9354-9186 Québec inc. c. Callidus Capital Corp*., [2020] 1 R.C.S. 521, 2020 CSC 10, para. 49.
72 *Syndic de Chronométriq inc.*, 2023 QCCA 1295, para. 58.

...and with or without notice, make any order that it considers appropriate in the circumstances."
(Emphasis added by the Court)

[62] As Justice Immer noted, while sitting on the Superior Court, in *Brunswick Health Group* (67), it is section 11 of the CCAA that confers jurisdiction on the Superior Court to approve an RVO. This jurisdiction is limited only by the restrictions contained in the CCAA itself (68) and by the requirement that the order must be “appropriate in the circumstances” (as stated in the English version of the section). (69)

[63] The power to issue orders under section 11 of the CCAA is indeed vast (70), however, as the Supreme Court of Canada noted in *Callidus*, it is not without limits. (71)

[64] In a 2023 decision (72), the Court of Appeal recalled the following, in dealing with the inherent jurisdiction of the Superior Court under section 183 of the BIA:

> [58] In matters of insolvency, courts have held that, as pragmatic problem-solvers, they could exercise their inherent jurisdiction to effect a remedy or fill statutory gaps. The jurisprudence has evolved to include substantive law within the purview of the inherent jurisdiction, despite criticism. At the same time, the inherent jurisdiction must be used sparingly and with caution because of its broad and loosely defined nature. Inherent jurisdiction cannot be used in contravention of statutory provisions. It is also limited by the nature of the BIA.
>
> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case:
> Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., [1976] 2 S.C.R. 475 at 480; Wasserman Arsenault Ltd. v. Sone (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th) 145 (Ont. C.A.). (…)
>
> [21] Further limitations are based on the nature of the BIA — it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt’s assets among creditors. In this context, there should not be frequent resort to the power. (…)
>
> (Emphasis added by the Court)

Footnotes:
67. *Proposition de Brunswick Health Group Inc.*, 2023 QCCS 4643.
68. Ibid., para. 39.6.
69. Ibid., para. 39.7.
70. *9354-9186 Québec inc. c. Callidus Capital Corp.*, [2020] 1 S.C.R. 521, 2020 SCC 10, para. 49.
71. Ibid., para. 39.6.
72. *Syndic de Chronometriq inc.*, 2023 QCCA 1295, para. 58.

[65] Puisque la LACC doit être interprétée de concert avec la LFI, le Tribunal retient que la juridiction de la Cour supérieure sous la LACC ne peut pas être utilisée pour contourner les dispositions législatives claires de la LACC ou de la LFI.

[66] Dans *Deloitte*[73], la Cour suprême réfère aux trois (3) considérations à garder à l'esprit dans l'exercice du pouvoir discrétionnaire conféré par la LACC, à savoir :

66.1. L'opportunité de l'ordonnance sollicitée;

66.2. La diligence;

66.3. La bonne foi du demandeur;

[67] Discutant de la première considération, la Cour suprême mentionne qu'elle « s'évalue au regard des objectifs réparateurs de la LACC ». Après avoir énuméré plusieurs de ces objectifs, la Cour ajoute que « la protection de l'intérêt public doit elle aussi figurer sur cette liste »[74].

[68] Pour interpréter l'Ordonnance ODI, le Tribunal doit donc écarter toute interprétation qui serait contraire aux dispositions de la LACC ou de la LFI, ainsi qu'une interprétation qui irait à l'encontre de l'intérêt public.

4.6. Limites aux réclamations pouvant être compromises par la LACC et la LFI

[69] L'article 19 (1) de la LACC énumère les « seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice ». Le terme « réclamation » est défini comme suit dans la LACC :

> « ***réclamation*** S'entend de toute dette, de tout engagement ou de toute obligation de quelque nature que ce soit, qui constituerait une réclamation prouvable au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité.* »

[70] Dans l'affaire *AbitibiBowater*[75], la Cour suprême a établi trois (3) conditions pour déterminer ce qui constitue une réclamation prouvable sous la LFI :

> « Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli.* Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. »[76]

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[73] *Montréal c. Deloitte Restructuring*, [2021] 3 R.C.S. 736, para. 85.
[74] *Id*, para. 86.
[75] *Terre-Neuve-et-Labrador* c. *AbitibiBowater Inc.*, [2012] 3 R.C.S. 443.
[76] *Id*, para. 26.

[65] Since the CCAA must be interpreted in harmony with the BIA, the Court concludes that the Superior Court's jurisdiction under the CCAA cannot be used to circumvent the clear legislative provisions of either the CCAA or the BIA.

[66] In *Deloitte* (73), the Supreme Court of Canada referred to three (3) considerations to keep in mind when exercising the discretionary power granted under the CCAA, namely:

66.1. The appropriateness of the order sought;
66.2. The diligence of the applicant;
66.3. The good faith of the applicant.

[67] Discussing the first consideration, the Supreme Court noted that it "must be assessed in light of the remedial objectives of the CCAA." After listing several of these objectives, the Court added that "the protection of the public interest must also appear on that list." (74)

[68] To interpret the RVO, the Court must therefore reject any interpretation that would contradict the provisions of the CCAA or the BIA, as well as any interpretation that would run counter to the public interest.

4.6. Limits on Claims That Can Be Compromised Under the CCAA and the BIA

[69] Section 19(1) of the CCAA lists "the only claims that may be considered in a compromise or arrangement involving a debtor company." The term "claim" is defined in the CCAA as follows:

"**Claim**" means any debt, liability, or obligation of any nature whatsoever that would constitute a provable claim within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.

[70] In the case of *AbitibiBowater* (75), the Supreme Court of Canada established three (3) conditions for determining what constitutes a provable claim under the BIA:

"First, there must be a debt, a liability, or an obligation owed to a creditor. Second, the debt, liability, or obligation must have arisen before the debtor becomes bankrupt. Third, it must be possible to assign a monetary value to that debt, liability, or obligation." (76)

Footnotes:
73. *Montréal c. Deloitte Restructuring*, [2021] 3 S.C.R. 736, para. 85.
74. Ibid., para. 86.
75. *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, [2012] 3 S.C.R. 443.
76. Ibid., para. 26.

[71] Dans la présente affaire, il n'est pas évident que ces conditions sont respectées. En particulier, il ne peut être attribué de valeur pécuniaire à l'obligation de Taiga de collaborer avec l'AMF dans le cadre de l'Enquête. C'est donc dire que, selon l'article 19 de la LACC, cette obligation ne saurait être considérée dans l'Ordonnance ODI, qui est sans conteste une transaction visant une compagnie débitrice.

[72] Dans l'arrêt *Orphan Well*[77], la Cour suprême devait décider ce qu'il advenait des obligations environnementales de fin de vie, constituant à fermer les puits de pétrole pour éviter les fuites, à l'occasion de la faillite d'une entreprise œuvrant dans l'industrie pétrolière et gazière. En particulier, la Cour devait décider si cette obligation de remise en état avait été compromise dans le cadre de la faillite.

[73] La Cour suprême décide qu'un « organisme de réglementation faisant respecter un devoir public au moyen d'une ordonnance non pécuniaire n'est pas un créancier »[78]. Elle réitère aussi, citant la juge Martin dans l'arrêt *Abitibi*, que « les obligations publiques ne sont pas des réclamations prouvables qui peuvent être comptabilisées ou compromises dans la faillite »[79]. La Cour conclut qu'il est « clair que l'organisme de réglementation n'est pas un créancier de l'actif [du failli]. Les obligations de fin de vie que l'organisme de réglementation veut imposer [au failli] sont de nature publique. Ni l'organisme de réglementation ni le gouvernement de l'Alberta ne peuvent bénéficier financièrement de l'exécution de ces obligations. Ces obligations à caractère public sont non pas envers un créancier, mais envers les concitoyens et échappent donc à la portée des « réclamations prouvables ».

[74] Le Tribunal y voit une analogie claire avec l'Enquête de l'AMF et l'Assignation. À ce stade-ci, l'AMF ne demande pas le paiement d'une amende ou d'une pénalité. Elle ne demande que la communication d'informations et de documents afin de mener à bien l'Enquête. De l'avis du Tribunal, il s'agit, comme dans *Orphan Well*, d'une obligation envers l'ensemble de la société, afin de permettre à l'AMF de mener sa mission de protection du public et de « chien de garde » des marchés financiers.

[75] L'obligation de collaborer avec l'AMF dans le cadre de l'Enquête ne saurait avoir été compromise par l'Ordonnance ODI, puisqu'il ne s'agit pas d'une réclamation au sens de la LACC ou de la LFI.

[76] Ajoutons que l'article 11.1 (2) de la LACC prévoit expressément que la suspension des procédures en vertu de la LACC ne porte pas atteinte[80] aux investigations entamées par un organisme administratif à l'encontre de la compagnie débitrice. La suspension des procédures n'a d'effet que sur l'exécution d'un paiement ordonné par un tel organisme ou par le tribunal.

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77 *Orphan Well Association c. Grant Thornton Ltd.*, [2019] 1 R.C.S. 150.
78 *Id,* para. 130.
79 *Id,* para. 131.
80 Sauf exception, voir l'article 11.1 (3) de la LACC

[71] In the present case, it is not evident that these conditions are met. In particular, it is impossible to assign a monetary value to Taiga's obligation to cooperate with the AMF as part of the investigation. Therefore, according to section 19 of the CCAA, this obligation cannot be regarded as part of the RVO, which is clearly a compromise involving a debtor company.

[72] In the case of *Orphan Well* (77), the Supreme Court had to decide what became of end-of-life environmental obligations, namely, the duty to close oil and gas wells to prevent leaks, when an oil and gas company became insolvent. In particular, the Court had to determine whether such an obligation could be compromised in bankruptcy.

[73] The Supreme Court held that "a regulatory body enforcing compliance with a public duty by issuing a non-monetary order is not a creditor." (78) It reaffirmed, citing Justice Martin in *Abitibi*, that “public law obligations are not provable claims that can be accounted for or compromised in bankruptcy.” (79) The Court concluded that it is "clear that the regulatory body is not a creditor of the [bankrupt's] estate. End-of-life obligations imposed by the regulator are matters of public law. Neither the regulator nor the government of Alberta can benefit financially from enforcing those obligations. Such obligations, being public in nature, are owed not to a creditor, but to society at large — to citizens — and thus fall outside the scope of 'provable claims'."

[74] The Tribunal sees a clear analogy between this and the AMF's Investigation and the Subpoena. At this stage, the AMF is not demanding payment of a fine or penalty; it is only requesting the production of documents and information to conduct its investigation. In the Tribunal's view, this represents, as in *Orphan Well*, an obligation owed by society as a whole, enabling the AMF to fulfill its public protection mission and its watchdog role over financial markets.

[75] The obligation to cooperate with the AMF as part of its Investigation therefore cannot have been compromised by the RVO, since it does not constitute a claim within the meaning of either the CCAA or the BIA.

[76] Furthermore, section 11.1(2) of the CCAA expressly provides that the stay of proceedings under the CCAA does not apply to regulatory or administrative investigations initiated against the debtor company (80). The stay only applies to the enforcement of a payment ordered by a tribunal or regulatory authority.

Footnotes:
77. *Orphan Well Association v. Grant Thornton Ltd.*, [2019] 1 S.C.R. 150.
78. Ibid., para. 130.
79. Ibid., para. 131.
80. Except as provided under section 11.1(3) of the CCAA.

[77] Ici, l'AMF ne demande que la communication d'informations pour mener l'Enquête. Il s'agit d'un autre indice de l'intention du législateur de ne pas empêcher la tenue de l'Enquête en raison des procédures entreprises sous la LACC. L'Ordonnance ODI ne peut pas être interprétée comme ayant cet effet.

4.7. Taiga est mal fondée de s'opposer à la communication de l'information demandée, sa demande est prématurée

[78] L'AMF demande simplement qu'on lui communique certaines informations nécessaires à l'Enquête. L'Enquête n'a, de toute évidence, toujours pas été complétée et nul ne sait si l'AMF demandera éventuellement l'imposition de sanctions. Nous ignorons aussi qui sera visé par d'éventuelles demandes de sanctions, le cas échéant. L'Enquête est un processus évolutif dont l'issue est incertaine.

[79] L'Assignation vise à « rassembler des matériaux bruts pour étude ultérieure »[81]. Dans l'arrêt *Irvine*, la Cour suprême du Canada rappelle que les « tribunaux judiciaires doivent […] toujours demeurer conscients du danger qu'il y a de surcharger et de compliquer indûment le processus d'enquête sur l'application de la loi. Lorsque ce processus, à l'état embryonnaire, consiste à rassembler des matériaux bruts pour étude ultérieure, les tribunaux ne sont pas enclins à intervenir.[82] »

[80] Cet enseignement est tout à fait applicable en l'instance. L'Enquête en est à un stade embryonnaire. Au terme de l'Enquête, plusieurs options s'offriront à l'AMF, selon ce qu'elle découvrira en cours d'enquête :

80.1. L'Enquête pourrait n'entraîner aucune conséquence;

80.2. Conformément à l'article 210 LVM, l'Enquête pourrait mener à l'institution d'une poursuite pénale par l'AMF, qui pourrait mener à l'imposition d'une amende (202 LVM) ou à un emprisonnement (208.1 LVM);

80.3. Conformément à l'article 273.1 LVM, l'Enquête pourrait mener à l'institution de procédures administratives devant le Tribunal administratif des marchés financiers;

80.4. Conformément à l'article 273.3 LVM, l'Enquête pourrait mener à une interdiction pour une personne d'agir comme administrateur ou dirigeant d'un émetteur pour une période maximale de cinq (5) ans.

[81] Le Tribunal est d'avis qu'il est préférable d'attendre le dénouement de l'Enquête afin de décider si l'Ordonnance ODI interdit la sanction que l'AMF cherchera à obtenir, le cas échéant. La réponse pourrait être différente, selon que la sanction recherchée soit une sanction administrative pécuniaire, une amende pénale, une interdiction

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[81] *Irvine c. Canada (Commission sur les pratiques restrictives du commerce)*, [1987] 1 R.C.S. 181, page 235. Voir aussi *Autorité des marchés financiers c. Fournier*, 2012 QCCA 1179, para. 51.

[82] *Irvine c. Canada (Commission sur les pratiques restrictives du commerce)*, [1987] 1 R.C.S. 181, page 235.

[77] Here, the AMF merely requests the communication of information to conduct its Investigation. This is yet another indication of the legislature's intent not to hinder the conduct of investigations due to proceedings initiated under the CCAA. The RVO cannot be interpreted as having such an effect.

4.7. Taiga is Not Justified in Opposing the Communication of the Requested Information — Its Application Is Premature

[78] The AMF is simply asking that certain necessary information be provided for its Investigation. The Investigation has, quite clearly, not yet been completed, and it is unknown whether the AMF will eventually seek sanctions. We also do not know who might be targeted by any potential sanction requests. The Investigation is an evolving process, and its outcome remains uncertain.

[79] The Subpoena seeks to "gather raw materials for later study." (81) In the *Irvine* case, the Supreme Court reminded us that "judicial tribunals must always remain aware of the risk of overburdening and unduly complicating the process of law enforcement investigations. When such a process is still in its early stages and consists only of gathering raw data for later analysis, courts should generally refrain from intervening." (82)

[80] The same reasoning applies here. The investigation is still in its preliminary stage. At the end of the investigation, several options may be available to the AMF, depending on what it discovers:

> 80.1. The investigation might not result in any consequences;
> 80.2. Under section 210 of the Securities Act (LVM), the investigation could lead to criminal proceedings by the AMF, which could result in a fine (section 202 LVM) or imprisonment (section 208.1 LVM);
> 80.3. Under section 273.1 of the LVM, the investigation could lead to the institution of administrative proceedings before the Financial Markets Administrative Tribunal;
> 80.4. Under section 273.3 of the LVM, the investigation could result in a ban preventing a person from acting as a director or officer of an issuer for up to five years.

[81] The Tribunal is of the view that it is preferable to await the outcome of the Investigation before determining whether the RVO prohibits the sanction that the AMF may ultimately seek. The answer might differ depending on whether the sanction pursued is an administrative monetary penalty, a criminal fine, a prohibition from acting as a director, imprisonment... *(sentence continues on next page)*

Footnotes:
81. *Irvine v. Canada (Commission on Restrictive Trade Practices)*, [1987] 1 S.C.R. 181, p. 235. See also *Autorité des marchés financiers v. Fournier*, 2012 QCCA 1179, para. 51.
82. *Irvine v. Canada (Commission on Restrictive Trade Practices)*, [1987] 1 S.C.R. 181, p. 235.

d'occuper un poste d'administrateur, une peine d'emprisonnement ou une combinaison de ce qui précède. Le Tribunal fait sien les propos du juge Markus Koehnen, de la Cour supérieure de l'Ontario :

> « [68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises »[83].

[82] Même s'il est possible qu'un tribunal décide éventuellement que la sanction recherchée par l'AMF ne peut l'être en raison de l'Ordonnance ODI (ce sur quoi le Tribunal ne se prononce pas), ceci ne justifie en rien de permettre à Taiga de refuser de collaborer à l'Enquête[84].

[83] Il ne fait pas de doute que les documents demandés par l'AMF par l'entremise de l'Assignation sont en possession de Taiga. En effet, ces documents sont des « *Retained Assets* », tel que défini à l'Ordonnance ODI[85]. 9526, à qui les « *Excluded Liabilities* » de Taiga ont été transférées, ne détient pas ces documents.

[84] L'AMF a le pouvoir de demander ces documents et Taiga doit les fournir. Dans l'affaire *Télé-Mobile*[86], la Cour suprême traite de l'obligation civique fondamentale pour toute personne de communiquer les documents devant servir aux fins d'un procès criminel, sans droit d'être indemnisé pour cette communication. La Cour explique que cette obligation émane de certaines dispositions du *Code criminel*, et ajoute que certaines « autres lois fédérales ou provinciales de nature réglementaire contraignent certaines personnes à témoigner ou produire des documents »[87]. Parmi les exemples de telles lois fournis par la Cour suprême se trouve la *Securities Act* de la Colombie-Britannique, qui contient des dispositions similaires à la LVM.

[85] Le Tribunal ne voit aucune raison de s'écarter de cet enseignement. Comme le mentionne la Cour d'appel fédérale, lorsque l'on « empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer […] que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable »[88]. Rappelons que l'intérêt public doit être pris en compte au moment d'interpréter l'Ordonnance ODI.

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83 *Re Green Relief Inc.*, 2020 ONSC 6837, para. 68.
84 Par analogie, voir *Milner Greenhouses Ltd. v. Saskatchewan*, 2004 SKQB 160, para. 29.
85 Pièce R-1, page 20. Cette définition vise comprend tous les actifs qui ne sont pas des Excluded Assets. Ce terme est aussi défini à la pièce R-1 comme étant les actifs énumérés à la Schedule A du Share Purchase Agreement (R-12). Or, la Schedule A démontre qu'il n'existe aucun Excluded Asset.
86 *Société Télé-Mobile c. Ontario*, [2008] 1 R.C.S. 305.
87 *Id*, para. 57.
88 *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, 1985 CanLII 5505 (CAF), page 795.

...or some combination thereof. The Tribunal endorses the comments made by Justice Markus Koehnen of the Ontario Superior Court:

[68] “My inclination is to not define the scope of the section or the release in a vacuum. Both the release and section 5.1(2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.” (83)

[82] Even if it were possible that a court might ultimately determine that the sanction sought by the AMF cannot be imposed because of the RVO (an issue on which this Tribunal does not take a position), this in no way justifies allowing Taiga to refuse to cooperate with the investigation. (84)

[83] There is no doubt that the documents requested by the AMF through the subpoena are in Taiga’s possession. Indeed, these documents are part of the “Retained Assets” as defined in the RVO. (85) Entity 9526 — to which Taiga’s “Excluded Liabilities” were transferred — does not possess these documents.

[84] The AMF has the authority to request these documents, and Taiga must provide them. In *Télé-Mobile* (86), the Supreme Court addressed the fundamental civic duty of any person to produce documents for use in criminal proceedings, without entitlement to compensation for doing so. The Court explained that this duty stems from provisions of the Criminal Code, and added that "other federal or provincial laws also compel individuals to testify or produce documents." (87) Among the examples cited by the Supreme Court is the Securities Act of British Columbia, which contains provisions similar to those of the Quebec Securities Act (LVM).

[85] The Tribunal sees no reason to depart from this principle. As stated by the Federal Court of Appeal, "when a public body is prevented from exercising its lawful powers, it can rightly be said that the public interest—of which that body is the guardian—suffers irreparable harm." The Tribunal recalls that the public interest must always be considered when interpreting the RVO. (88)

Footnotes:

83. *Re Green Relief Inc.*, 2020 ONSC 6837, para. 68.
84. By analogy, see *Milner Greenhouses Ltd. v. Saskatchewan*, 2004 SKQB 160, para. 29.
85. Exhibit R-1, p. 20. This definition includes all assets not listed as “Excluded Assets.”
86. *Société Télé-Mobile c. Ontario*, [2008] 1 S.C.R. 305.
87. *Procureur général du Canada c. Fishing Vessel Owners’ Association of B.C.*, [1985] 1 C.F. 791.
88. Ibid., p. 795.

[86] Taiga affirme qu'elle ne cherche pas à empêcher l'AMF d'effectuer l'Enquête; elle sollicite simplement une déclaration à l'effet qu'elle n'a aucune obligation de collaborer à l'Enquête ou de donner suite à l'Assignation. Cette affirmation est habile, mais elle ne résiste pas à l'analyse.

[87] Tel que déjà mentionné, les informations recherchées sont en possession de Taiga. Les Individus quittancés, qui sont aussi l'objet de l'Enquête, n'auront probablement pas le même accès aux informations recherchées par l'AMF que Taiga, surtout si le Tribunal déclarait que Taiga n'a aucune obligation de collaborer à l'Enquête. Bien qu'il soit théoriquement vrai que l'AMF pourrait continuer l'Enquête même sans la collaboration de Taiga, la déclaration recherchée par Taiga compliquerait considérablement l'Enquête et ferait en sorte que la tenue d'une enquête exhaustive serait à toutes fins pratiques impossible. Afin de mener à bien son enquête, l'AMF doit avoir accès à toutes les informations qui étaient disponibles à Taiga au moment où les documents financiers, dont on soupçonne qu'ils pourraient contenir des informations fausses ou trompeuses, ont été publiés.

4.8. La Quittance octroyée aux administrateurs et dirigeants de Taiga exclut toute réclamation pour fraude ou faute intentionnelle

[88] Le paragraphe 48 de l'Ordonnance ODI contient la Quittance en faveur des administrateurs, dirigeants et employés de Taiga, dont les Individus quittancés. La Quittance n'est toutefois pas applicable en ce qui a trait à « *any claim […] arising from fraud or willful misconduct, nor any claim against the Directors & Officers of [Taiga] that is not permitted to be released pursuant to section 5.1 (2)* » de la LACC.

[89] Même s'il fallait donner à l'Ordonnance ODI la portée que Taiga cherche à lui donner, il demeure clair que rien n'empêche l'AMF de poursuivre ces individus en alléguant un comportement frauduleux ou une faute intentionnelle. Pour ce faire, l'AMF doit cependant être en mesure d'effectuer l'Enquête.

[90] Émettre les conclusions déclaratoires que Taiga recherche nuirait considérablement à la tenue de cette Enquête. Il sera extrêmement difficile pour l'AMF d'établir la présence d'un comportement frauduleux si elle n'a pas accès aux documents demandés par l'Assignation. Il s'agit d'un autre motif justifiant le rejet de la Demande de Taiga.

4.9. Impact de la notification à l'AMF avant l'approbation de l'Ordonnance ODI

[91] Rappelons que l'AMF a reçu notification de la *Application for the issuance of a second amended and restated initial order and an approval and reverse vesting order* de Taiga le 4 octobre 2024. Les pièces au soutien de cette demande lui ont été notifiées le 7 octobre 2024. La pièce R-11 ainsi notifiée était le projet d'Ordonnance ODI proposé par Taiga. La demande pour approuver l'Ordonnance ODI a été présentée à la

[86] Taiga claims that it is not seeking to prevent the AMF from conducting its Investigation; it merely requests a declaration that it has no obligation to cooperate with the Investigation or to comply with the Subpoena. This assertion is clever but does not withstand analysis.

[87] As already mentioned, the information sought is in Taiga's possession. The Released Individuals, who are also the subject of the Investigation, likely do not have the same access to the information requested by the AMF as Taiga does—particularly if the Tribunal were to declare that Taiga has no obligation to cooperate with the AMF. While it is theoretically true that the AMF could continue its Investigation without Taiga's cooperation, granting the declaration sought by Taiga would significantly hinder the Investigation and would make a comprehensive inquiry practically impossible. To conduct its Investigation effectively, the AMF must have access to all information that was available to Taiga at the time when financial documents —suspected of containing false or misleading information—were published.

4.8. The Release Granted to Taiga's Directors and Officers Does Not Exclude Claims for Fraud or Willful Misconduct

[88] Paragraph 86 of the RVO states that the release in favor of Taiga's directors, officers, and employees does not apply to any claim "arising from fraud or willful misconduct, nor any claim against the Directors & Officers of [Taiga] that is not permitted to be released pursuant to section 5.1(2) of the CCAA."

[89] Even if the RVO were to be interpreted as broadly as Taiga suggests, it remains clear that nothing prevents the AMF from pursuing those individuals for alleged fraudulent conduct or intentional wrongdoing. To do so, the AMF must, however, be able to carry out its investigation.

[90] Issuing the declaration conclusions requested by Taiga would seriously hinder the conduct of this Investigation. It would be extremely difficult for the AMF to determine whether fraudulent behavior occurred if it cannot access the documents requested by the Subpoena. This constitutes another reason for rejecting Taiga's application.

4.9. Impact of the AMF's Notification Before the Approval of the RVO

[91] It should be recalled that the AMF received notice of the Application for the issuance of a second amended and restated initial order and an approval and reverse vesting order from Taiga on October 4, 2024. The documents supporting this application were served on the AMF on October 7, 2024. Exhibit R-11 filed in evidence includes the draft RVO proposed by Taiga. The motion for approval of that RVO was then made... *(sentence continues on next page)*

Cour le 10 octobre 2024, sans que l'AMF ne soit présente et sans qu'elle ne fasse de représentations pour modifier les termes de l'Ordonnance ODI.

[92] Taiga plaide donc que l'AMF « avait pleinement connaissance des termes du RVO avant qu'il ne soit rendu » et qu'elle « aurait pu faire le nécessaire pour le [l'Ordonnance ODI] ne dégage pas Taiga […] de toute obligation en lien avec ses enquêtes »[89].

[93] Le Tribunal est toutefois d'avis que la notification effectuée auprès de l'AMF n'a pas l'impact que Taiga suggère et ne permet pas à Taiga de refuser toute collaboration avec l'AMF dans le cadre de l'Enquête, sous prétexte que l'Ordonnance ODI le prévoit. Voici pourquoi.

[94] Rappelons que le 19 août 2024, l'AMF émettait une ordonnance d'interdiction d'opérations sur les actions de Taiga[90], en raison du défaut de Taiga de déposer certains documents financiers pour la période se terminant le 30 juin 2024. Cette ordonnance a été rendue 9 jours après l'Ordonnance initiale[91] rendue par le juge Sheehan en vertu de la LACC.

[95] L'Ordonnance ODI prévoit que toutes les actions émises et en circulation de Taiga seront vendues à l'Acheteur. Afin de mener à bien cette transaction, Taiga devait d'abord obtenir la levée de l'ordonnance d'interdiction d'opérations émise par l'AMF. Cette levée de l'interdiction a été émise par l'AMF dans les jours suivants l'émission de l'Ordonnance ODI.

[96] Dans ces circonstances, il était donc compréhensible que l'AMF reçoive notification des procédures judiciaires, puisque sa participation était requise pour mener à bien le processus. L'AMF pouvait difficilement se douter qu'elle était notifiée dans le but d'éventuellement lui opposer les termes larges de l'Ordonnance ODI, afin de l'empêcher de mener à bien une enquête éventuelle.

[97] Taiga plaide qu'en raison de l'interdiction d'opérations sur les actions de Taiga émise en août 2024, l'AMF savait, ou devait savoir, qu'elle allait éventuellement débuter une enquête sur les activités de Taiga. Le Tribunal n'est pas d'accord avec cette prétention.

[98] L'Enquête entamée en avril 2025 vise des informations potentiellement fausses ou trompeuses qui auraient été incluses dans des documents produits par Taiga en vertu de la LVM ou ses règlements. Elle vise aussi les gestes commis par les représentants de Taiga impliqués dans la préparation de ces documents[92].

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89 Plan d'argumentation de Taiga daté du 4 août 2025, para. 31.
90 Voir notamment la pièce R-16, Décision no. 2024-FS-1063991, paragraphe 7.
91 Pièce R-8.
92 Voir notamment le paragraphe 6 de la Demande de Taiga.

...on October 10, 2024, without the AMF being present and without it making any representations to modify the terms of the RVO.

[92] Taiga therefore argues that the AMF "was fully aware of the terms of the RVO before it was issued" and that it "could have taken the necessary steps regarding the RVO"; thus, according to Taiga, the order "releases Taiga […] from any obligations relating to the investigations." (89)

[93] The Tribunal, however, is of the opinion that the notification made to the AMF had no such impact as Taiga suggests and does not allow Taiga to refuse any cooperation with the AMF during the course of the Investigation on the pretext that the RVO provides for such an exemption. Here is why.

[94] It should be recalled that on August 19, 2024, the AMF issued a cease-trade order prohibiting trading in Taiga's shares (90) due to Taiga's failure to file certain financial documents for the period ending June 30, 2024. This order was issued just nine days after the initial order (91) rendered by Justice Sheehan under the CCAA.

[95] The RVO provides that all issued and outstanding shares of Taiga would be sold to the purchaser. In order for this transaction to proceed, Taiga first had to obtain the lifting of the cease-trade order issued by the AMF. This lifting order was issued by the AMF in the days following the issuance of the RVO.

[96] Under these circumstances, it was entirely reasonable that the AMF should have received notice of the judicial proceedings, since its participation was required for the compromise to proceed properly.
The AMF could hardly have anticipated that it was being notified in the context of proceedings whose terms Taiga would later invoke against it to obstruct a future investigation.

[97] Taiga argues that, because of the August 2024 cease-trade order, the AMF knew or should have known that it might later initiate an investigation into Taiga's activities. The Tribunal disagrees with this argument.

[98] The Investigation launched in April 2025 concerns potentially false or misleading information that may have been included in documents submitted by Taiga under the Securities Act (LVM) or its regulations.
It also concerns the actions taken by Taiga's representatives involved in the preparation of those documents. (92)

Footnotes:

89. Taiga's argument plan dated August 4, 2025, para. 31.
90. See notably Exhibit R-16, Decision No. 2024-FS-1063991, para. 7.
91. Exhibit R-8.
92. See notably paragraph 6 of Taiga's Application.

[99] Il y a une énorme différence entre la publication de documents financiers contenant des informations fausses ou trompeuses et le fait de ne pas avoir produit les documents requis par la législation sur les valeurs mobilières. Il est une lapalissade d'affirmer que l'on ne peut pas disséminer de l'information fausse ou trompeuse dans un document qui n'existe pas. Le Tribunal ne dispose d'aucune assise pour affirmer que l'AMF savait qu'elle allait éventuellement débuter une enquête.

[100] Les allégations de la Demande de Taiga[93] font voir que l'Enquête de l'AMF a débuté le 11 avril 2025. En date du 11 octobre 2024, soit six (6) mois plus tôt, les représentants de l'AMF n'avaient pas de raison de contester l'émission de l'Ordonnance ODI et n'avait pas non plus l'obligation de scruter à la loupe le volumineux projet d'ordonnance, d'analyser les nombreuses définitions qui y sont contenues pour voir s'ils devaient intervenir pour protéger une éventuelle enquête non-débutée. Ce débat n'était pas du tout envisagé en octobre 2024. Le Tribunal fait sien le raisonnement au même effet des juges Michelin dans *Galarneau*[94] et Pinsonnault dans *Sail Plein Air*[95].

[101] Lors de l'audience du 10 octobre 2024, personne n'a porté à l'attention du juge le fait que l'Ordonnance ODI serait utilisée pour permettre à Taiga de ne pas coopérer dans le cadre d'une éventuelle enquête de l'AMF. Le Tribunal n'en fait pas reproche aux avocats de Taiga, pour la simple et bonne raison qu'une telle enquête n'existait pas à l'époque. Comme le mentionne le juge Sheehan dans l'affaire *Groupe médical Elna*, « it is difficult for this Court to grant a release for actions or factual circumstances that the Court is not aware of »[96].

[102] Les critères généralement reconnus pour décider de l'opportunité d'approuver une ordonnance de dévolution inversée sont au nombre de quatre (4) et émanent de la décision de la *Ontario Superior Court of Justice* dans l'affaire *Harte Gold Corp.*[97] :

> « (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? »

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93 Voir le paragraphe 6 de la Demande de Taiga
94 *Avis d'intention de Galarneau Entrepreneur général inc.*, 2025 QCCS 558, para. 73.
95 *Proposition de Sail Plein Air inc.*, 2024 QCCS 1689, para. 147-148.
96 *Arrangement relatif à Elna Medical Group Inc./Groupe médical Elna inc.*, 2025 QCCS 1329, para. 83.
97 *Harte Gold Corp. (Re)*, 2022 ONSC 653, para. 38.

[99] There is a significant difference between (A) publishing financial documents containing false or misleading information and (B) failing to file the documents required under securities legislation.
It goes without saying that one cannot disseminate false or misleading information in a document that does not exist. The Tribunal finds no basis for the assertion that the AMF knew or should have known that it would eventually initiate an Investigation.

[100] The allegations in Taiga's Application (93) state that the AMF Investigation began on April 11, 2025. On October 11, 2024, six (6) months earlier, AMF representatives had no reason to contest the issuance of the RVO, nor any obligation to review the extensive draft order, analyze its many definitions, or determine whether they should intervene to protect a potential, non-existent future investigation. That debate simply was not anticipated in October 2024. The Tribunal adopts the reasoning expressed by Justices Michelin in *Galarneau* (94) and Pinsonnault in *Sail Plein Air*. (95)

[101] During the October 10, 2024 hearing, no one brought to the judge's attention that the RVO might later be used to allow Taiga to avoid cooperating with a potential future AMF investigation. The Tribunal therefore cannot reproach Taiga's counsel for not having raised this issue — simply because no investigation yet existed at the time. As Justice Sheehan noted in *Elna Medical Group Inc.*, "It is difficult for this Court to grant a release for actions or factual circumstances that the Court is not aware of." (96)

[102] The generally recognized criteria for deciding whether to approve an RVO were established by the Ontario Superior Court of Justice in *Harte Gold Corp. (Re)* (97) and include four (4) key questions:

(a) Why is the RVO necessary in this case?
(b) Does the RVO produce an economic result at least as favorable as any other viable alternative?
(c) Is any stakeholder worse off under the RVO than they would have been under another viable alternative? And
(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO?

Footnotes:

93. See paragraph 6 of Taiga's Application.
94. *Avis d'intention de Galarneau Entrepreneur général inc.*, 2025 QCCS 558, para. 73.
95. *Proposition de Sail Plein Air inc.*, 2024 QCCS 1689, paras. 147–148.
96. *Arrangement relatif à Elna Medical Group Inc.*, 2025 QCCS 1329, para. 83.
97. *Harte Gold Corp. (Re)*, 2022 ONSC 653, para. 38.

[103] Si l'interprétation que Taiga avance aujourd'hui avait été portée à l'attention du juge lors de l'audience d'approbation de l'Ordonnance ODI, le juge n'aurait pas pu conclure, comme il le fait au paragraphe 23 de ses motifs, que le troisième critère était respecté. Voici comment s'exprime le juge dans ses motifs :

> « iii. is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?
>
> [23] The answer to this question is clearly no. EDC is the only creditor with an economic interest in Taiga's business and assets under any restructuring or sale scenario. Moreover, Taiga's employees, suppliers and distributors all benefit from the continuation of Taiga's business under the RVO structure and would be worse off in the event Taiga's assets were sold or liquidated. »[98]

[104] Comme on le constate, aucune mention n'est faite de l'impact potentiel de l'Ordonnance ODI sur les organismes publics en général, ou sur l'AMF en particulier. Pourtant, l'interprétation de cette ordonnance, que soutient maintenant Taiga, place l'AMF dans une pire position que si la transaction avait été conclue par une autre structure viable, comme une vente d'actifs.

[105] Dans le cas d'une vente d'actifs, on peut présumer que l'acheteur aurait fait l'acquisition de tous les registres comptables et informatiques de l'entreprise. Puisque l'AMF peut « exiger la communication ou la remise de toute pièce reliée à l'objet de l'enquête »[99], il aurait été aisé pour l'AMF d'obtenir les documents qu'elle recherche de la part de l'acheteur. Ce sont les termes de l'Ordonnance ODI qui l'en empêchent, selon l'interprétation avancée par Taiga. Face à une telle interprétation, il est impossible de conclure qu'aucune partie prenante n'est désavantagée par l'Ordonnance ODI, par rapport à une vente d'actifs traditionnelle.

[106] Le Tribunal est donc d'avis que, si l'AMF avait connu l'interprétation qu'avance aujourd'hui Taiga, elle aurait fait des représentations pour faire modifier l'Ordonnance ODI en ce qui concerne Taiga et le juge n'aurait pas approuvé cette ordonnance telle qu'elle lui a été soumise.

[107] Dans le cadre de ses représentations, Taiga fournit plusieurs exemples jurisprudentiels où l'on peut constater que des organismes publics ont été en mesure de négocier certaines modifications (*carve-out*) au projet d'ordonnance afin de protéger leurs droits. Elle fournit même un exemple dans le présent dossier, démontrant que les agences provinciale et fédérale du revenu ont obtenu une telle dérogation[100].

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98 Pièce R-2, page 5.
99 Article 242 LVM.
100 Voir le paragraphe 28 de l'Ordonnance ODI, pièce R-1, où il est précisé que les agences du revenu pourront, malgré l'ordonnance, opérer compensation entre certaines sommes qui leur étaient dues par Taiga et des sommes que ces agences pourraient lui devoir.

[103] If the interpretation that Taiga now advances had been brought to the judge's attention during the hearing for approval of the RVO, the judge could not have concluded, as he did in paragraph 23 of his reasons, that the third criterion had been met. The judge expressed himself as follows:

"iii. Is any stakeholder worse off under the RVO than they would have been under any other viable alternative?

[23] The answer to this question is clearly no. EDC is the only creditor with an economic interest in Taiga's business and assets under any restructuring or sale scenario. Moreover, Taiga's employees, suppliers and distributors all benefit from the continuation of Taiga's business under the RVO and would be worse off in the event Taiga's assets were sold or liquidated."(98)

[104] As can be seen, no mention was made of the potential impact of the RVO on public authorities in general, or the AMF in particular. However, the interpretation of that order now advanced by Taiga places the AMF in a worse position than if the compromise had been concluded through another viable structure, such as an asset sale.

[105] In the case of an asset sale, it can be assumed that the purchaser would have acquired all of the company's accounting and IT records. Since the AMF can require the production or disclosure of any document related to the subject of its investigation (99), it would have been easy for the AMF to obtain the documents it is now seeking from the buyer. It is the terms of the RVO itself that prevent this, according to Taiga's interpretation. Given this, it is impossible to conclude that no party was disadvantaged by the RVO compared with a traditional asset sale.

[106] The Tribunal therefore finds that, had the AMF been aware of the interpretation Taiga now advances, it would have made representations to modify the RVO regarding Taiga's situation, and the judge would not have approved the order as submitted.

[107] In its submissions, Taiga cites several case law examples where public authorities were able to negotiate carve-outs from draft orders to protect their rights. Taiga even provides an example from the present case, demonstrating that the provincial and federal revenue agencies obtained such an exemption. (100)

Footnotes:
98. Exhibit R-2, page 5.
99. Section 242 of the *LVM* (Securities Act).
100. See paragraph 28 of the RVO Order, Exhibit R-1, which specifies that the tax authorities may, despite the order, offset certain sums owed to them by Taiga against amounts Taiga may owe them.

[108] Le Tribunal est toutefois d'avis que ces exemples n'appuient pas la position soutenue par Taiga.

[109] Dans le cas des agences du revenu, il est clairement question de réclamations monétaires. L'impact d'une ordonnance ODI ne contenant pas une telle exception en faveur des agences du revenu était facilement prévisible. Il est donc logique que ces agences soient intervenues pour faire modifier les termes de l'Ordonnance ODI en leur faveur. Dans le cas qui nous occupe, l'AMF ne réclame aucune somme à Taiga. Elle demande simplement des documents et informations afin de mener à bien l'Enquête.

[110] Dans *Harte Gold*[101], l'ODI approuvée par la Cour supérieure de l'Ontario concernait une entreprise exploitant des mines. Comme dans notre affaire, cette ordonnance impliquait que les dettes non-désirées seraient assignées à une compagnie nouvellement formée, qui serait ensuite mise en faillite[102].

[111] Une entreprise minière est soumise à certaines obligations environnementales, par exemple de décontaminer un site lorsqu'une mine cesse ses opérations. Dans cette affaire, une exception à la libération des obligations a été prévue en faveur du gouvernement de l'Ontario, afin que toute réclamation de sa part qui ne constitue pas une réclamation prouvable au sens de la LFI soit exclue de toute quittance. De telles obligations étaient prévisibles au moment de présenter l'ordonnance de dévolution inversée pour approbation par le tribunal et l'ordonnance rendue ne plaçait pas le gouvernement de l'Ontario dans une pire position que si la restructuration avait été accomplie par une vente d'actifs traditionnels.

[112] Le même raisonnement s'applique à l'affaire *Rambler*[103], entendue par la Cour suprême de Terre-Neuve et Labrador. Il était aussi question de la restructuration d'une mine par une ODI et l'exception prévue en faveur du gouvernement de cette province était au même effet.

[113] L'affaire *Tacora*[104] n'est d'aucun secours à Taiga, puisque dans le *carve-out* auquel elle réfère, le Tribunal traitait d'une réclamation monétaire contractuelle en vertu d'un *intercreditor agreement*. Il s'agissait d'une réclamation connue, de sorte qu'il était aisé pour le créancer de négocier une exception.

[114] Taiga met beaucoup d'emphase sur l'affaire *Magasin Laura*[105], où le juge Pinsonnault a reproché à certains anciens employés d'avoir passé sous silence leurs

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101 *Harte Gold Corp. (Re)*, 2022 ONSC 653.
102 *Id*, para. 15.
103 *In the matter of an application of Rambler Metals and Mining Canada Limited and 1948565 Ontario Inc.*, Supreme Court of Newfoundland and Labrador, Court file No. 2023 01G 0841, September 11, 2023.
104 *In the matter of a plan of compromise or arrangement of Tacora Resources Inc.*, Ontario Superior Court of Justice (Commercial List), Court File No. CV-23-00707394-00CL, 26 juillet 2024.
105 *Arrangement relatif à Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc.*, 2023 QCCS 3435.

[108] The Tribunal is, however, of the opinion that these examples do not support the position advanced by Taiga.

[109] In the case of tax authorities, the matter clearly involves monetary claims. The impact of an RVO without such an exception in favor of the tax authorities was easily foreseeable. It was therefore logical for those authorities to intervene to seek modifications to the terms of the RVO in their favor. In the present case, however, the AMF is not claiming any monetary sum from Taiga. It is simply requesting documents and information to conduct its investigation.

[110] In Harte Gold (101), the RVO approved by the Ontario Superior Court concerned a mining company. As in the present case, that order implied that unwanted debts would be assigned to a newly formed company, which would then be put into bankruptcy. (102)

[111] A mining company is subject to certain environmental obligations, such as decontaminating a site once operations cease. In that case, an exception to the release of obligations was granted in favor of the Ontario government, given that any claim from it that did not constitute a provable claim under the *Bankruptcy and Insolvency Act* (BIA) was excluded from the release. Such obligations were foreseeable at the time of presenting the reverse vesting order for court approval, and the order issued by the court did not place the Ontario government in a worse position than if the restructuring had been carried out through a traditional asset sale.

[112] The same reasoning applies to the *Rambler* case (103), heard by the Newfoundland and Labrador Supreme Court. That case also concerned the restructuring of a mine through an RVO, and the exception granted in favor of the provincial government had the same effect.

[113] The Tacora case (104) offers no assistance to Taiga, since in the carve-out relied upon, the Tribunal dealt with a monetary contractual claim under an intercreditor agreement. It was a known claim, making it straightforward for the creditor to negotiate an exception.

[114] Taiga also places significant emphasis on the Magasin Laura case (105), in which Justice Pinsonnault criticized certain former employees for having remained silent about their… *(sentence continues on next page)*

Footnotes:
101. *Harte Gold Corp. (Re)*, 2022 ONSC 653.
102. Ibid., para. 15.
103. *In the matter of an application of Rambler Metals and Mining Canada Limited and 1948565 Ontario Inc.*, Supreme Court of Newfoundland and Labrador, Court File No. 2023 01G 0841, September 11, 2023.
104. *In the matter of a plan of transactio or arrangement of Tacora Resources Inc.*, Ontario Superior Court of Justice (Commercial List), Court File No. CV-23-00707394-00CL, July 26, 2024.
105. *Arrangement relatif à Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc.*, 2023 QCCS 3435.

plaintes déposées auprès de la CNESST[106] après leur licenciement. Ces employés alléguaient avoir été victimes d'un congédiement déguisé, en violation de leur droit fondamental de ne pas faire l'objet de discrimination en vertu de la *Charte des droits et libertés de la personne*[107].

[115] Dans cette affaire, les procédures en vertu de la LACC ont été entamées en juillet 2020. En septembre 2020, les employés en question déposent leurs plaintes auprès de la CNESST et en avisent aussitôt Magasin Laura. Le contrôleur répond ensuite à la CNESST, en lui transmettant l'avis de surseoir pour chacune des plaintes, informant ainsi la CNESST de la suspension des procédures ordonnée par la Cour supérieure. En octobre 2020, la Cour émet une ordonnance autorisant spécifiquement le contrôleur à recevoir et considérer les preuves de réclamation des employés et ex-employés de Magasin Laura. Les employées en question déposent donc des preuves de réclamation correspondant aux sommes que Magasin Laura reconnaît leur devoir, mais passent sous silence leurs réclamations basées sur la discrimination. Les preuves de réclamation déposées sont acceptées par le contrôleur. Le plan d'arrangement sera approuvé par la Cour en juillet 2021.

[116] Or, en ce qui concerne les plaintes pour discrimination, la CNESST ignore la suspension des procédures et dépose tout de même les plaintes auprès du TAT[108]. Magasin Laura et le contrôleur ne découvrent l'existence de ces plaintes qu'au cours de l'été 2022. Les plaintes demandaient la réintégration des employées et le versement de leur salaire depuis la fin de leur emploi.

[117] Le contrôleur s'adresse donc à la Cour supérieure pour faire déclarer que les réclamations des employées ont été compromises par le plan d'arrangement. Le juge analyse donc en détail les termes du plan d'arrangement, pour ultimement conclure que les réclamations pour discrimination sont couvertes par le plan homologué. Le juge reproche aux employés de s'être tapies « dans les mauvaises herbes (*lie in the weeds*) pendant les Procédures LACC pour activer discrètement leurs procédures devant le TAT à la fin du processus de redressement […] pour tenter de tirer un avantage indu »[109]. Il fait donc droit à la demande du contrôleur.

[118] Le présent dossier se distingue de l'affaire *Magasin Laura* à plusieurs égards. Dans *Magasin Laura*, la réclamation des employés avait été déposée avant l'homologation du plan d'arrangement. Les employés et la CNESST avaient connaissance du plan proposé et ont même déposé des preuves de réclamations, mais ont volontairement choisi de passer sous silence une portion de leur réclamation, pour la réactiver après la fin du processus en vertu de la LACC. Ce comportement est aux

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106 Commission des normes, de l'équité, de la santé et de la sécurité au travail.
107 RLRQ, c. C-12.
108 Tribunal administratif du travail.
109 *Arrangement relatif à Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc.*, 2023 QCCS 3435, para. 197.

[114] … complaints filed with the CNESST(116) following their dismissal. These employees alleged that they had been victims of a disguised termination, in violation of their fundamental right not to be discriminated against under the *Charter of Human Rights and Freedoms.* (107)

[115] In that case, proceedings under the CCAA had begun in July 2020. In September 2020, the employees in question filed their complaints with the CNESST, and immediately notified Magasin Laura. The monitor responded to the CNESST, forwarding to it the notice of stay of proceedings ordered by the Superior Court under the CCAA. In October 2020, the Court issued an order specifically authorizing the monitor to receive and consider proofs of claim from the employees and former employees of Magasin Laura. The employees then filed claims corresponding to the amounts acknowledged as owed by Magasin Laura, but remained silent regarding claims based on discrimination. The proofs of claim filed were accepted by the monitor, and the plan of arrangement was approved by the Court in July 2021.

[116] However, regarding the discrimination complaints, the CNESST ignored the stay of proceedings and nonetheless filed the complaints before the TAT (Administrative Labour Tribunal) (108). Neither Magasin Laura nor the monitor discovered the existence of these complaints until summer 2022. The complaints sought reinstatement of the employees and payment of lost wages since the end of their employment.

[117] The monitor then applied to the Superior Court for a declaration that the employees' claims had been compromised by the plan of arrangement. The judge thoroughly analyzed the terms of the plan and ultimately concluded that the discrimination claims were covered by the approved plan. The judge reproached the employees for having "laid in the weeds during the CCAA process, activating their proceedings before the TAT at the end of the restructuring process in an attempt to gain an undue advantage." (109) The judge granted the monitor's request.

[118] The present case differs from *Magasin Laura* in several respects. In *Magasin Laura*, the employees' claims had been filed before the plan of arrangement was approved. Both the employees and the CNESST were aware of the proposed plan and had even filed proofs of claim, but they voluntarily chose to remain silent on part of their claim so as to reactivate it after the process ended under the CCAA.
This conduct is viewed as... *(continued on next page)*

Footnotes:
106. *Commission des normes, de l'équité, de la santé et de la sécurité au travail* (CNESST).
107. *Charte des droits et libertés de la personne* (Québec).
108. *Tribunal administratif du travail* (Administrative Labour Tribunal).
109. *Arrangement relatif à Magasin Laura (PV) inc./Laura's Shoppe (PV) Inc.*, 2023 QCCS 3435, para. 197.

antipodes de celui de l'AMF dans le présent dossier, qui ne pouvait se douter de la portée que Taiga désire maintenant donner à l'Ordonnance ODI.

[119] Taiga réfère aussi aux décisions de la Cour supérieure dans *Bloom Lake*[110] et dans *Groupe financier Chok*[111] pour faire valoir l'importance pour un créancier ayant reçu notification des procédures sous la LACC de se manifester pour faire valoir ses droits en temps opportun. Le Tribunal est d'accord avec ces décisions, mais ajoute qu'elles doivent être distinguées de la présente affaire. Dans ces décisions, les créanciers connaissaient l'existence des réclamations que l'on désirait compromettre et ont simplement omis de se manifester. Nous sommes loin de la situation à laquelle l'AMF est présentement confrontée.

4.10. L'affirmation selon laquelle M. Stewart Wilkinson n'aurait pas fait l'acquisition des actions de Taiga en l'absence de l'Ordonnance ODI telle que prononcée

[120] Taiga place une importante emphase sur la déclaration sous serment de M. Wilkinson, qui affirme que sans l'Ordonnance ODI telle qu'elle a été rendue, il n'aurait pas complété le transaction[112].

[121] Taiga plaide que, face à la demande en irrecevabilité de l'AMF, ce fait doit être tenu pour avéré. Elle invite donc le Tribunal à donner plein effet à l'interprétation littérale de l'Ordonnance ODI qu'elle avance et ainsi conclure que Taiga n'a aucune obligation en lien avec l'Enquête.

[122] Il est vrai que les faits allégués à la Demande de Taiga doivent être tenus pour avérés. La déclaration sous serment est une forme de témoignage écrit et répond aux prescriptions de l'article 2843 C.c.Q., à savoir que le « témoignage est la déclaration par laquelle une personne relate les faits dont elle a eu personnellement connaissance ».

[123] Or, l'affirmation de M. Wilkinson n'est pas factuelle. Il mentionne ce qu'il aurait fait face à une situation hypothétique. Un juge peut certes tirer des inférences, à la lumière de la preuve, sur ce qu'une personne aurait probablement fait si elle avait été placée devant certaines circonstances, mais un témoin ne peut pas affirmer une telle chose. Il ne s'agit pas d'un fait dont M. Wilkinson a personnellement connaissance, pour la simple et bonne raison que la situation décrite par le témoin ne s'est pas produite. L'Ordonnance ODI a été rendue dans la forme demandée par Taiga. Un témoin de faits ne peut affirmer ce qu'il se serait produit si la teneur de l'Ordonnance avait été différente.

---

[110] *Arrangement relatif à Bloom Lake*, 2017 QCCS 5573.
[111] *Groupe financier Chok inc. c. 9497706 Canada inc.*, 2023 QCCS 4482.
[112] Paragraphe 32 de la Demande de Taiga, supporté par le paragraphe 3 de la déclaration sous serment de M. Wilkinson.

...the complete opposite of the AMF's conduct in the present case, which could not have anticipated the scope that Taiga now wishes to assign to the RVO.

[119] Taiga also refers to decisions of the Superior Court in *Bloom Lake* (110) and *Groupe financier Chok* (111) to emphasize the importance for a creditor, once notified of CCAA proceedings, to appear in order to assert their rights in due time. The Tribunal agrees with these decisions but adds that they are distinguishable from the present case. In those cases, creditors knew of the existence of claims they sought to compromise but simply failed to come forward. This is far removed from the situation the AMF now faces.

4.10. The statement that Mr. Stewart Wilkinson would not have acquired Taiga's shares without the RVO as issued

[120] Taiga places significant emphasis on the sworn declaration of Mr. M. Wilkinson, who affirms that without the RVO as rendered, he would not have completed the transaction. (112)

[121] Taiga therefore invites the Tribunal to accept that declaration as fact and to interpret the AMF's inadmissibility motion in light of it. It urges the Tribunal to give full literal effect to the RVO Order's wording, as advanced by Taiga, and thereby conclude that Taiga has no obligation in connection with the AMF investigation.

[122] It is true that the facts alleged in Taiga's motion must be assumed to be true. A sworn declaration is a form of written testimony and must comply with the requirements of Article 2843 of the Civil Code of Québec, which provides that "*testimony is a statement by which a person relates facts of which they have personal knowledge*."

[123] However, Mr. Wilkinson's statement is not factual. He refers to what he would have done in a hypothetical situation. A judge may indeed draw inferences, based on the evidence, as to what a person would likely have done in certain circumstances — but a witness cannot attest to such a thing.
This is not testimony about something Mr. Wilkinson personally experienced, simply because the situation he describes never occurred. The RVO was issued in the form requested by Taiga; a witness cannot validly attest to what would have happened if the Order's wording had been different.

Footnotes:
110. *Arrangement relatif à Bloom Lake*, 2017 QCCS 5573.
111. *Groupe financier Chok inc. c. 9497706 Canada inc.*, 2023 QCCS 4482.
112. Paragraph 32 of Taiga's motion, supported by paragraph 3 of Mr. Wilkinson's sworn declaration.

[124] Ironiquement, Taiga plaide que l'AMF n'avait qu'à se présenter à la Cour pour contester l'Ordonnance ODI ou négocier des modifications à ses termes, afin de ne pas être forclose de demander des informations à Taiga en lien avec l'Enquête. Cet argument démontre bien que l'affirmation de M. Wilkinson n'est pas factuelle. Il ne peut pas affirmer d'une part qu'il n'aurait pas acheté sans l'Ordonnance ODI dans sa forme actuelle, et d'autre part qu'il était parfaitement loisible pour l'AMF de négocier des modifications à l'Ordonnance ODI.

[125] Le Tribunal est donc d'avis que l'affirmation de M. Wilkinson n'est pas un fait qui doit être tenu pour avéré pour les fins de la demande en irrecevabilité de l'AMF.

POUR CES MOTIFS, LE TRIBUNAL :

[126] **ACCUEILLE** la Demande de l'AMF en irrecevabilité de *l'Application of Taiga Motors Corporation to enforce the conclusions of the Approval and Reverse Vesting Order dated October 10, 2024*;

[127] **REJETTE** *l'Application of Taiga Motors Corporation to enforce the conclusions of the Approval and Reverse Vesting Order dated October 10, 2024*, portant la date du 11 juin 2025;

[128] **LE TOUT**, avec frais de justice en faveur de la défenderesse Autorité des marchés financiers;

____
PATRICK OUELLET, J.C.S.

Me Sophie Melchers
Me Charlotte Dion
Me Florence Jarry
NORTON ROSE FULBRIGHT CANADA, S.E.N.C.R.L., S.R.L.
Avocates de la requérante

Me Stéphanie Jolin
Me François-Benjamin Déraps
Me Raphaëlle Mombleau
CONTENTIEUX DE L'AUTORITÉ DES MARCHÉS FINANCIERS
Avocats de la défenderesse

Dates d'audience : 2 et 3 septembre 2025

[124] Ironically, Taiga argues that the AMF should simply have appeared before the Court to challenge the RVO or to negotiate amendments to its terms, in order not to lose its right to request information from Taiga in connection with the investigation. This argument clearly shows that Mr. Wilkinson's statement is not factual. He cannot claim, on one hand, that he would not have made the purchase without the RVO in its present form, and on the other hand, that it was entirely possible for the AMF to negotiate amendments to the RVO.

[125] The Tribunal therefore concludes that Mr. Wilkinson's statement is not a fact that can be assumed true for the purposes of assessing the AMF's inadmissibility motion.

FOR THESE REASONS, THE COURT:

[126] **GRANTS** the AMF's motion of inadmissibility regarding the *Application of Taiga Motors Corporation to enforce the conclusions of the Approval and Reverse Vesting Order dated October 10, 2024*;

[127] **DISMISSES** the *Application of Taiga Motors Corporation to enforce the conclusions of the Approval and Reverse Vesting Order dated October 10, 2024*, filed on June 11, 2025;

[128] **THE COURT,** therefore, rules in favor of the defendant, the Autorité des marchés financiers (AMF).

Patrick Ouellet, J.C.S.
(Superior Court Judge)

Counsel for the Applicant:
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Me Charlotte Dion
Me Florence Jarry
Norton Rose Fulbright Canada, S.E.N.C.R.L., S.R.L.
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Contentieux de l'Autorité des marchés financiers
Counsel for the Defendant

Hearing Dates: September 2 and 3, 2025

TAB 8

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

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 **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, *Joshua W. Winter* for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

[65] This passage would appear to support Mr. Thornton's submission.

[66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

[67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

[68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

[69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

[70] The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

[71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

[72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

[73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

[74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

[75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

TAB 9

EVIDENCE
[*Recorded by Electronic Apparatus*]

Thursday, October 3, 1996

.0941

[*English*]

The Chairman: We shall resume consideration of Bill C-5, an act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act.

We had a good day yesterday in going through many of the amendments, and today we're going to continue this deliberation with clause 122.

Our procedure will be to continue the consideration of the clauses in order, and then we'll turn to clause 105 at the end to consider the amendment from the Bloc.

Mr. Parliamentary Secretary, would you like to pick it up where we left off?

On clause 122

Mr. Bodnar (Saskatoon - Dundurn): On clause 122, the government has amendment G-57, and again this amendment is a technical amendment. It is similar to the one we did yesterday on the BIA. We're under the CCAA right now.

The Chairman: This is a parallel to the amendment we made in clause 30. Are there any questions?

Amendment agreed to [See *Minutes of Proceedings*]

Clause 122 as amended agreed to

Clause 123 agreed to

On clause 124

Mr. Bodnar: On clause 124 we have government amendment G-58, and that's just to correct a typo.

Amendment agreed to [See *Minutes of Proceedings*]

Mr. Bodnar: G-59 is also under clause 124.

Mr. Jacques Hains (Acting Director General, Corporate Governance Branch, Department of Industry): This was in the brief of the Canadian Life and Health Insurance Association to this committee when they appeared, where they recommended some clarifications to CCAA amendments. This is one of them.

The Chairman: Are there any questions?

Amendment agreed to [See *Minutes of Proceedings*]

Mr. Bodnar: Next is government amendment 60.

Mr. Hains: This is internal. All we're doing here is breaking the provisions into paragraphs to make it easier to read and understand.

Amendment agreed to [See *Minutes of Proceedings*]

Mr. Bodnar: G-61 again is quite a technical amendment.

Mr. Hains: This is just the one that was approved three amendments ago, the source being the Canadian Insolvency Practitioners Association. Remember clause 30? We just amended it again in the CCAA. This is the same thing.

.0945

Mr. Milliken (Kingston and the Islands): I have a question on this one. In their brief yesterday, I guess it was - I've lost track of the days - the CNTU recommended against allowing directors to compromise their liability under the act, and this amendment facilitates that. I know it isn't the one that does it. What answer is the department giving to this request?

Mr. Hains: The proposal in Bill C-5 to allow corporate directors, as part of a reorganization plan, to propose a compromise of their directors' liability was a recommendation that originated from the bankruptcy and insolvency advisery committee. The intent of this particular proposal is to try to provide incentive and encouragement to corporate directors when the going gets tough for their corporations, to stay on instead of leaving sinking ships out of fear of personal liability, to make bold decisions to try to salvage the business.

By that we mean they should make offers to creditors to compromise what they're owed. Often, in so doing, corporate directors automatically increase their own exposure, because those creditors who accept to compromise the debt vis-à-vis the corporations could go through the back door and use some statutory provisions to sue directors for the compromise they willingly accepted of the corporations. So it's an element of fairness. That is the explication of the proposal.

What this particular amendment is doing here - again, it was recommended by the Canadian Insolvency Practitioners Association - is clarifying that the claims that can be compromised are the claims that arose before, but while their reorganization plan is being worked on, the financial obligations, as they accrue, shall be met.

So I think this is a good improvement, a clarification of the intent.

The Chairman: Is that fine?

Mr. Milliken: That's fine.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Government amendment 62, Mr. Hains. This is an internal....

Mr. Hains: Yes, that's right. It's been identified by our private sector advisers. This amendment is necessary to cover all instances of bankruptcy arising out of a failed proposal. When a proposal is made under either the CCAA or BIA, it could be automatic bankruptcy, retroactive. What this is saying here makes that clear.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Government amendment 63, Mr. Hains.

Mr. Hains: Again, this is an amendment that was approved by your committee yesterday, Mr. Chairman, on the BIA. We're mirroring it here on the CCAA. The source is the Insolvency Institute of Canada.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Amendment G-64.

TAB 10

CANADA

CONSOLIDATION

CODIFICATION

Companies’ Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to October 28, 2025

Last amended on December 12, 2024

À jour au 28 octobre 2025

Dernière modification le 12 décembre 2024

Published by the Minister of Justice at the following address:
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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to October 28, 2025. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of October 28, 2025 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 28 octobre 2025. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 28 octobre 2025 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Compromise with secured creditors

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

R.S., c. C-25, s. 5.

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

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

1997, c. 12, s. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or

Transaction avec les créanciers garantis

5 Lorsqu'une transaction ou un arrangement est proposé entre une compagnie débitrice et ses créanciers garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Démission ou destitution des administrateurs

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

1997, ch. 12, art. 122.

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres —

TAB 11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pope & Talbot Ltd. (Re),*
2009 BCSC 1552

Date: 20091112
Docket: S077839
Registry: Vancouver

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

AND IN THE MATTER OF THE RECEIVERSHIP OF POPE & TALBOT LTD. and others

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for Federal Insurance Company:	K.D. Kraft H.D. Edinger
Counsel for National Union Fire Insurance Company of Pittsburgh, PA:	G.M. Nijman
Counsel for XL Specialty Insurance Company:	D. Harris, Q.C. J.D. Hughes
Counsel for former Directors & Officers of Pope & Talbot	D.B. Kirkham, Q.C.
Counsel for PricewaterhouseCoopers Inc.	R.J.H. Berrow K. Jackson
Counsel for Ableco Finance LLC:	P. Rubin
Place and Date of Hearing:	Vancouver, B.C. October 14-15, 2009
Place and Date of Judgment:	Vancouver, B.C. November 12, 2009

Introduction

[1] Three insurers who issued Directors and Officers liability ("D&O") policies in favour of directors and officers of Pope and Talbot Inc. ("P&T Inc.") and its subsidiaries, including Pope and Talbot Ltd. ("P&T Ltd."), seek a declaration that the proper law of those policies is the law of the State of Oregon.

[2] In addition, one insurer, National Union Fire Insurance Co. of Pittsburgh, Pennsylvania, maintains that a mediation and arbitration ("ADR") clause contained in its policy, which is an excess policy, is a condition precedent to any determination of coverage by this Court. As a result, it seeks a stay of proceedings of the upcoming hearing regarding the insurers' purported coverage obligations, insofar as its coverage obligations are concerned.

[3] The present application follows my decision concerning territorial competence and *forum conveniens* issued on July 27, 2009 and reported as *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1014, 76 C.C.L.I. (4th) 212. The history of the insolvency proceedings, brought initially in Canada pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), is also set out in those reasons for judgment.

[4] P&T Ltd. is currently in receivership. PricewaterhouseCoopers Inc. ("PWC") is the receiver. Proceedings under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") are stayed. Previously, P&T Ltd. applied for and received protection from its creditors pursuant to the *CCAA.* The Directors Charge established by the Order of Chief Justice Brenner on November 21, 2007 (during the *CCAA* proceedings), to respond to certain types of claims that may be brought against the directors and officers of, *inter alia*, P&T Ltd. and its parent company, P&T Inc., remains to be drawn upon. Insolvency proceedings brought in Delaware on behalf of P&T Inc. have been deferred to the current Canadian insolvency proceedings by the US Bankruptcy Court for the District of Delaware. That insolvency is akin to Canadian *CCAA* proceedings as opposed to proceedings under the *BIA*.

> The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers. Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.

[121] Topolniski J. also remarked that solutions to *BIA* issues will require judges to consider the realities of commerce and business efficacy:

> [27] Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis.

[122] The same point was made by Farley J. in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176, 27 C.B.R. (3d) 148 (Ont. Ct. J. (Gen. Div.)) at p. 185:

> While the *BIA* is generally a very fleshed-out piece of legislation when one compares it to the *CCAA*, it should be observed that s. 47(2)(c): "The court may direct an interim receiver ... to ... (c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

[123] Section 183(1) of the *BIA* invests Bankruptcy Courts with equitable jurisdiction:

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

(c) in the Provinc[e] of...British Columbia, the Supreme Court[.]

[124] Although the *BIA* permits Bankruptcy Courts to interfere with leases and creditor agreements in some circumstances, it makes no specific mention of interference with conditions precedent to an insurer's coverage obligations. Nor does the *Act* define what is meant by "auxiliary" or "ancillary" jurisdiction.

[125] Dictionary definitions offer little guidance. *Black's Law Dictionary* defines "auxiliary" to mean: "The incidental aid by an equity court to a court of law when justice requires both legal and equitable processes and remedies". The *Shorter Oxford Dictionary* defines it as: "Helpful: giving support or succour; ...subsidiary, additional, anciliary." The word "ancillary" is defined in *Black's Law Dictionary* to mean: "A court's jurisdiction to adjudicate claims and proceedings related to a claim that is properly before the court". The definition contained in the *Shorter Oxford Dictionary* reads: "Subservient, subordinate; auxiliary, providing support".

[126] I view the question, in the circumstances of this case, in terms of the Court's inherent jurisdiction to control its own process in order to promote the objects of the *BIA* rather than gap filling through statutory interpretation.

[127] The Alberta Court of Appeal, in *Residential Warranty*, added its own remarks concerning the scope of the Bankruptcy Court's reliance on inherent jurisdiction:

> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case. ...
>
> [21] Further limitations are based on the nature of the *BIA* – it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. ... However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA:* [citations omitted]. It has also been used where there is no other alternative available: [citations omitted] and to accomplish what justice and practicality require: [citation omitted].
>
> ...
>
> [37] Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse.

TAB 12

Citation: Allen-Vanguard Corporation (Re), 2011 ONSC 5017
Court File No. CV-09-00008502-00CL
Date: 20110825

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 ARRANGEMENT AND REORGANIZATION OF **ALLEN-VANGUARD CORPORATION** UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND SECTION 186 OF THE *ONTARIO BUSINESS CORPORATIONS ACT*., R.S.O. 1990, c.B.16, AS AMENDED Applicants	)	*Ronald G. Slaght, Q.C., Eli S. Lederman* for the Directors and Officers of Allen-Vanguard Corporation *C. Scott Ritchie, Michael G. Robb, Daniel E.H. Bach* for class action plaintiffs *Alan L.W. D'Silva, Daniel S. Murdoch* for Underwriters **Heard**: November 16, 2010

C. CAMPBELL J.:

REASONS FOR DECISION

[1] Two motions were heard together: the first by former directors and officers of Allen-Vanguard to enforce the terms of a Sanction Order, which the directors and officers say release them as well as Allen-Vanguard from all claims except those specifically provided for in section 5.1 (2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA.") In addition, the former directors assert that the claims of the Plaintiffs in two proposed Class Actions are not sustainable against them in law under s. 5 .1 (2) of the CCAA.

[2] The second motion by the Underwriters of Allen-Vanguard seeks to dismiss or stay the action brought against the Underwriters by shareholders in a proposed Class Action.

[3] A cross-motion brought by Plaintiffs in the two proposed Class Actions seeks, if required, variation of the terms contained in the Sanction Order granted December 16, 2009, to permit the Class Actions to proceed.

[4] By way of an endorsement dated February 9, 2011**,** the Court sought further information from the parties with respect to the factual circumstances that surrounded the agreement that was embodied in the terms of the Sanction Order. That information has been provided and will be referred to later in these Reasons.

[31] The object of the CCAA is to facilitate the restructuring of an insolvent corporation. In order to effect restructuring, a compromise of creditors' claims is almost inevitably an essential ingredient of a Plan under the CCAA.

[32] The Plan, to be effective and to obtain Court approval, requires consensus and agreement by various classes of creditors. Many of the issues that arise before a Plan is approved by the Court involve a contestation between creditor groups as to how they should be classified and what extent of what group approval should be appropriately required. No motion was brought to seek to lift the stay in respect of actions provided for in the Initial Order.

[33] In this case, no creditor came forward to oppose approval of the Plan, including the terms of the release language as set out in the Sanction Order. The effect of a Sanction Order is to create a contract between creditors. (See *Canadian Red Cross Society* (2002), 35. C.B.R. (4th) 43 (Ont. S.C.J.).

[34] The most significant feature of the CCAA Applications that have come before the Court in the last two or three years is that the negotiation has taken place to achieve consensus among creditors often before the Initial Order under the statute.

[35] One can rightly understand the reluctance on the part of a provider of interim financing to continue to do so on an indefinite basis, when the approval process may be dragged out for days, weeks or months.

[36] All secured creditors whose security continues to deteriorate during the period of negotiation will seek an early determination of the consensus necessary for approval of a Plan; otherwise, liquidation may be preferable.

[37] Such consensus requires agreement among many stakeholders, including not just creditors but as well current and former directors and officers, many of whose continued cooperation is necessary and integral to a Plan’s success.

[38] To avoid the inequity that would result from creditor claims that were outstanding as against directors at the time of a CCAA application, s. 5.1(2) was amended in 1997 to its present form. As Hart J. noted in *Re-Liberty Oil & Gas Ltd.* 2002 ABQB 949 at paragraph 4, before the enactment of this section, the legislation provided for compromises of claims only against the petitioning company. The new section extends relief against directors of the petitioning company subject to exceptions.

[39] It is appropriate to approach statutory interpretation with the assumption that meaning is to be accorded to each of the words used in the provision within the overall purpose of the CCAA. The absence of other words can also be purposeful.

[40] The CCAA has been said to be a skeletal statute designed to give flexibility and expediency in the ability of the company, with the concurrence of its creditors, to accomplish a restructuring of its debt in the avoidance of liquidation or bankruptcy, and does not contain a

comprehensive code that lays out all that is permitted or barred. (See *ATB Financial v. Metcalfe & Mansfield Alternative Investments11 Corp.*, 2008 ONCA 587 per Blair J.A para. 44.)

[41] Since the hearing in this matter, the Supreme Court of Canada has rendered a decision in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, which endorses the broad principles of the CCAA and the discretion granted to the Court to effect a restructuring if possible or an orderly liquidation.

[42] The case involved a contest between the deemed trust provisions of the *Excise Tax Act* and the CCAA. Madam Justice Deschamps, speaking for the majority, noted the need for clarity of the underlying purpose with respect to the CCAA.

[43] Paragraphs 12 to 14, 17, 58-59 and 63 of that decision read as follows:

> 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 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 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.
>
> …
>
> 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).
>
> …
>
> 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* reflex, (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting.)
>
> …
>
> 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?

[44] I have quoted from the above decision at length to stress the nature of the discretion that is inherent in the CCAA statute to allow the Court to fashion a structure or process to best benefit stakeholders. Consistent with that purpose and as a matter of statutory interpretation, it is appropriate to look at the interpretation of s. 5.1(1) and (2) of the CCAA. Section 5.1 (1) deals with "obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations."

[45] A Plan can therefore provide for the compromise of claims against directors where a director may in law be liable for the payment of a company's obligation with the exceptions set out in s. 5.1(2).

[46] In my view, the best that can be said of s. 5 is that it is not as clearly drafted as it might have been.

[47] It is noteworthy that in the first line of s. 5.1(2), the only claims that may not be excluded in a compromise are those against "directors." Claims that can be excluded in a compromise include those against "officers" and the "company" itself. Why is this the case? One reason undoubtedly is the personal liability that directors face under both Federal and Provincial legislation, or the personal undertaking of a director to a creditor such as a personal guarantee. (See *C.I.T. Financial v Lambert* 2005 BCSC 1779.)

[48] By way of example, s. 131 (1) of the OBCA provides that directors are made personally liable for unpaid wages of the corporation's employees to a maximum of six months. Reading through s. 5.1 (1) and (2), there is nothing in the wording that would prevent the compromise of such claims against officers or the company itself, but not as against directors. The CCAA does not contain a definition of the word "creditor" but does of the terms "secured creditor," "unsecured creditor" and "shareholder." It would seem that for the purposes of the CCAA and in particular s. 5.1 (2), a creditor would include both a secured creditor and an unsecured creditor, but would not include a shareholder.

[49] Section 5.1(2) refers only to creditors and not shareholders as prospective claimants, whether in contract, tort or statutory oppression.

[50] In this case, the claims by the Class Action Plaintiffs are on behalf of shareholders against directors, since the effect of the CCAA stayed the action against the company Allen-Vanguard. The claims arise with respect to a 2007 transaction and the pre-filing financial statements, but the claims do not involve officers or the company, only directors.

[51] While framed in negligence, the claims in these actions seek to involve the remedy of oppression under the OBCA to enlist the broad scope of remedy possible under that statute. However, it is only in respect of unpaid obligations of the company and other contract-type claims where the law imposes liability on the Defendant directors that invokes the exception in s. 5.1 (2). It is noteworthy that the word "negligence" does not appear in the section at all.

[52] In their essence, the claims in the two actions allege a failure on the part of the directors in 2007 and the company to enter into a provident transaction and the transaction represented a misrepresentation to shareholders of the value of the transaction causing a reduction in shareholder value. Such claims are not of the same kind as those contemplated in section 5.1 (1). They do not relate to "obligations of the company where the directors are by law liable."

[53] The claims relate to transactions that were well in advance of the Initial CCAA Order. In *Re Canadian Airlines Corp.* 2000 ABQB 442 (leave refused to ABCA and to SCC), it was held that claims against the directors should only be released if they arose prior to the date of the CCAA proceeding.

[54] I agree that the oppression remedy is expansive in scope and empowers the Court to make determinations and orders that can have a direct and even a radical impact on the internal management and status of a corporation, including even an order winding up the corporation. (See *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2nd) 113 (Ont. Div. Ct.) and *Incorporated Broadcasters Ltd. v. CanWest Global* 2001 CanLII 28395 (ON S.C.) at paragraphs 101-105.) Oppression as it occurs within s. 5.1(2) of the CCAA must be read within the context of the section itself.

[55] The claims in the Love and Laneville actions are in negligence and no other remedy is sought apart from a claim for damages and access to whatever insurance may be available to respond to claims against directors and officers. There is nothing before the Court to suggest that the insurers, assuming there is a valid policy, are aware of the restriction on remedy.

[56] I see no basis from the pleadings in this action for which it would be appropriate to consider the scope of relief that might otherwise apply under the oppression remedy section of the OBCA. Counsel for the Plaintiffs in the Proposed Class Actions cannot bolster their position by limiting recovery to the applicable Directors and Officers Insurance, when there is no basis for the claim at all, either under the language of the Release or the meaning to be accorded to s. 5.1 (2).

[57] In *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, the Supreme Court of Canada commented on the expectations of stakeholders including but not limited to shareholders, in considering a Plan of Arrangement in the context of an oppression claim. Part of

the test for “oppression” referred to in that decision is an expectation on the part of the claimant to be “treated in a certain way and that failure to meet the expectation involved unfair conduct."

[58] I fail to understand how the expectation of one or more shareholder groups can be any different with respect to the impugned transaction than those of creditors or indeed the company itself vis-à-vis the directors, particularly since neither the officers nor the company itself is pursued.

[59] The Sanction Order in this case by its terms provided release of the claims now sought to be pursued. By the terms of the Sanction Order, the only reasonable expectation of stakeholders would be that unless specifically authorized by the Order, any claim against directors would be barred**.** Potential claims against directors were not assigned to class plaintiffs nor was direction sought by any party about the effect of s. 5.1 prior to the issuance of the Order. Given the issue now before the Court and the disagreement of the parties, perhaps the better practice would have been to advise the Court of the issue and "carve" it out of the Plan.

[60] The Court is put in a difficult position when asked in a very constrained timeframe to approve the restructuring with releases. It should certainly not be the expectation that in every instance, releases of the type here should be granted as a matter of course. Those with unpaid obligations of the company may assert that directors are liable if they fail to fulfill the company’s obligation when they are legally bound to do so.

[61] I am of the view that third-party releases in particular should be the exception rather than the rule. There may very well be instances in which the releases are not integral or necessary to the restructuring and should not be approved. That was not suggested in the approval process here. There was no evidence presented at the time of the granting of the Sanction Order to suggest that directors were not important to the restructuring. Indeed, the only evidence before the Court was to the contrary: that the directors were integral to the Plan's success.

[62] In this case, the putative Plaintiffs did not oppose the granting of the Sanction Order and in effect took their chances that the Order might after the fact permit the limited claim referred to in the Monitor's Report.

[63] All of the other stakeholders, including the secured creditors, directors, officers and the Applicant Company, approved the form of Order.

[64] It is certainly speculative at this time to consider, had the form of Order proposed been objected to, to what extent the Court would have any jurisdiction to grant the language now sought by the Plaintiffs, without rejecting the Plan entirely.

[65] The duty of directors is first and foremost to the company itself. The oppression remedy does not in my view permit one group (shareholders) to claim oppression when other stakeholders, for example employees or creditors or indeed the company itself, have allegedly suffered a loss that results in insolvency and are unable to seek redress and still preserve restructuring.

[66] To vary or amend the Sanction Order now to permit the claims to continue might at the very least require the presence and concurrence of all of those who supported the form of Order in the first place.

[67] Counsel for the proposed Plaintiffs refer to several decisions, which they urged support the proposition that shareholder actions for oppression against directors are permitted under s. 5.1 (2) of the CCCA.

[68] Each of those decisions, while fact-specific, in my view is consistent with a narrow range of actions warranted for a shareholder against the director under the exception to s. 5.1 (2).

[69] In *Re-Liberty Oil & Gas Ltd.*, 2002 ABQB 949, where the action did proceed, the allegation involved a personal representation, indeed a fraudulent one, by the defendant director to two individuals who happened to be shareholders. The complained acts were not those of the company (as here), but rather personal and direct as between the director and shareholder. In other words, there was the proximity that one would expect in a tort situation.

[70] In *Worldwide Pork Corp.*, 2009 SK QB 414, the action was not permitted to proceed. At paragraphs 14 and15 Justice Dawson said:

> It must be remembered that the oppression remedy is not designed to settle every dispute of a corporation but only those that involve and abuse of the corporate system and for which a common-law remedy does not exist.
>
> As well, the plaintiffs have pled that their claim is for damages, for loss of profits and loss of pay out dividends. There must be a causal connection between the alleged oppresive conduct and the loss claimed to be suffered by the plaintiffs. That is, there must be a causal nexus between the alleged conduct and the loss suffered by the plaintiffs. There is no pleading which sets out how the alleged loss of profit or dividends resulted from the conduct alleged to be oppressive. But in any event the losses claimed are losses as a result of Worldwide Pork not being profitable, that is, being unable to provide a return to shareholders for their investment. Such a loss cannot support an action for oppression since it comes with in the exception contained in section 5.1 (2) (b.) of the CCAA.

[71] In *Re-Blue Star Battery Systems International Corp.* (2000), 10 B.L.R. (3d) 221, Farley J. of this Court dealt with a claim very much like that considered by the Supreme Court of Canada in *Century Services, supra,* as it involved G.S.T. At paragraph 12, he said

> Thus it appears to me that RevCan, not having put itself into position where it could (and did) perfect its derivative claims as set out in section 323 (2) (a) of the *Excise Tax Act* never had a claim against the directors which could survive the sanction of the Plan vis-à-vis the Applicants. Nothing that this Court could do at the present time (that is, at the time when considering the CCAA sanctioned motion) could crystallize a RevCan claim against the directors. RevCan would have to take additional multiple steps over some period of time to establish a claim against the directors."

[72] Farley J. went on to discuss the hypothetical of a claim in oppression against the directors as provided for in s. 5.1(2) in the context where the creditor had put the directors on notice of the promise of the company to pay the tax.

[73] The argument of the Proposed Plaintiffs here is that "oppressive conduct" is not to be carved out, but that wrongful conduct that involves directors, even though the action as against the company cannot continue, it can continue against the directors.

[74] What in my view is consistent with the decisions in the three cases mentioned and in the Québec case *Papiers Gaspésia* 2006 QCCS 1460 (CanLII) and with the interpretation of s. 5.1(2) is that the actions of the directors toward persons who may be regarded as creditors, and may in this context include a shareholder, are based on a direct relationship when a director takes on an obligation to make a payment that would otherwise be the obligation of the company and promises to do so or is obliged to do so by legislation. In most cases this will be a post-filing obligation. In other words, a promise by a director directly to a creditor stakeholder that is made following a CCAA Initial Order may attract liability to the director and should not be released.

[75] It would be inconsistent with the scheme of the CCAA to allow all claims in which shareholders claim oppression to proceed against directors for acts or omissions that they did in the name of the company prior to the Initial Order. There would be little if any incentive to directors to pursue restructuring if they were going to be so exposed. On the other hand, personal undertakings or obligations of directors made during the CCAA process should not easily be released.

[76] To permit the kind of claims as the Proposed Plaintiffs would see them would create a priority to that class of unsecured creditors that properly should belong to the creditors as a group. No leave to continue the Class action was sought before the Sanction Order was granted and even on this motion no submission was put forward for the exercise of discretion under section 5 .1 (3).

[77] None of the cases referred to in argument dealing with s. 5.1(2) squarely deals with the issue raised here – that the section was intended to related to post-filing claims or personal undertakings of directors to creditors in connection with the proposed plan prior to filing.

[78] The final argument on behalf of Class Plaintiffs is that to deny the claim of shareholders as against directors would only benefit their insurers, since the Class Plaintiffs have agreed to limit any recovery to the amount of the insurance. I fail to see how this advances the position of the Proposed Plaintiffs. No information was put before the Court about the particulars of the insurance. The Court has no information to know whether or not the insurers even know of this issue.

[79] If the claim does not lie as against the directors in the first place under s. 5.1(2), the limitation of the claim as against the potentially available insurance does not advance the case of the class of Plaintiffs.

[80] There would be little meaning left to s. 5.1 if all claims of negligence and wrongful conduct against directors for pre-filing activity could not be released and no need for the discretion provided for in s. 5.1 (3) for Court to override this compromise as not being fair or reasonable. As noted above in the passages from the *Century Services* case, the purpose of the CCAA and the discretion granted to the Court are to permit restructuring to work, not create new causes of action.

[81] The concern of the Court, which necessitated the further inquiry, was that the language of the Sanction Order might imply on the part of the Applicant and directors who had knowledge of

the particulars of the claim that the facts could give rise to a s. 5.1(2) claim. I am satisfied based on the further information provided that no such admission is to be implied.

[82] The relief sought by the directors is therefore granted.

Underwriters

[83] Underwriters acted on share and warrant offerings of Allen-Vanguard in September 2007 and certified a related prospectus. The Love Class Action was commenced in February 2010 and the proposed Representative Plaintiff claims damages against Underwriters under s. 130 of the *Securities Act (Ontario)* and also makes claims on the basis of negligence, unjust enrichment and waiver of tort.

[84] Underwriters rely on the provisions of the releases granted by the Sanction Order and in particular the claims against the Applicant Company Allen- Vanguard. As well, Underwriters rely on the definition of “Equity Claims” in the Sanction Order and submit that because the provisions of the Order in paragraph 26 (ii) bar certain claims against third parties who might claim contribution and indemnity against the restructured company, they should be entitled to the benefit of that provision.

[85] The response of the proposed Class Plaintiffs in the Love litigation is that the claim against Underwriters is based on the negligence, fraud or wilful misconduct of Underwriters. It is submitted that Underwriters are not entitled to indemnity as against Allen-Vanguard for the several negligence of Underwriters, either at law or under s. 130 of the *Securities Act*.

[86] The proposed Class Plaintiff submits that given the nature of the claim as against Underwriters, Underwriters would never have had a right to an indemnity for the claims asserted in the Love Action and therefore there were no such claims to be released.

[87] It is submitted that Underwriters bargained any possible indemnity away by the terms of their contract with Allen-Vanguard in September 2007, and that even if they had the benefit of an indemnity, all that was required for the Plan's success was that Alan-Vanguard be protected from Underwriters, not that Mr. Love's claims against Underwriters be eliminated.

[88] Counsel for the Plaintiff in the Love Action also urges that Underwriters did not have the right of indemnity as at the time of the Initial Order, and the Sanction Order bars any indemnity that they might otherwise have had and there is nothing in the language of either Order to preclude the claim of the Class Plaintiff against Underwriters limited to Underwriters' negligence.

[89] Finally, it is submitted that since Underwriters did not “bring anything to the table” in respect of the restructuring, there is no basis on which the Court should vary the Sanction Order to now provide the indemnity that the Order fails to provide.

[90] In the alternative, the Class Plaintiffs suggest that the Sanction Order be clarified, if necessary, to clearly provide the right of the Class Plaintiff to proceed against Underwriters.

[91] In my view, there is a distinction to be made between the claim as against the directors and that against Underwriters, since in the case as against the directors, the parties appear to have bargained that if the claim could be brought under s. 5.1(2), it could proceed. That consideration was known to the parties who negotiated and agreed on the form of the Sanction Order and that was the only claim not otherwise covered by the Release terms.

[92] In the case of Underwriters, there was nothing to suggest that any discussion or negotiation took place with respect to specific protection for Underwriters or the allowance of a claim against Underwriters at the time that the Sanction Order was approved.

[93] This is another reason why in my view s. 5.1(2) of the CCAA should be read narrowly with respect to pre-filing claims or claims that relate to pre-filing activity.

[94] The *Ontario Business Corporations Act*, R.S.O. 1990 c. B. 16 ("OBCA") contains a statutory process for that kind of action and remedy sought by the Class Plaintiffs in both actions. Section 246(1) reads as follows:

> **246.** (1) Subject to subsection (2), a complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

[95] The Supreme Court of Canada dealt with the issue of collective shareholder claims versus claims that are those of the corporation itself in *Hercules Management Ltd. et al. v. Ernst & Young*, 1997 CanLII 345, [1997] 2 S.C.R.165. The case involved a claim by shareholders of the corporation against its auditors for an alleged negligence in preparation of financial statements of the corporation. Paragraph 48 of the reasons refers to and adopts a statement of Farley J. in *Roman Corp. v Peat Marwick Thorne* (1992), 11 O.R. (3rd) 248 (Gen. Div.) at p 260.

> As a matter of law the only purpose for which shareholders receive an auditor’s report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

[96] The plaintiffs in *Hercules* asserted reliance on financial statements in monitoring the value of their equity and then due to auditors' negligence, they failed to extract it before the financial demise of the company.

[97] The Supreme Court, in assessing the claim, referred at paragraph 59 to the rule in *Foss v Harbottle*:

> 59. The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2),* [1982] 1 All E.R. 354, at p. 367, as follows:
>
>> The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his

> investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

60. The manner in which the rule in *Foss v. Harbottle*, *supra*, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that they were prevented from properly overseeing the management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognize that in supervising management, the shareholders must be seen to be acting <u>as a body</u> in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders *qua* individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

61. This line of reasoning finds support in Lord Bridge's comments in *Caparo*, *supra*, at p. 580:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. <u>But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders . . . will be recouped by a claim against the auditor in the name of the company, not by individual shareholders</u>. [Emphasis in Supreme Court decision.]

It is also reflected in the decision of Farley J. in *Roman I*, *supra*, the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, *inter alia*, that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in *Foss v. Harbottle* and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.

62. One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done <u>to the corporation</u>. Indeed, this is

> the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

[98] The policy of limiting indeterminate liability as in *Hercules* is consistent with the basis for the limitation of claims under s. 5.1(2) as set out above. In my view the words of s. 5.1(2) do not create a cause of action that would otherwise not exist except by leave of the Court. It simply provides an exception to what otherwise could be included in a release.

[99] The release terms contained in the Sanction Order would deprive Underwriters from any claims for contribution or indemnity to which they would otherwise be entitled at law from the Company and its directors and officers should the actions of the Class Plaintiffs proceed.

[100] This is just one further reason to support not just what is required for a derivative action but also what is required to be taken into consideration before the Court issues a Sanction Order in this case in effect on consent.

[101] As noted above, what has come to be known as a "liquidating" CCAA application can provide problems not just for the parties but the Court itself. The presumption behind the timing of the Application in this case was that if not granted quickly, bankruptcy would have ensued with the inevitable loss of jobs, assets and creditor claims.

[102] The Class Plaintiffs are taken to have known of the CCAA proposal as early as September 2009 and could have sought leave to commence a derivative action prior to or during the CCAA process. No such step was taken.

[103] I am satisfied that it is appropriate in the circumstances to stay the claims as against Underwriters in negligence and misrepresentation.

[104] The Claim against Underwriters also alleges fraud. If the only claim were in fraud and full particulars of alleged fraud were contained in the pleading, the claim might survive since the wording of the Release does not extend to fraud.

[105] Apart from fraud, claims in negligence against Underwriters are caught by the terms of the Release. Arguably, the claims are those of the Company that are specifically released.

Variation of the Sanction Order

[106] As noted above in reference to the decision in *Canadian Red Cross*, a Sanction Order in addition to being an Order of the Court and subject to the normal rules for variation thereof, represents an agreed contract between the creditors of an insolvent corporation.

[107] The Class Plaintiffs in the Laneville action did not seek to lift the stay at the time of the Initial Order. The Class Plaintiff accepted the Release provisions which extend to Underwriters when the Sanctioned Order was granted.

[108] Underwriters were released by the terms of the Sanction Order, and the Order, which was not appealed, represents a final determination of the rights of shareholders as against Underwriters.

[109] As was mentioned above, in respect of the suggestion of variation of the Sanction Order to permit the claim as against the directors, I conclude that it is not appropriate to vary a Sanction Order after the fact. The reliance that parties place on the finality of a Sanction Order is such that it would only be in extraordinary circumstances of a clear mistake, operative misrepresentation or fraud that would permit variation without re-opening the whole process.

[110] In *Extreme Retail (Canada) Inc. v. Bank of Montréal*, [2007] O.J. 3304 (Ont. S. J.) [Commercial List], Stinson J. held at paragraph 21 that an Approval and Vesting Order was a final determination of the rights of parties represented in that proceeding. Morawetz J. adopted those comments in *Royal Bank Body Blue Inc.* 2008 CanLII 19227 [ON S.C.] to the same effect at paragraphs 19 and 20. In my view the same principle applies to a Sanction Order.

[111] I see nothing in the requests of either Underwriters or the Class Plaintiffs that would be appropriate to permit variation of the Sanction Order as each of them have proposed.

[112] Should the Class Plaintiff in the Laneville action seek to pursue a claim against Underwriters limited alone in fraud, the action should be permitted to proceed subject to the Plaintiff persuading a judge that such a limited claim should be certified.

Conclusion

[113] For the above reasons the motion by the directors will succeed to enjoin the claims as against them in both the Love and Laneville actions. The motion of Underwriters to strike is granted, and motions for variation of the Sanction Order of both Underwriters and the Class Plaintiffs are dismissed. Counsel may make written submissions on the issue of costs.

C. CAMPBELL J.

Released:

TAB 13

Catch Me If You Can: Third-Party Releases Under the Companies' Creditors Arrangement Act

Luc Morin and Arad Mojtahedi[*]

I. INTRODUCTION

> You know why the Yankees always win, Frank?...[I]t's 'cause the other teams can't stop staring at those damn pinstripes.

This immortal quote from legendary con artist Frank Abagnale in the movie *Catch Me If You Can* comes to mind when thinking about the ever-growing reach of releases granted to a variety of constituents in the context of a restructuring process conducted under the *Companies' Creditors Arrangement Act*.[1]

Those "damn pinstripes" are the restructuring objectives of the *CCAA*, chief among them being the rescue of a business as a going concern. As we discuss in this article, this backdrop continues to drive the evolution of third-party releases under the *CCAA* and the proliferation of their use in modern vesting orders.

In pursuing the overarching objective of the *CCAA*, which is to save a business and preserve its economic engine for the benefit of a body of stakeholders, courts have been receptive to the idea of approving releases to those who are both directly and substantively contributing to the rescue operation.

In its original iteration, releases were sought in favour of those stakeholders directly sponsoring a plan of arrangement and who, rightfully so, would condition their investment in an ailing business on a release in favour of the company. Although they were reluctant at first, courts came to appreciate that such releases could enable successful restructurings. Typically, courts would find

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[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

comfort in and rely on the fact that for such arrangements to be implemented successfully, the statutory support of a significant body of stakeholders was required through a vote. More recently, however, doubling down on the accepted principle that the outcome of a restructuring is no longer necessarily linked to a plan of arrangement,[2] and more often than not takes the form of a transfer of business through a sale of assets blessed by the court with an approval and vesting order ("AVO") or a reverse vesting order ("RVO"), courts have been granting releases without this creditors' support veneer.

In the same vein, originally, third-party releases were granted by the courts to plan sponsors who were substantively contributing to the success of a plan of arrangement in order to shield them from recourse by disgruntled stakeholders that would otherwise frustrate a successful restructuring. Today, courts routinely grant releases in favour of directors and officers ("D&O") of the company. Some have argued that D&O can hardly qualify as third parties and that their own actions are often associated with the business failures that resulted in the company filing for protection under the *CCAA* in the first place. This perspective often fails to take into account the crucial role that D&O are asked to play in navigating the troubled waters of restructuring a business. Conversely, others may argue that this contribution, rather than qualifying as substantive, is strictly in line with the D&O's fiduciary care and maintenance duties. Besides, contrary to other constituents, D&O often enjoy the protection of a contractual D&O insurance policy and/or a *CCAA* charge, commonly referred to as the "D&O charge", to alleviate their potential exposure; thus, it may also be argued that a court-sanctioned release is inappropriate. Also of interest when dealing with releases in favour of D&O is the impact of the limits set forth in section 5.1 of the

[2] See *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABQB 2 at paras 90–115; Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini & the Honourable D Blair Nixon, eds, *Annual Review of Insolvency Law 2019* (Toronto: Thomson Reuters, 2020) at 624; Luc Morin & Nicolas Mancini, "Nothing Personal: The *Bloom Lake* Decision and the Growing Outreach of Vesting Orders against *in personam* Rights" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2017* (Toronto: Carswell, 2018) at 905.

> In short, not only does the undersigned believe that the proposed plan is fair and reasonable, but accepting the arguments presented by CP brought public confidence in the courts into disrepute.[51]

III. THE SPECIAL CASE OF D&O RELEASES

It may seem counterintuitive to refer to D&O as third parties when dealing with a debtor company, but the legal reality is that they are a separate body of constituents and, although they are held to fiduciary care and maintenance standards, they must be treated as third parties. The legislator certainly recognized this reality by incorporating section 5.1 of the *CCAA* in 1997 in response to *Steinberg*, setting aside the courts' initial reluctance to grant releases in favour of the D&O.[52]

Although we are sensitive to the argument typically put forward by disgruntled stakeholders suggesting that business failures that led a debtor company to resort to the *CCAA* should fall squarely on the D&O, this is usually the result of a factual, if not intellectual, shortcut. There is usually no shortage of reasons to explain why a company had to resort to the *CCAA* but in the end, in the vast majority of cases, they point to changes in market conditions, variables and circumstances to which the company and its business are subject, many of which are beyond the control of D&O—for example, a change in the rules of the game or an unforeseeable collapse of market conditions.

Does this mean that D&O made a wrong decision? Not necessarily. More importantly, it should not matter, as long as decisions later perceived to be wrong were made in an informed and sensible manner. In light of the business judgment rule,[53] the mere fact that D&O may be partially responsible for the company's insolvency does not derail the ability of the court to grant a release in favour of D&O in order to facilitate a successful restructuring process under the *CCAA*.

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[51] *Ibid* at para 65 [author's translation].
[52] *Metcalfe*, supra note 23 at paras 96–99.
[53] *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68; *BCE Inc v 1976 Debentureholders*, 2008 SCC 69.

To those who suggest that releases in favour of D&O are akin to a reward for them simply abiding by their fiduciary care and maintenance duties, we would point to the *CCAA* court's wide discretion in granting such releases. Releases ought to be linked to a substantive contribution to the successful restructuring of the debtor company from the D&O that goes beyond their typical exercise of fiduciary care and maintenance duties. Directors and officers are also usually uniquely positioned to assist a successful restructuring.

In the end, not all D&O are created equal: depending on their contribution to the successful restructuring of the business, some D&O could benefit from a third-party release, while others might not. Mere respect for their fiduciary care and standard duties should not be sufficient for D&O to obtain a court-issued third-party release. For that kind of contribution, D&O, who by the very nature of their functions have access to privileged information allowing them to appropriately gauge their risk and protect themselves *ab initio*, should rely on their D&O insurance policy. It is our view that court-issued releases should serve as an incentive to D&O to go beyond the exercise of their fiduciary care and maintenance duties, ultimately to the benefit of all stakeholders involved. As with all third-party releases, those in favour of D&O must be rationally connected to the purpose of the restructuring and provided in exchange for a meaningful contribution toward its achievement.

As previously noted, in 1997 section 5.1 was added to the *CCAA* with the aim of encouraging directors of insolvent corporations to remain in office and work toward a successful restructuring. The section provides for the following:

> Claims against directors — compromise
>
> 5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

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

The amendments included the specific exception that “a provision for the compromise of claims against directors may not include claims that (a) relate to contractual rights of one or more creditors; or (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.” The wording of section 5.1(2)(a), in turn, pays homage to the principles of the binding force of contracts and freedom of contract.

Nevertheless, the 1997 amendments have not been interpreted restrictively. In fact, the courts do not see themselves as being limited by the language of section 5.1(1) to only releases for liabilities “where the directors are by law liable in their capacity as directors”, and have found that section 5.1 does not limit their discretion to render any order that is appropriate in the circumstances pursuant to section 11 of the *CCAA*.

The case law has also come to recognize the legitimate policy objective of encouraging directors to stay at the helm as the restructuring is underway, while preventing them from taking advantage of a release in order to avoid the consequences of their negligent representations or oppressive conduct. In particular, when directors make direct promises to certain creditor stakeholders

TAB 14

9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
Respondents

and

Ernst & Young Inc.,
IMF Bentham Limited (now known as Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier
Respondents

and

9354-9186 Québec inc. et
9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc.,
IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation
Intervenants

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

c.

Callidus Capital Corporation,
International Game Technology,
Deloitte S.E.N.C.R.L., Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Insolvency Institute of Canada and
Canadian Association of Insolvency
and Restructuring Professionals *Interveners*

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc.,
Institut d'insolvabilité du Canada et
Association canadienne des professionnels
de l'insolvabilité et de la réorganisation
Intervenants

Répertorié : 9354-9186 Québec inc. *c.* Callidus Capital Corp.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Held: The appeal should be allowed and the supervising judge's order reinstated.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. 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. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte 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 » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi n[o] 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

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

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

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

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

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

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

TAB 15

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° 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.

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.

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,

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 inferrable 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.

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* dégagée 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.

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 unmistakeable 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.

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 44*f*) 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 assujetti 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*.

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.

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] 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.

[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] 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.

[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] 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*.

[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*.

TAB 16

Ontario Supreme Court
BlueStar Battery Systems International Corp., Re
Date: 2000-11-06

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

In the Matter of a Plan of Compromise or Arrangement of BlueStar Battery Systems International Corp. and BlueStar Systems Canada Corp.

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: October 31, 2000

Judgment: November 6, 2000

Docket: 00-CL-3860

Kevin Dias, for Her Majesty the Queen in Right of Canada (Canada Customs and Revenue Agency).

Derrick Toy and Orestes Pasparakis, for BlueStar Applicants.

Brent MacPherson, for PricewaterhouseCoopers Inc. (Monitor of Applicants).

Daniel R. Dowdall and Alex A. Ilchenko, for Finova Capital (Canada) Corp.

Steven Golick, for Enertek Mexico S. de R.L. de C.V.

Robert A. Klotz, for Bradley, Curtis Streelman and MDM Marketing Inc.

***Farley J.*:**

1 Canada Customs and Revenue Agency ("RevCan") by material dated October 30, 2000 moved for an order declaring that the claims against the directors of the Applicants not be compromised by this Court's sanction of the Plan of Arrangement made pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"). This Plan was filed on September 5, 2000, the same day that the Applicants sought protection under the CCAA. The sanction hearing had been long scheduled for October 31, 2000. On that date I approved the Plan vis-à-vis the Applicants; however I reserved judgement on RevCan's late blooming motion. I now deal with it as if it were being dealt with coincident with the sanction hearing (that is the fact that I approved the Plan vis-à-vis the Applicants a few days ago is to be ignored). I was advised that it does not appear that s. 5.1 of the CCAA has been judicially commented on before. It may be that my analysis herein will be of some assistance—or at least a starting point for discussion—in understanding this section of the CCAA.

2 For the sake of easy reference I have reproduced s. 5.1 in its entirety below:

5.1(1) Claims against directors—compromise—A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) Exception—A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) Powers of court—The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

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

3 RevCan asked for the alternative relief of a declaration that the Plan was not fair and reasonable in the circumstances in that it precluded unsecured creditors of the Applicants from pursuing claims against the directors. RevCan sought the additional relief of an order granting it leave to register in the Federal Court a certification for the amount of the Goods and Services Tax ("GST") liability of BlueStar Systems Canada Corp. ("BSCC") and to obtain an execution for that amount from the Federal Court pursuant to s. 323 (2)(a) of the *Excise Tax Act* and leave to direct the Sheriff to attempt to satisfy that execution against assets of BSCC that were not protected by my CCAA stay order of September 5, 2000.

4 RevCan submitted that it was entitled to such relief for the following grounds. BSCC is indebted for GST liability for the period September 1999 to September 2000 in the amount of $ 1,096,684. While new management took control of the operations of BSCC beginning in February 2000, BSCC continued to fail to remit the GST it was required to remit pursuant to the *Excise Tax Act.* From March 2000 through the end of August 2000, BSCC representatives

made numerous promises to RevCan representatives in respect of paying the outstanding GST liability but did not do so. GST returns for January—May 2000 were only filed at the end of August 2000. While not sworn to, RevCan asserts that the Applicants, their counsel and the Monitor were put on notice of RevCan's position several weeks before the hearing.

5 Sections 5.4 and 5.9 of the Plan that was approved by the unsecured creditors of the Applicants would compromise RevCan's claims against the directors of the Applicants. At the meeting of the unsecured creditors on October 26, 2000, the RevCan representative raised the concerns of RevCan and asked that the meeting consider amendments to the Plan. After consulting with representatives from BSCC, the chairman of the meeting, an officer of the Monitor, ruled that as BSCC did not wish to make any amendments to the Plan, the meeting would not consider such amendments. RevCan indicates that the Applicants never provided it with any explanation as to why the restructuring of both corporations could not proceed under the Plan without having the claims against the directors compromised by the Plan.

6 The meeting was attended by 222 unsecured creditors, either in person or by proxy. Three unsecured creditors abstained from voting. The 219 who voted represented claims totalling $42,286,376.82. A total of 211 unsecured creditors with claims totalling $41,877,271.70 voted to approve the Plan, representing 96.3% in number and 99.0% in value of those voting. RevCan did not vote against the Plan or abstain from voting; rather RevCan voted in favour of the unamended Plan. I would also point out that RevCan did not advance a competing CCAA Plan including one which would not wipe out the liability of the directors.

7 The Initial Order of September 5, 2000 contained a "come back" clause. Any creditor, including RevCan, would have been at liberty to move in court before the Plan was voted upon to attempt to amend the Plan. However once a vote has been taken, there are fairly definite restrictions upon amending a CCAA plan. See *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) at p. 143; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at pp. 174-5; *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) at p. 15.1 shall deal later with the question of whether the present case falls within the "exceptional circumstances only" condition of the Court of Appeal in Algoma as to an amendment.

8 One might view RevCan's motion as one challenging the classification of creditors; in other words RevCan appears in essence to wish to be put into a separate class from the rest of the

unsecured creditors. I think it fair to observe that it appears that RevCan is the only unsecured creditor to be affected by the inclusion of the compromise of directors liability in the Plan. However, where an initial order of the Court places creditors into certain classes (or in the present case puts them all into a single class), the proper procedure for attacking the classification is by way of appeal of the classification order, and “not the sanctioning order”: see *Keddy Motor Inns Ltd., Re* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.) at pp. 251-2. In the present case, since the classification order was contained in the Initial Order effectively obtained on an *ex parte* basis since RevCan was not then present, RevCan could have utilized the “come back” clause on a timely basis instead of going to appeal. It is unfortunate for RevCan that it did not do so.

9 Under the CCAA, all Crown claims, including secured claims, rank as unsecured claims: see s. 18.4. Therefore RevCan’s claim for unpaid GST is unsecured. In addition, the CCAA specifically eliminates the “deemed trust” in favour of GST found in s. 222 of the *Excise Tax Act;* but in contrast it does not interfere with the deemed trust provisions found in s. *221*(4) and (4.1) of the *Excise Tax Act*[1]: see s. 18.3(1)(2)[2].

10 Director liability for GST arises pursuant to s. 323(1) of the *Excise Tax Act* which provides:

> s. 323 (1) Where a corporation fails to remit an amount of net tax as required under subsection 228 (2) or (2.3), the directors of the corporation at the time the corporation was required to remit the amount are jointly and severally liable, together with the corporation, to pay that amount and any interest thereon or penalties relating thereto.

However that legislation goes on to provide that:

> s. 323(2) A director of a corporation is not liable under subsection (1) unless
>
> > (a) a certificate for the amount of the corporation’s liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
> >
> > (b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation’s liability referred to in

[1] *Sic.* Should be *Income Tax Act*—ed.
[2] *Sic.* Should be s. 18.3(1), (2)—ed.

subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or

(c) the corporation has made an assignment or a receiving order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or receiving order.

Only s. 323 (2)(a) would be of any relevance in the present analysis.

11 The Applicants point out that pursuant to the Plan, in respect of which Rev-Can voted in favour, unsecured creditors, including RevCan, accepted "in full and final satisfaction of their Proven Claims" the consideration provided for under the Plan. The Applicants further reason that since RevCan's claim for GST has been fully satisfied, then pursuant to s. 323 (2)(a) of the *Excise Tax Act,* no director liability could arise in respect of same. On that basis, in respect of GST, RevCan's claim is satisfied by operation of law, and in particular the terms of the *Excise Tax Act,* upon confirmation of the Plan. On that basis, the directors of the applicants do not need to rely on s. 5.1 (1) of the CCAA to include "provision for the compromise of claims against directors of the company". Given that one may puzzle over why the directors in the present case included an excusatory provision in the Plan vis-à-vis themselves when such a claim for GST is a derivative claim relating to the original or foundation liability of BSCC. Perhaps their concern was that RevCan in the seven weeks between the Initial Order of September 5, 2000 and the vote on October 26, 2000 might have obtained leave to register the certificate for BSCC's GST liability in the Federal Court and obtained an execution for that amount pursuant to s. 323 (2)(a) of the *Excise Tax Act* and leave to direct the Sheriff to attempt to satisfy the execution against assets of BSCC unprotected from the stay. If that had taken place, then it seems to me that the Court would have to take a look at the Plan as a whole and on a single point of time basis. In other words, one would not necessarily conclude that the Plan *first* compromised the claims against BSCC in full satisfaction of the proven claims, including the proven claim of RevCan, *before* moving on to consider RevCan's then perfected claim (as opposed to the inchoate one we actually have in this case) against the directors.

12 Thus it appears to me that RevCan, not having put itself into position where it could (and did) perfect its derivative claims against the directors as set out in s. 323 (2)(a) of the *Excise*

Tax Act never had a claim against the directors which could survive the sanction of the Plan vis-à-vis the Applicants. Nothing that this Court could do at the present time (that is, at time when considering the CCAA sanction motion) could crystalize a RevCan claim against the directors. RevCan would have to take additional multiple steps over some period of time to establish a claim against the directors. RevCan was alert to this concern, yet it did nothing to initiate even the first step in the procedure. In these circumstances, even if this Court's leave were effective in any way to protect RevCan's claim, it would not seem to me that RevCan has established any basis for the exercise of this Court's discretion in that regard. It would also be remiss of me not to observe here that this would prevail even if RevCan had not for whatever unexplained reason voted in favour of the (complete) Plan (complete in the sense of compromising claims against the Applicants *and the directors*).

13 I would note that RevCan raised certain passages of K.D. McGuiness, *The Law of Guarantee* (2nd ed., 1996; Toronto, Carswell) in support of its position: specifically s. 10.114 at pp. 601-2 (including the somewhat dated and inaccurate view of the CCAA as set forth in *Browne v. Southern Canada Power Co.* (1941), 23 C.B.R. 131 (Que. C.A.)). Suffice it to say that the present case is not a surety claim release one.

14 What then *if* RevCan here had in fact perfected its claim against the directors? Would the directors have been able to utilize s. 5.1 of the CCAA as a safe haven? It would appear to me that the directors would have been entitled (s. 5.1 (1)) to have included in the Plan a compromise of their liability included in the Plan and would not be disqualified (s. 5.1 (2)) from doing so. This disqualification from utilizing s. 5.1 (1) as is found in s. 5.1 (2) relates to (a) contractual rights of a creditor, such as a guarantee by a director for example, or (b) claims based on allegations of misrepresentations made by directors to creditors or of wrongful' or oppressive conduct by directors. Firstly there was nothing in this case to suggest that there was any sort of a contract (including a guarantee) from any of the directors. Secondly there was no allegation of any misrepresentation by any director nor was there any allegation of wrongful or oppressive conduct by any director. It would seem to me that while the reference in s. 5.1 (2) is to "directors", it would seem that the disqualification should relate to those of the directors who may fall within (a) or (b) thereof. As to the (b) category, there was no allegation against any director in the RevCan material; it appears that all of the RevCan dealing and difficulties with respect to either promises or getting information were restricted to non-directors at BSCC. However it seems to me that the directors of any corporation in

difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the *Canada Business Corporations Act* and the *Business Corporations Act* (Ontario) would be of assistance in defining “oppressive conduct”. Similarly it would appear that “wrongful conduct” would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal.

15 What then of s. 5.1 (3)? This is not a disqualification provision which automatically applies. Rather this provision establishes that the Court may use its discretion to “declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances”. It is key to note that this declaration does not affect the Plan then in question vis-à-vis the applicant corporation. In *Sammi Atlas Inc., supra,* I noted at p. 174:

> …In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) the Court of Appeal observed at p. 15 that the court’s jurisdiction to amend a plan should “be exercised sparingly and in exceptional circumstances only” even if the amendment were merely technical and did not prejudice the interests of the corporation or its creditors and then only where there is jurisdiction under the CCAA to make the amendment requested,…

However this s. 5.1 (3) declaration when viewed as an amendment (or equivalent to an amendment) of a plan is something which this amendment to the CCAA (enacted subsequent to the Algoma case) specifically authorizes, but in any even since the declaration only applies to the compromise as it relates to the directors, it does “not prejudice the interests of the corporation or its creditors”.

16 Given that s. 5.1 (1) provides that the compromise of claims against directors be as to those claims "that relate to the obligations of the company unless the directors are by law liable in their capacity as directors for the payment of such other factors" and given the exception disqualifications of s. 5.1 (2), one would reasonably conclude that the most usual type of claim would be that imposed by statute whereby the director qua director is obliged as well as the corporation to pay a government. Then the fact that RevCan is "singled" out in this Plan in question with respect to its GST claim, would not appear on this ground alone to be sufficient to invoke the Court's discretion in RevCan's favour. However if RevCan had served its motion on a more timely basis so as to allow the directors sufficient opportunity to dispute RevCan's allegations concerning broken promises, then if RevCan's allegations were unrefuted or unchallenged, given the magnitude of the GST claim over an extended period of a year which unlikely would have escaped the notice of a reasonable director, and given the repeated and broken promises to pay the GST and the lack of advance notice to RevCan before obtaining the Initial Order which precluded RevCan from taking any preliminary enforcement proceedings (it being recognized that RevCan has to walk the tightrope between collecting taxes when due and allowing delinquent companies some leeway so that they might attempt to get over temporary difficulties without that opportunity being precluded by draconian collection techniques otherwise available to RevCan), I might well have been inclined to give such a declaration that the GST claim against the directors not be compromised on the basis that such a compromise would not have been full and reasonable in the circumstances. I think it also worth noting that s. 5.1 (3) provides that "a claim" not be compromised, as opposed to all claims as may otherwise have been included pursuant to s. 5.1 (1). It would also seem to me that the language of this provision is sufficiently wide enough to be able to pick and choose amongst the directors and further that any individual claim may be segmented so that it may be partially excepted.

17 In the end result however RevCan's motion is dismissed. Even if this were not a matter of first instance I would not award any costs against RevCan in these circumstances.

Motion dismissed.

TAB 17

Court of Queen's Bench of Alberta

Citation: Chartered Professional Accountants of Alberta v Neilson, 2018 ABQB 170

Date: 20180307
Docket: 1701 04043
Registry: Calgary

Between:

Chartered Professional Accountants of Alberta

Applicant

- and -

James Russell Neilson

Respondent

And Between:

Docket: B101 960623
Registry: Calgary

In the matter of the Bankruptcy of James Russell Neilson

Between:

Chartered Professional Accountants of Alberta

Applicant

- and -

James Russell Neilson

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice J.T. Eamon

I. Introduction

[1] The Applicant applies pursuant to section 125 of the *Chartered Professional Accountants Act*, SA 2014, c C-10.2 (the "Act") to enforce the portions of a Sanction Agreement imposing money fines and costs on the Respondent arising from three allegations of professional misconduct which he committed as a Certified General Accountant. Two of the allegations of misconduct occurred before the Respondent became bankrupt. One arose from events after he became bankrupt. The Sanction Agreement was made during his bankruptcy.

[2] The Respondent says that the financial liabilities in his Sanction Agreement are provable claims in the bankruptcy, so the Applicant cannot enforce the Sanction Agreement outside that process.

[3] The issue is whether disciplinary fines and costs imposed on a professional accountant by his or her professional regulatory authority after the accountant became bankrupt are a provable claim under subsection 121(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA").

II. Background facts

[4] The Respondent was a Certified General Accountant in Alberta ("CGA"). The CGA profession was regulated by the Certified General Accountants' Association of Alberta (the "CGAA") under the *Regulated Accounting Professions Act*, RSA 2000, c R-12 ("RAPA"). The Applicant is CGAA's successor.

[5] On November 20, 2014 a third party complainant (in this case, an accounting firm) made a complaint to the CGAA alleging that the Respondent:

(a) knowingly falsified financial statements for 2 corporations;
(b) knowingly distributed the false financial statements to third parties that included the misappropriated and unauthorized use of the complainant's logo;
(c) engaged in conduct which reflects negatively on the Respondent's honesty, integrity, trustworthiness, or suitability as a registrant of the profession.

[6] CGAA was required under section 70(1) of RAPA to send a copy of the complaint to the regulated member concerned within 30 days after receiving it.

[7] The CIC Secretary of the CGAA sent the complaint to the Respondent by letter dated January 14, 2015 and delivered February 2, 2015. There was no explanation provided why the CGAA did not meet the 30 day deadline and nothing is made of it by the Respondent in argument. There is no evidence to suggest that the delay was related to any knowledge or

concern the Respondent might go bankrupt or to manipulate the issue whether the matter is or is not a provable claim.

[8] The Respondent was notified by the CIC Secretary in the January 14, 2015 letter that he was required to respond to the complaint under subsection 70(2) of RAPA. He was provided the wrong response date (30 days from the date of the letter rather than 30 days from receipt) but nothing turns on that.

[9] The Respondent assigned himself into bankruptcy on February 12, 2015. The Respondent's response to the complaint was not yet due.

[10] On July 1, 2015 the Act came into force, replacing RAPA as the legislation governing the accounting professions in Alberta. Section 159 provides that a complaint under RAPA must be concluded as if RAPA remained in force, by the various officers, committees and tribunals under the Act.

[11] On July 29, 2015 the Respondent's registration under the Act was suspended. I was not provided information about of the grounds for suspension or when suspension proceedings were commenced.

[12] The CIC Secretary reported to the CIC Chair on September 10, 2015 that the complainant provided sufficient documentation to suggest the Respondent falsified financial statements and misappropriated and fraudulently used the complainant's logos. The CIC Secretary recommended the matter be sent for investigation.

[13] The CIC Chair directed an investigation on September 17, 2015.

[14] On September 29, 2015 the Applicant notified the Respondent that an investigator was appointed.

[15] On March 8, 2016 the Applicant's Complaints Inquiry Committee concluded there was sufficient evidence to warrant a hearing by a Discipline Tribunal and referred the allegations of professional misconduct to hearing. The substance of these (edited to remove the names of third parties) was as follows:

(a) Allegation #1: Attaching the complainant's logo to the unaudited financial statements of a named private company for the years ended September 30, 2012 and 2013, without the complainant's knowledge or authorization and without the complainant's participation in the financial statements;

(b) Allegation #2: Associating with false and misleading information by sending all or part of those financial statements to certain named persons;

(c) Allegation #3: Not responding to the CIC Secretary's request of February 2, 2015 to provide a response to the complaint and not cooperating with the investigation.

[16] Allegation #3 is an internal complaint by the CIC Secretary that arises from the Respondent's alleged failure to cooperate in the investigation of the third party complaint.

[17] The Applicant and Respondent made a Sanction Agreement on August 8, 2016 under subsection 74(1) of RAPA.

[18] Under that agreement the Respondent admitted, purportedly for that proceeding only, to the allegations of unprofessional conduct referred to hearing on March 8, 2016 by the

Complaints Inquiry Committee. He agreed that the following sanctions would be imposed in consequence of the misconduct:

(a) cancellation of registration;
(b) fines of $20,000 for Allegation #1, $15,000 for Allegation #2, and $15,000 for Allegation #3, payable within 30 days of service of the statement of costs;
(c) costs of the investigation, hearing and compliance with any orders, payable within 30 days of service of the statement of costs;
(d) publication to all members of CPA Alberta;
(e) publication by posting the notice on the CPA Alberta website for 10 years;
(f) publication to all other regulatory accounting bodies in Canada and any other professional organization in which the Respondent was known to hold concurrent membership;
(g) publication in several named news media outlets.

[19] The Sanction Agreement provided that three other complaints, which had been referred to hearing on unspecified dates, would be stayed. Two of these complaints were from members of the public and the third was from the CIC Secretary. The CGAA agreed to stay these files because the complaints from the public were already before criminal courts and the public interest was served by the proposed Sanction Agreement. The Respondent sought disclosure of these stayed files in the present proceeding.

[20] On October 25, 2016 the Applicant requested payment of the fines and costs from the Respondent under the Sanction Agreement. The amount of costs demanded was $15,579.84 and the fines amounted to $50,000.

[21] The Respondent refuses to pay.

[22] The Respondent has not yet been discharged from bankruptcy.

[23] The Respondent says the claims are provable claims in his bankruptcy, and are subject to the stay of claims under the BIA. He stated in submissions to the Court that if he had known the CGAA's monetary claims were not stayed in his bankruptcy, he would not have agreed to the Sanction Agreement. The Respondent said in an affidavit filed in response to the application that he was told by the lawyer representing him in the negotiation of the Sanction Agreement that he and counsel for the Applicant had agreed any monetary order would not be enforceable due to the stay provided by the Respondent's assignment into bankruptcy.

[24] That lawyer is no longer acting for the Respondent. The Respondent did not provide evidence from his former lawyer. He said during argument of this application that he was not successful in obtaining from his former lawyer any information about conversations he may have had with the CGAA's counsel about a stay. He told me that he was not seeking a further adjournment to pursue evidence from his former lawyer.

[25] The Applicant provided evidence in response, including an affidavit from the Applicant's lawyer who negotiated the Sanction Agreement, to the effect that it has no record or information of any agreement that the monetary claims would be stayed. No one cross-examined on these affidavits.

[26] The Respondent's trustee in bankruptcy was notified of this application and chose not to appear. It submitted a letter outlining its position that the costs and fines may be a contingent liability in the bankruptcy because they arose from conduct and actions prior to the bankruptcy.

III. Applicable law

[27] The parties dispute whether the monetary obligations which the Applicant seeks to enforce are a claim provable in bankruptcy under the BIA.

[28] A claim provable in bankruptcy is defined in section 2 of the BIA:

> ***claim provable in bankruptcy, provable claim or claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor;

[29] Creditor is also defined in section 2:

> ***creditor*** means a person having a claim provable as a claim under this Act;

[30] Subsection 121(1) of the BIA establishes the criteria for a provable claim:

> 121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> (3) ...
>
> (4) ...

[31] As mentioned, the Respondent asserts the Applicant's claim is stayed. Subsection 69.3(1) of the BIA provides for a stay of proceedings for the recovery of provable claims:

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

[32] The Respondent also relies on section 69.6 of the BIA. Subsection 2 provides:

> Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

[33] These provisions should be interpreted in light of the purposes of the BIA. One of the key objectives of the BIA is financial rehabilitation of the debtor (***Alberta (Attorney General) v Moloney***, 2015 SCC 51, [2015] 3 SCR 327 at paras 36 - 38, 77). Discharge from provable claims is the main rehabilitative tool under the BIA, and provides the bankrupt a fresh start, relieved of

the burdens of pre-existing indebtedness (*ibid*). Parliament has created various exceptions to the discharged liabilities (BIA, section 172 and subsection 178(1); ***Moloney*** at paras 37, 79).

[34] Unlike in proceedings governed by common law or civil law, a claim may be asserted in insolvency proceedings (that is, a provable claim) even if it is contingent on an event that has not yet occurred (***Re AbitibiBowater, Inc***, 2012 SCC 67, [2012] 3 SCR 443 at para 34). ***Peters v Remington***, 2004 ABCA 5 at para 25 provides a classic description of a contingent claim:

> A contingent claim is “a claim which may or may not ever ripen into a debt, according as some future event does or does not happen”: *Gardner v. Newton* (1916), 1916 CanLII 337 (MB QB), 29 D.L.R. 276 at 281, 10 W.W.R. 51 (Man. K.B.).

[35] The BIA does not specify the degree of certainty required to make a contingent or unliquidated claim provable. The need for probability of liability arising from pending Court proceedings is too high a threshold for the establishment of such a claim. The criterion used by Courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (***Re Confederation Treasury Services Ltd (Bankrupt)***, [1997] OJ No 67, 96 OAC 75 (CA); ***National Bank of Canada v Merit Energy Ltd***, 2001 ABQB 583, 294 AR 15 at paras 77 - 78, aff'd 2002 ABCA 5, 96 Alta LR (3d) 1; ***AbitibiBowater*** at para 36). Claims to discretionary remedies or awards might or might not be provable claims, depending on the degree of discretion (***Schreyer v Schreyer***, 2011 SCC 35, [2011] 2 SCR 605 at paras 26 - 28; ***Lacroix c Valois***, [1990] 2 SCR 1259 (not cited by the parties)). The assessment whether the claim is too remote or speculative is fact specific (***AbitibiBowater*** at paras 48, 58, 61).

[36] In the regulatory context, financial charges may qualify as a provable claim. Where they do, they are included in the ambit of the discharge provisions of section 178 (***Moloney*** at paras 50, 79).

[37] The rehabilitative purpose of the BIA does not, of course, erase all consequences of professional misconduct. The BIA does not prevent a professional regulator from pursuing proceedings to protect the public from unprofessional practice, including proceedings to suspend or remove the practitioner from the profession or to assess or rehabilitate the practitioner. In ***Moloney***, the Court stated:

> .... Bankruptcy does not purport to erase all the consequences of a bankrupt's past conduct. However, by ensuring that all provable claims are treated as part of the bankruptcy regime, the BIA gives debtors an opportunity to rehabilitate themselves financially. While this does not amount to erasing all regulatory consequences of their past conduct, it is certainly meant to free them from the financial burden of past indebtedness.
>
> (***Moloney*** at para 83)

[38] In ***Re Hover***, the Alberta Court of Appeal held that a regulated professional’s failure to pay past indebtedness may have regulatory consequences post-bankruptcy, where the regulator is acting in the public interest to regulate the profession and not to collect the debt. In that case, Dr. Hover’s sanctions included suspension of his license until he paid the fines and costs assessed in his discipline proceeding. He later became bankrupt and claimed the regulator could no longer refuse him a license based on his failure to pay. The Court held that Dr. Hover’s failure to pay

fines and costs imposed before his bankruptcy (which were a provable claim) did not preclude the professional regulator from refusing to reinstate him. It was acting in the public interest to regulate the profession of dentistry and not to collect a debt (***KPMG Inc. v. Alberta Dental Association (Re Hover)***, 2005 ABCA 101).

[39] ***Hover*** was discussed extensively by the Alberta Court of Appeal in ***Moloney***, but the Supreme Court of Canada did not mention it on that appeal or in the companion case of ***407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)***, [2015] 3 SCR 397, 2015 SCC 52. ***Moloney*** and ***ETR*** were concerned with debt collection schemes, not professional regulation.

[40] Parliament subsequently enacted section 69.6 of the BIA, which came into force in September 2009 (SC 2007, c 36, s 37; cif September 18, 2009, SI 2009-68). Section 69.6 only pertains to proposals and does not address the specific point in ***Hover***.

[41] Regulatory charges are not similar in all respects to financial claims between private parties. The ***AbitiBowater*** decision held that financial regulatory charges are a provable claim if three criteria are met: (1) there must be a debt, liability or obligation owed to a creditor, (2) which was incurred before the debtor became bankrupt, and (3) it must be possible to attach a monetary value to the debt, liability or obligation (***AbitibiBowater*** at para 26; ***Moloney*** at para 55).

[42] In ***AbitiBowater*** the Court described the first part of the test as follows at para 27:

> The BIA's definition of a provable claim, which is incorporated by reference into the CCAA, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.
>
> [Underlining added]

[43] The inquiry into the second requirement is based on section 121(1) of the BIA, which imposes a time limit on claims. The Court observed at para 28:

> The enquiry into the second requirement is based on s. 121(1) of the BIA, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt"....

(The Court noted that the statute under consideration in that case provided more flexibility for environmental claims.)

[44] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question in that case was whether the environmental orders that were not expressed in monetary terms could be translated into such terms (*ibid* at para 30). In the context of an environmental order, there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a

monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process (*ibid* at para 36).

[45] In a recent decision of the Alberta Court of Appeal, the majority summarized this test, again in the environmental context, as follows:

> 60 If the environmental obligation is framed in monetary terms, it will qualify as a provable claim: ***AbitibiBowater*** at paras. 2, 30. If it is not framed in monetary terms, it must be examined to see whether it will "ripen into a financial liability", having regard to the "factual matrix and the applicable statutory framework" (at paras. 3, 31). There is a three part test (at para. 26):
>
>> (a) There must be a debt, liability or obligation to a creditor. When a regulatory body exercises its enforcement powers against a debtor, it is a "creditor" in insolvency proceedings (at para. 27);
>>
>> (b) The debt, liability or obligation must be incurred at the relevant time in relation to the insolvency. For environmental claims, this can be before or after the insolvency proceedings have commenced (*CCAA*, s. 11.8(9); *BIA*, s. 14.06(8)); and
>>
>> (c) It must be possible to attach a monetary value to the debt, liability or obligation. The claim may be contingent, as long as it is not too remote or speculative to be included with the other claims. That depends on whether there is "sufficient certainty" that the regulatory body will ultimately perform remediation and crystallize the claim (at para. 36). In assessing the certainty of the claim, the court can examine the entire factual context, including whether the debtor is in control of the property, whether it has the means to comply with the order, whether there are other parties responsible for the remediation, as well as the effect that compliance with the order would have on the insolvency process.
>
> (***Grant Thornton Ltd v Alberta Energy Regulator***, 2017 ABCA 124, leave to appeal granted, [2017] SCCA No 231, appeal heard and reserved February 15, 2018).

[46] The Applicant argued, relying on ***AbitibiBowater***, that to satisfy the first part of the three part test, the regulator must exercise enforcement power against a debtor before the date of bankruptcy. Otherwise, the regulatory agency is not a creditor. It argues that all that had occurred in the present case before bankruptcy was sending a letter to the Respondent asking him to comment on the complaint. This was not exercise of enforcement power, so the Applicant is not a creditor. The Respondent says it is enough that the regulator received the complaint before bankruptcy, thus engaging the complaints inquiry process.

[47] What is sufficient regulatory activity in the context of the BIA? To what extent (if any) does ***AbitibiBowater*** require enforcement proceedings before the date of bankruptcy? In answering the questions it is useful to briefly review the factual context of that case.

[48] The Abitibi companies entered debtor protection proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("CCAA") on April 17, 2009. On June 12, 2009, the Province asked Abitibi to provide certain reports for five industrial sites, including

environmental site assessment reports. A claims procedure order was issued August 26, 2009. The Minister issued the environmental protection orders over the sites in issue on November 12, 2009, requiring certain remediation action plans and work. The industrial activities giving rise to the remediation claims had ceased well before the CCAA proceedings started. The dispute between the Province and Abitibi had started at least by December 2008 when the Province passed legislation expropriating three of the sites, including provisions that would shield the Province from counter-claims in any restructuring process (motion judge's reasons, 2010 QCCS 1261 at paras 184 - 190).

[49] The motion judge found that the Minister acted as a creditor both before and after making the environmental protection orders in issue (2010 QCCS 1261 at para 212). The Supreme Court of Canada observed that because the Province issued the orders, it would be recognized as a creditor (para 46) and the Province identified itself as a creditor by resorting to EPA enforcement mechanisms (para 49).

[50] In some regulatory cases, including environmental remediation cases like ***AbitibiBowater***, it is necessary to distinguish the general duty owed to the public at large to comply with legislation from those cases where a statutory debt or regulatory charge has arisen (***AbitibiBowater*** at paras 44 - 48, 72 - 74, and ***PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd***, 1991 ABCA 181, 81 Alta LR (2d) 45, 117 AR 44, leave to appeal denied, [1991] SCCA No 497 cited therein). As McLachlin CJC (as she then was) stated at para 72, the BIA draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive restructuring, and monetary claims that can be compromised. I do not read the majority's reasons as differing over this fundamental proposition (***AbitibiBowater*** at para 59).

[51] The requirement that the regulator exercise enforcement powers serves to identify it as a creditor by distinguishing the situation from the general duty on citizens to obey the law. However, I do not see any suggestion in the BIA that the requirement of a creditor means that the creditor must necessarily identify itself before the bankruptcy event. Such a strict requirement would defeat the rehabilitative objectives of the BIA, and would be contrary to subsection 121(1) of the BIA, which includes as provable claims "all debts and liabilities, present or future, … to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt".

[52] That interpretation would also run counter to the ordinary principles concerning contingent claims. The essence of a contingent claim is that not all elements necessary to establish liability have occurred by the date of bankruptcy. It is not necessary that a contingent claimant identify itself before the date of bankruptcy or has decided by that date to advance its claim based on facts occurring before the date of bankruptcy. The fact the claim is disputed does not disqualify it as a contingent claim. (That is not to say that these are irrelevant. The degree of knowledge of a claim is relevant to the third part of the test, whether the claim is too speculative or remote for inclusion in the insolvency process. For a recent example, see ***RMP Energy Inc v SemCAMS ULC***, 2012 ABQB 495 at paras 41 - 51, 56, 66 - 69; leave to appeal refused, 2012 ABCA 312 at paras 28 - 29 (not cited by the parties)).

[53] Some passages in the reasons of the motion judge, Mr. Justice Gascon (as he then was), in ***AbitibiBowater*** suggest that the decision to enforce (i.e., identify as a creditor) is one of the contingencies of a contingent claim. He said:

> [233] Contingent claims are nothing more than incomplete claims, the enforceability of which depends on some contingency or future event that has not yet occurred (and may never occur). In the case of a guarantee, it might be the non-payment by the principal debtor. In the case of an environmental claim of the sort advanced by the Province, it would be the decision of the latter to carry out the remediation and pass along the cost as the EPA provides.
>
> [234] The fact that all the elements of the claim do not presently exist does not deprive a contingent claim of its essential element of being a claim that can be quantified and the amount of which can be compromised.

[54] The Supreme Court did not discuss whether the relevant date for assessing claims was the initial Canadian Filing Date, the claims bar date, or another date. It was not necessary to deal with that, because the first part of the test (status as a creditor) was not in issue in that case (***AbitibiBowater*** at para 49).

[55] The CCAA as it existed on the date the debtors entered CCAA proceedings provided that claims would be determined, for companies other than those in bankruptcy or winding up, in the amount which might be proved under the BIA (CCAA, s 12(2)(a)(iii)). Section 19 further provided, with a few exceptions, that the only claims that could be compromised were those that related to debts or liabilities, present or future, to which the company (i) was subject on the day on which proceedings were commenced, or (ii) may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred before the day on which proceedings were commenced (CCAA, s 19 as amended by SC 2007, c 36, s 69).

[56] The fact the environmental protection orders were made well after the CCAA proceedings commenced, given the substantial similarity between section 19 of the CCAA and subsection 121(1) of the BIA, would suggest that it is not necessary that the enforcement power be exercised before the relevant claims assessment date. But again, the timing of the first part of the test was not in issue in that case.

[57] The only temporal requirement discussed by the Supreme Court of Canada in ***AbitibiBowater*** concerns the second part of the test - whether the liability was by reason of an obligation incurred before the debtor became bankrupt. Absent additional guidance from the Court, I see no reason why regulatory charges should be singled out for different treatment by requiring a contingent creditor in a regulatory context to have decided to actually advance its claim before the date of bankruptcy.

[58] With respect to the third part of the ***AbitibiBowater*** test, the Applicant relies on a line of administrative penalty cases in support of its position that administrative penalties imposed after the date of bankruptcy are too remote and speculative to be included as contingent claims: ***Association des courtiers & agents immobiliers du Québec c Fuoco***, 2007 QCCQ 292; ***Chambre de la sécurité financière c Harton***, 2008 QCCA 269, 2008 CarswellQue 756; ***Re Thow***, 2009 BCSC 1176, 57 CBR (5th) 222; ***Chambre de la sécurité financière v Thibault***, 2016 QCCA 1691, [2016] QJ No 13897, 42 CBR (6th) 8.

[59] These cases (other than ***Thibault***) refused to accept an administrative penalty imposed after the date of bankruptcy is a provable claim, on one or both of two grounds: the claim would be too remote or speculative; or, a fine imposed after the date of bankruptcy is not a provable claim.

[60] For example, in ***Re Thow*** the Court found that a sanction imposed by a securities regulator for misconduct that occurred before bankruptcy was not a provable claim. The Court reasoned:

> 46 In my opinion, the *(Re) Air Canada* case supports the Commission's position that the penalty is not an obligation as contemplated by s. 121 of the BIA until the penalty is assessed by the Commission. Likewise, *Chaloux*, *Strini* and *Glenister* also support the Commission's position that because its decision was discretionary, there was not a contingent liability or "obligation" until the Commission actually fined Mr. Thow, which was after the date of his bankruptcy. Therefore, in my opinion the obligation did not arise until after bankruptcy and the Commission's penalty is not a provable claim in this bankruptcy.

[61] In my view, the mere fact that fines or costs were imposed after bankruptcy does not necessarily disqualify the claim as provable in bankruptcy. Some discretionary decisions lead to provable claims (***Schreyer***). Others do not (***Lacroix***). In ***Thibault***, the bankrupt attempted to plead guilty to a regulatory charge before his bankruptcy. The Court found on the facts of that case that the resulting sanctions were a provable claim in his bankruptcy although not imposed by the regulator until after the bankruptcy (***Thibault*** at paras 22 - 28). Every case is a question of fact.

[62] The Applicant also relies on a line of cases holding that a costs award in a civil claim arising out of pre-bankruptcy litigation but made after the date of bankruptcy is not a provable claim. The Applicant emphasizes that costs are discretionary and where the discretion has not been exercised before the date of bankruptcy, they cannot be considered provable claims.

[63] This line of costs cases says that costs of legal proceedings are in the discretion of the Court, and until an order for payment of costs is made there is no obligation or liability to pay them and no right to recover them. Even if the litigation were substantially or entirely completed before the date of bankruptcy, the costs would not be a provable claim if the Court had not ordered costs before bankruptcy (***Chaloux v Kingston Fairways Golf Course*** (2004), 48 CBR (4th) 237 (Ont SCJ) and ***Strini v Mihalicz***, 2006 ABQB 912, following ***Glenister v. Rowe***, [1999] EWCA Civ 1221, [1999] 3 All ER 452 (CA)). To like effect, though not cited by the parties, is the proposition stated in Houlden, Morawetz and Sara, *The 2017 Annotated Bankruptcy and Insolvency Act* (Thomson Reuters, 2017) at G36(21) that costs awarded against a bankrupt as defendant in pre-bankruptcy litigation are not provable in the bankruptcy.

[64] I would not follow the costs cases cited to me (***Glenister***, ***Chaloux***, ***Strini***) or others like them. I consider them wrongly decided and inconsistent with the principles set out in ***AbitibiBowater***.

[65] There is no watertight compartment insulating costs awards relating to pre-bankruptcy litigation from the consequences of bankruptcy merely because costs are discretionary. Rather, the question is whether a costs award is too remote or speculative to be included in the claims process.

[66] Those who engage in litigation in the Courts subject themselves to a costs regime which is well defined and predictable. Discretion is exercised in accordance with principle not whim.

[67] In Alberta, these costs principles are established in the Alberta Rules of Court, Part 10 and well developed in case law. It is probable that costs will follow the event or events (where

costs are awarded by issue) of the litigation (Rule 10.29). Cases where party and party or solicitor and client costs are the norm are well defined in case law. Where a party and party costs award is probable, the scale of costs is predictable. Costs can, and sometimes must, be allocated to steps taken before or after an event in time such as service of a formal offer to settle (Rule 4.29). So it is possible to allocate costs to steps taken before and after the date of bankruptcy.

[68] Pre-bankruptcy costs in civil litigation are sufficiently predictable that they should be included as provable claims. They are not remote or speculative. The trustee in bankruptcy would need to value them having regard to contingencies.

[69] What about costs relating to steps taken in proceedings that continued after the date of bankruptcy? In the present case, some costs related to steps taken before the date of bankruptcy and others after. Although many civil claims against bankrupts will be stayed on bankruptcy and subsumed into bankruptcy administration, some claims can continue. As an example some personal claims do not vest in the trustee, such as ongoing non-financial parenting litigation in a matrimonial dispute. The disciplinary proceeding against the Respondent is also such a case, in the sense that it was primarily a non-financial regulatory proceeding aimed at protecting the public from unfit accounting practitioners and was not a proceeding that could be stayed under the BIA (apart from the limited circumstances where section 69.6 of the BIA applies).

[70] I am mindful of commentary cited in ***Strini*** that a bankrupt should not be entitled to "litigate with impunity" and the suggestion that a costs order made after the bankruptcy event will not be caught in the bankruptcy if the bankrupt party continues the litigation (***Strini*** at para 23 and commentary cited therein). However, the question whether a bankrupt should be released from provable claims, and to what extent, is a policy decision for Parliament in making exceptions to the section 172 and 178 discharge provisions. Other values come into that policy question, including rehabilitation of the debtor and the debtor's access to justice.

[71] Costs are a provable claim if they are a liability "present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt <u>or to which the bankrupt may become subject before the bankrupt's discharge</u> by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt" (subsection 121(1), underlining added). That is a question of fact having regard to all the circumstances.

[72] The mere fact a person who later became bankrupt continued in litigation is not enough for the entire costs obligation to have arisen from an obligation incurred before the bankruptcy. The answer to the question depends on the context, including the type of litigation, its status and maturity at the date of bankruptcy, the opportunities to exit litigation, and formal or other settlement offers made during the course of the proceedings where a party is put to his or election to settle or suffer the consequences of a costs penalty for ongoing litigation steps.

[73] As an example, where bankruptcy occurs mid-stream of an interim parenting application, the costs to the date of bankruptcy might be associated with having undertaken litigation before bankruptcy. Perhaps the later costs associated with completing the interim application also are associated with the pre-bankruptcy decision to commence that application. It does not follow that the later costs of the larger parenting dispute qualify for the same treatment. In most civil claims there are opportunities to settle and exit litigation. It may be that at some point, costs of ongoing steps should no longer be associated with the decision to undertake or carry on proceedings before the date of bankruptcy. Or, putting it another way, some of the costs might be too remote.

[74] Although I would refuse to follow the costs cases cited by the Applicant for the foregoing reasons, I also note that ***Glenister*** and other UK cases before and after it to like effect were unanimously overruled by the UK Supreme Court in ***Re Nortel***, 2013 UKSC 52, [2014] AC 209 at paras 87 - 93 and 136 (not cited by the parties). The majority characterized the earliest cases holding that contingent costs liabilities were not provable claims as "somewhat aberrant" in view of the purposes of bankruptcy legislation (*ibid* at para 93).

[75] How do these principles apply to the costs of the regulatory proceeding in the present case? The Alberta Rules of Court do not apply to the Applicant's discretion to award costs in disciplinary proceedings. Whether costs imposed by a regulator are too remote or speculative depends on the Court's factual assessment of the practices and policies of the regulator concerned and the context of the proceeding.

[76] The same principles apply to fines. It is a question of fact whether the prospect of a fine is remote or speculative. However, unlike costs awards, it would be a rare occasion where that prospect could be considered sufficiently certain before the sanction decision is pronounced.

[77] In any professional discipline process, sanctions serve a variety of objectives including specific and general deterrence and maintaining the public confidence in the regulated profession. Every case is fact specific. As the Saskatchewan Court of Appeal commented in ***Merchant v Law Society of Saskatchewan***, 2009 SKCA 33 at para 95:

> ... Not unexpectedly, the reasonable range of sentences in disciplinary matters is elastic. It will be impacted by considerations of age, experience, discipline history, the unique circumstances of the member, and the nature of the conduct complained of.

[78] In sanctioning, tribunals must be sensitive to proportionality; otherwise they risk judicial review by the Courts. As the Alberta Court of Appeal has said, "at the end of the day the sanction must be proportionate and reasonable…. The pursuit of general deterrence does not warrant imposing a crushing or unfit sanction…." (***Walton v Alberta (Securities Commission)***, 2014 ABCA 273 at paras 154 and 165).

[79] Accordingly, absent other evidence, a Court should presume that a professional disciplinary sanction process includes consideration of the personal circumstances of the offender at the time of sanctioning, and aggravating and mitigating factors. These often cannot be known if bankruptcy occurs at an early stage of the regulatory complaints process. In some rare cases, such as ***Thibault***, the evidence might indicate sufficient certainty of the result. It depends on all the circumstances, such as the regulator's practices, procedures and rules, the maturity of the proceedings, and the position taken by the respondent in such proceedings.

[80] In summary, in cases of administrative penalties or costs of disciplinary proceedings, the inquiry in relation to the third step of the ***AbitibiBowater*** test is whether the event that has not yet occurred is too remote or speculative. The mere fact a fine or costs award was imposed after bankruptcy does not necessarily disqualify the amount as a claim provable in bankruptcy.

IV. Analysis

[81] Before dealing with the issue of provable claims, I will deal with three preliminary issues.

[82] First, the Respondent submitted hearsay evidence of an agreement between the lawyers for each side who negotiated the Sanction Agreement that the costs and fines would be subject to the stay under the BIA (paras 23 - 24 above). The Applicant submitted direct evidence refuting the existence of such an agreement (para 25 above).

[83] There are constraints on my resolving conflicting evidence in a summary proceeding such as this one. The Respondent's evidence is not admissible (being hearsay), but might have supported a request for a trial of an issue if it was sufficient to suggest a genuine issue for trial. However, the Respondent did not want an adjournment to obtain direct evidence from his former lawyer (para 24 above). His hearsay evidence is not sufficient to raise a triable issue, and even if admissible I would not give it any weight:

(a) The Respondent's evidence is a bare assertion, relaying a hearsay statement from a third person without any details of the words spoken in the alleged conversation or records thereof. It is well established that such assertions, without details, do not necessarily raise an issue requiring a trial (***Shefsky v California Gold Mining Inc***, 2016 ABCA 103 at para 113 per Slatter JA dissenting; approved in ***Goodswimmer v Canada (Attorney General)***, 2017 ABCA 365 at paras 39 - 40).

(b) The evidence is highly suspect because it is inconsistent with the written agreement, which was signed by the Respondent while he was in bankruptcy. It provided for payment of the fines and costs within 30 days of service of the statement of costs. The Respondent's bare assertion does not explain the inconsistency.

[84] The second preliminary issue is the Respondent's request for disclosure of files from the Applicant relating to other complaints that were stayed under the Sanction Agreement (para 19 above).

[85] I have power to order records production where necessary to maintain fairness in the proceedings. I did not during argument, and still do not, see any grounds to order disclosure of those files. Nothing in the evidentiary record or submissions before me indicates they have any potential relevance or materiality to the issues whether the fines and costs agreed to in the Sanction Agreement are provable claims.

[86] The third preliminary issue is the Respondent's submission that the Applicant could not bring the application under section 125 of the Act because proceedings are stayed. The Applicant seeks permission nunc pro tunc (i.e., retroactively) in the event any claims are stayed.

[87] I exercise my discretion under section 69.4 to permit this application to be heard; as I am satisfied it is equitable to do so. All interested parties either participated or had notice and opportunity to participate. The additional expense associated with first bringing the dispute before the trustee would be needless.

[88] I turn to whether the fines and costs are provable claims.

[89] The structure for the complaints process under RAPA is typical of professional regulators. Complaints must be reviewed in the first instance by an officer of the regulator (here, the CIC Secretary). They must be sent to the member for comment. The regulator may encourage resolution between complainant and member, but may continue proceedings notwithstanding a

settlement. Following comment and review, the regulator must decide whether to summarily dismiss the complaint or refer it for investigation. Following investigation, the Complaints Inquiry Committee (which is composed of members of the profession and, optionally, additional members selected from the public) decides whether to direct further investigation, summarily dismiss it, or refer it to a discipline tribunal for determination. A member may make a sanction agreement with the Complaints Inquiry Committee. If approved, the agreement is a finding and order of a discipline tribunal. A discipline tribunal may impose sanctions following the necessary hearing and determinations of unprofessional conduct. In addition to fines, the tribunal may order the member to pay the costs or any part of the costs of an investigation and hearing in the manner determined by the bylaws. See RAPA, sections 67 - 97, 121, 122.

[90] Costs and fines are governed by sections 92 and 93 of RAPA:

> **93(1)** If a discipline tribunal determines that the conduct of an investigated party constitutes unprofessional conduct, the discipline tribunal may make one or more of the following orders:
>
> (a) reprimand the investigated party;
>
> (b) suspend registration for a stated period or pending compliance with specified conditions;
>
> (c) restrict any or all aspects of the investigated party's public accounting practice or other areas of practice for a stated period of time, pending compliance with specified conditions, or until otherwise ordered by a discipline tribunal or a person or body specified by the discipline tribunal;
>
> (d) impose conditions or requirements on the investigated party for a stated period of time or until otherwise ordered by the discipline tribunal, including conditions that the investigated party
>
> (i) practise under supervision in accordance with specified terms,
>
> (ii) not engage in sole practice,
>
> (iii) undergo counselling in accordance with specified terms,
>
> (iv) permit periodic inspections of practice by an individual authorized by the practice review committee or complaints inquiry committee or the chair of either of those committees, or
>
> (v) report on specified matters to the accounting organization, the CIC secretary or the discipline tribunal secretary;
>
> (e) accept, for a stated period or pending compliance with specified conditions, a voluntary suspension of registration or an undertaking to restrict practice;
>
> (f) direct the investigated party to satisfy a committee or person specified by the discipline tribunal that a disability or addiction can be or has been

overcome, and suspend the investigated party until the committee or person is so satisfied;

(g) require the investigated party to take counselling that is appropriate in the opinion of a committee or person specified by the discipline tribunal;

(h) direct the investigated party to successfully complete a particular course of studies or examinations, or both, or to satisfy a committee or person specified by the discipline tribunal as to the investigated party's professional competence generally or in a specified area of practice;

(i) direct a public accounting firm to develop and implement quality control procedures or professional development policies, to undergo a specific practice review or to increase the amount or change the type of professional liability insurance carried by the public accounting firm;

(j) direct the payment of all or part of the costs of complying with an order;

(k) prohibit, restrict or place conditions on the ability of a member of an accounting organization or a public accounting firm to train students or to supervise how students are trained;

(l) cancel registration under this Act;

(m) specify a time limit within which an order or any part of it must be complied with and specify the consequences of failing to comply, including suspension or cancellation of registration;

(n) direct the publication or posting of a decision in any manner the discipline tribunal considers appropriate to protect the public interest and to notify clients or former clients of the investigated party as the situation requires;

(o) make any further or other order that the discipline tribunal considers appropriate in the circumstances.

(2) Before making any order under subsection (1), the discipline tribunal is entitled to review and the accounting organization must provide

(a) the past disciplinary record of the investigated party, and

(b) any other information the accounting organization possesses about the investigated party concerning findings of unprofessional conduct against the investigated party in disciplinary proceedings by a professional organization in Alberta or another jurisdiction.

94(1) The discipline tribunal may order the investigated party to pay to the accounting organization

(a) the costs or any part of the costs of an investigation and hearing in the manner determined by the bylaws;

(b) a fine not exceeding $20 000 for each finding of unprofessional conduct;

(c) costs and a fine.

(2) Unless the discipline tribunal orders otherwise, the investigated party must pay to the accounting organization, as part of the costs ordered under subsection (1), all of the reasonable costs for the indemnification of the accounting organization for the costs relating to the review of complaints, the investigation and the discipline tribunal hearing, including the legal expenses and lawyer's fees in accordance with the *Alberta Rules of Court*.

(3) The order may specify when and how the amount is to be paid.

(4) If the investigated party does not pay costs or fines in accordance with the order of a discipline tribunal or appeal tribunal, the registration of the registrant is immediately cancelled unless a discipline tribunal or an appeal tribunal otherwise directs.

[91] In all of this, the CGAA is guided by the purposes of the complaints process. Section 65 of RAPA defines those purposes:

(a) to protect the public interest,

(b) to enforce practice standards and rules of professional conduct for registrants,

(c) to provide a means by which complaints about the conduct of registrants and former registrants can be dealt with in a fair and expeditious way, and

(d) to preserve the integrity of the accounting profession.

[92] The Applicant's amended notice of application seeks a declaration that the financial amounts under the Sanction Agreement are not a contingent liability or a claim provable in bankruptcy. The onus is on the Applicant to show it is entitled to the remedy it seeks.

[93] No authority was cited to me explaining when or why a CGAA discipline tribunal would impose a fine or costs in the complaints resolution process. I was not told whether CGAA discipline tribunals have policies or procedures about costs, whether they deliver formal published reasons in support of their decisions or whether any such decisions include discussions about costs.

[94] The Respondent submitted extracts from CGAA's legacy internet site providing links to decision summaries, showing that in all the discipline cases involving the CGAA which were notified on its internet site, the CGAA discipline tribunal imposed costs or the settlement included costs. The Applicant does not contest that assertion.

[95] As mentioned earlier, sanctions in a professional discipline process serve a variety of objectives including specific and general deterrence and maintaining the public confidence in the regulated profession. Every case is fact specific. Absent any evidence of any precedent for starting points or fixed sanctions for specific regulatory misconduct imposed by CGAA discipline panels, I conclude that the sanctioning phase in a CGAA proceeding was highly discretionary as would be expected in a regulatory process having the objectives defined in section 65 of RAPA. The decision to impose fines is part of that discretionary process.

[96] In the absence of other evidence, I conclude that the costs provisions are a cost recovery mechanism. Where the CGAA successfully disciplined a member it was extremely likely that the CGAA would seek and obtain an order for costs. That virtually invariable practice indicates that the costs awards are primarily a costs recovery mechanism. They may have a deterrent effect and exposure to them may be relevant to whether fines should be imposed, but the costs awards are not primarily a financial sanction.

[97] In this case, there were three allegations against the Respondent to which fines and costs were attached (para 15 above). Each had a discrete fine attached (para 18 above). The costs award applied to all the proceedings, without allocating specific amounts to each allegation (*ibid*).

[98] The CGAA was aware of the third party complaint (Allegations #1 and #2) and commenced reviewing that complaint as required by RAPA well prior to the bankruptcy. The CGAA may not have known all the facts at the date of bankruptcy. The Applicant emphasizes that the proceeding was in its early stages. However, it had the complaint for months before the bankruptcy. There is nothing to indicate that the third party complainant was not cooperative or informative. As a matter of common sense, the allegations in this complaint probably called for immediate attention to protect the public from fraud. Yet, the Applicant did not provide any evidence to show the allegations were not well understood or well supported, that it was unable to attend to the complaint quickly for the protection of the public, or anything about the likelihood of a conviction as of the date of bankruptcy.

[99] In contrast, the regulator's complaint (Allegation #3) had not occurred before the date of bankruptcy. The Respondent was not in default of his professional obligation to respond to the third party complaint on the day he assigned himself into bankruptcy.

[100] I cannot infer merely from the timing that the consequences of the third party complaint were remote or speculative. A professional accounting firm had complained to the CGAA that the Respondent had fraudulently taken their logo and put it on the statements of a non-client. There is no suggestion the Respondent was working for that firm or somehow mistakenly acted as an employee and issued statements without authority. It is difficult to think that a professional accounting regulator, acting in the public interest, would not proceed to investigate a complaint of fraud and act if it appeared there was a reasonable prospect of conviction.

[101] In my view, the CGAA was identified as a creditor in the context of the disciplinary matter. It received and forwarded the third party complaint to the Respondent before bankruptcy. It continued proceedings including suspension of the Respondent from practice during the bankruptcy. It would obviously investigate these serious allegations. In doing so it would incur recoverable costs. If the allegations were substantiated, it would be claiming these costs from the regulated professional. No one suggests there was some obvious and innocent explanation for the discrepancy in the financial statements. The fact the allegations were not admitted, or were disputed, does not disqualify financial claims such as costs from consideration as contingent claims.

[102] The costs of investigating and managing Allegations #1 and #2 to a voluntary settlement, both before the bankruptcy event and during the bankruptcy administration, are so closely related to the pre-bankruptcy professional misconduct and third party complaint that they should be considered as having arisen from an obligation incurred before the bankruptcy. The CGAA has

provided no evidence to suggest that the third parry complaint would not be investigated, or that any part of the costs relating to the third party complaint were remote or unexpected.

[103] I find that those costs are a provable claim. They are subject to the stay. Whether the Respondent is released from them by the bankruptcy is not before me and I make no ruling about that issue.

[104] In contrast, costs relating to Allegation #3 were remote and speculative at the date of bankruptcy because the regulatory default had not occurred at that date.

[105] How should I deal with the fact the costs were assessed for all the allegations together? It is not unusual that a professional regulator joins a complaint for failure to cooperate to an underlying third party claim. Often, the failure to cooperate complaint is so closely tied into the underlying facts of a third party complaint that it does not occasion any material additional costs. In my view it is appropriate to consider whether there are any incremental costs associated with Allegation #3. If there are incremental costs associated with it, they would not be a provable claim on the facts of this case.

[106] I turn to the question whether the fines are a provable claim.

[107] It is clear that the fine for Allegation #3 is not a provable claim. The failures to respond and subsequently to cooperate, which were key elements, had not occurred at the date of bankruptcy.

[108] The issue concerning the fines for Allegations #1 and #2 is whether the prospect of fine was too remote or speculative. If I am incorrect that Allegation #3 was not a contingent claim at the date of bankruptcy as stated in the immediately preceding paragraph, the same issue arises for that allegation.

[109] Given the integrity issues raised in the allegations, suspension or de-registration were probably foregone conclusions if the allegations were proved. However, whether a discipline tribunal would pile on fines could not be predicted.

[110] It is one thing to predict that costs would be imposed if there was misconduct. It is a very different thing to predict as of the date of bankruptcy whether a tribunal would see fit to impose a fine. As mentioned earlier, discipline tribunals must be sensitive to proportionality and the relevant facts and circumstances at the time of sanctioning. Their sanction decision depends on a myriad of information about the specific circumstances of the Respondent, and would likely include any aggravating circumstances (such as refusing to cooperate in the investigation) and any mitigating circumstances (such as an early and meaningful acknowledgment of responsibility or guilty plea). There is nothing in the record that suggests the regulator would have had such information at the date of bankruptcy. Important pieces of the puzzle did not exist at the date of bankruptcy, including information about the Respondent's cooperation or an early and meaningful guilty plea. At the date of bankruptcy, the disciplinary fines must have been remote or speculative.

[111] I do not accept the Respondent's submission that section 69.6 applies. That provision modifies stays under section 69 (where a notice of intention to file a proposal is given) and section 69.1 (where a proposal is filed). It does not apply to the stay where bankruptcy occurs, as imposed by section 69.3.

V. Conclusion

[112] The Applicant's costs claim is a provable claim, other than incremental costs (if any) associated with Allegation #3. The amount of the provable claim would be determinable by the trustee in bankruptcy in the ordinary way. If the parties need directions on any incremental costs associated with Allegation #3, they can arrange to speak to them in the application before me. The Applicant is entitled to a money judgment for those incremental costs, if sought.

[113] The Applicant's claims for fines are not provable claims. The Applicant is entitled to a money judgment against the Respondent for the fines.

[114] The formal order should provide that the Court declares pursuant to section 69.4 of the BIA that the stay under section 69.3 of the BIA does not apply to the commencement and prosecution of the application or any claim determined by the Court on this application not to be a provable claim. The stay applies to those claims determined in this application to be provable claims.

[115] If additional clarifications or directions are required, or anyone seeks costs of the application, the parties should arrange to speak to those within 45 days.

Heard on the 5th day of January, 2018.
Dated at the City of Calgary, Alberta this 6th day of March, 2018.

J.T. Eamon
J.C.Q.B.A.

Appearances:

Aidan D. Henderson
for the Plaintiff

James Russell Neilson
for the Self-Represented Litigant

TAB 18

Her Majesty The Queen in Right of the Province of Newfoundland and Labrador *Appellant*

v.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders) *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty The Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada *Interveners*

Indexed as: Newfoundland and Labrador *v.* AbitibiBowater Inc.

2012 SCC 67

File No.: 33797.

2011: November 16; 2012: December 7.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and Insolvency — Provable claims — Contingent claims — Corporation filing for insolvency protection — Province issuing environmental protection orders against corporation and seeking declaration that orders not "claims" under Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), and not subject to claims procedure order — Whether environmental protection orders are monetary claims that

Sa Majesté la Reine du chef de la province de Terre-Neuve-et-Labrador *Appelante*

c.

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., comité ad hoc des créanciers obligataires, comité ad hoc des porteurs de billets garantis de premier rang et U.S. Bank National Association (fiduciaire désigné par l'acte constitutif pour les porteurs de billets garantis de premier rang) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Sa Majesté la Reine du chef de la Colombie-Britannique, Ernst & Young Inc., en sa qualité de contrôleur, et Les Ami(e)s de la Terre Canada *Intervenants*

Répertorié : Terre-Neuve-et-Labrador *c.* AbitibiBowater Inc.

2012 CSC 67

N[o] du greffe : 33797.

2011 : 16 novembre; 2012 : 7 décembre.

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

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Réclamations prouvables — Réclamations éventuelles — Demande de protection contre l'insolvabilité par une société — Ordonnances environnementales émises par la province contre la société et demande, par la province, d'un jugement déclarant que les ordonnances ne constituent pas des « réclamations » aux termes de la Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, *can be compromised in corporate restructuring under CCAA — Whether CCAA is ultra vires or constitutionally inapplicable by permitting court to determine whether environmental order is a monetary claim.*

A was involved in industrial activity in Newfoundland and Labrador (the "Province"). In a period of general financial distress, it ended its last operation there, filed for insolvency protection in the United States and obtained a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). The Province subsequently issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, requiring A to submit remediation action plans for five industrial sites it had occupied, three of which had been expropriated by the Province, and to complete the remediation actions. The Province also brought a motion for a declaration that a claims procedure order issued under the *CCAA* in relation to A's proposed reorganization did not bar the Province from enforcing the environmental protection orders. The Province argued that the environmental protection orders were not "claims" under the *CCAA* and therefore could not be stayed and subject to a claims procedure order. It further argued that Parliament lacked the constitutional competence under its power to make laws in relation to bankruptcy and insolvency to stay orders that were validly made in the exercise of a provincial power. A contested the motion, arguing that the orders were monetary in nature and hence fell within the definition of the word "claim" in the claims procedure order. The *CCAA* court dismissed the Province's motion. The Court of Appeal denied the Province leave to appeal.

Held (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

Per Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified

ch. C-36 (« LACC »), et qu'elles ne sont pas assujetties à l'ordonnance relative à la procédure de réclamations — Les ordonnances environnementales constituent-elles des réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration sous le régime de la LACC? — La LACC est-elle ultra vires ou constitutionnellement inapplicable en permettant au tribunal de déterminer si une ordonnance environnementale constitue une réclamation pécuniaire?

A a poursuivi des activités industrielles à Terre-Neuve-et-Labrador (la « province »). Dans une période de grandes difficultés financières, elle a mis un terme à ses activités dans la province, elle a présenté une demande de protection contre l'insolvabilité aux États-Unis et elle a obtenu une suspension des procédures en vertu de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »). La province a par la suite prononcé cinq ordonnances environnementales en vertu de l'*Environmental Protection Act*, S.N.L. 2002, ch. E-14.2, contraignant A à présenter des plans de restauration pour cinq sites industriels qu'elle avait occupés, dont trois avaient été expropriés par la province, et à réaliser les plans de restauration approuvés. La province a également demandé par requête un jugement déclarant qu'une ordonnance relative à la procédure de réclamations rendue aux termes de la *LACC* dans le cadre de la réorganisation proposée de A n'empêchait pas la province d'exécuter les ordonnances environnementales. La province a plaidé que les ordonnances environnementales ne constituent pas des « réclamations » au sens de la *LACC* et que leur exécution ne peut donc être suspendue ni être assujettie à une ordonnance relative à la procédure de réclamations. Elle a de plus fait valoir que le pouvoir du Parlement de légiférer en matière de faillite et d'insolvabilité ne lui confère pas la compétence constitutionnelle pour suspendre l'application des ordonnances prononcées dans l'exercice valide de pouvoirs provinciaux. A a contesté la requête et a soutenu que les ordonnances étaient de nature pécuniaire et qu'elles étaient donc visées par la définition du terme « réclamation » utilisé dans l'ordonnance relative à la procédure de réclamations. Le juge chargé d'appliquer la *LACC* a rejeté la requête de la province et la Cour d'appel a rejeté la demande d'autorisation d'appel de la province.

Arrêt (la juge en chef McLachlin et le juge LeBel sont dissidents) : Le pourvoi est rejeté.

Les juges Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis : Les ordonnances des organismes administratifs ne sont pas toutes de nature pécuniaire, et donc des réclamations prouvables dans le cadre de procédures d'insolvabilité, mais at the outset of the proceedings. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims or orders on the basis of form alone. If the order is not framed in monetary terms, the *CCAA* court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process in a case such as the one at bar. First, there must be a debt, a liability or an obligation to a creditor. In this case, the first criterion was met because the Province had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred as of a specific time. This requirement was also met since the environmental damage had occurred before the time of the *CCAA* proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. The present case turns on this third requirement, and the question is whether orders that are not expressed in monetary terms can be translated into such terms.

A claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred. The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental protection order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim. If there is sufficient certainty in this regard, the court will conclude that the order can be subject to the insolvency process.

certaines peuvent l’être en dépit du fait qu’elles ne sont pas quantifiées dès le début des procédures. En matière environnementale, le tribunal chargé de l’application de la *LACC* doit déterminer s’il y a suffisamment de faits indiquant qu’il existe une obligation environnementale de laquelle résultera une dette envers l’organisme administratif qui a prononcé l’ordonnance. En pareil cas, la question pertinente ne se résume pas à déterminer si l’organisme a formellement exercé son pouvoir de réclamer une dette. Le tribunal qui évalue une réclamation ou une ordonnance ne se limite pas à un examen de sa forme. Si l’ordonnance n’est pas formulée en termes pécuniaires, le tribunal doit déterminer, en fonction des faits en cause et du cadre législatif applicable, si elle constitue une réclamation qui sera assujettie au processus de réclamation.

Pour qu’elles constituent des réclamations pouvant être assujetties au processus applicable en matière d’insolvabilité dans une affaire telle celle en l’espèce, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit s’agir d’une dette, d’un engagement ou d’une obligation envers un créancier. En l’espèce, il a été satisfait à la première condition puisque la province s’est présentée comme créancière en ayant recours aux mécanismes d’application en matière de protection de l’environnement. Deuxièmement, la dette, l’engagement ou l’obligation doit avoir pris naissance à un moment précis. Il a également été satisfait à cette condition puisque les dommages environnementaux sont survenus avant que les procédures en vertu de la *LACC* ne soient entamées. Troisièmement, il doit être possible d’attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. La présente affaire est centrée sur cette troisième condition, et la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes.

Il est possible de faire valoir une réclamation dans le cadre de procédures d’insolvabilité même si elle dépend d’un événement non encore survenu. Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d’insolvabilité est celui qui consiste à déterminer si l’événement non encore survenu est trop éloigné ou conjectural. Dans le contexte d’une ordonnance environnementale, cela signifie qu’il doit y avoir des indications suffisantes permettant de conclure que l’organisme administratif qui a eu recours aux mécanismes d’application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire. Si cela est suffisamment certain, le tribunal conclura que l’ordonnance peut être assujettie au processus d’insolvabilité.

Certain indicators can guide the *CCAA* court in this assessment, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. The analysis is grounded in the facts of each case. In this case, the *CCAA* court's assessment of the facts, particularly its finding that the orders were the first step towards performance of the remediation work by the Province, leads to no conclusion other than that it was sufficiently certain that the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim.

Certains indicateurs permettent de guider le tribunal dans cette analyse, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. L'analyse est fondée sur les faits propres à chaque cas. En l'espèce, l'appréciation des faits par le tribunal, plus particulièrement sa constatation que les ordonnances constituaient la première étape en vue de la décontamination des sites par la province, ne permet de tirer aucune conclusion autre que celle suivant laquelle il était suffisamment certain que la province exécuterait des travaux de décontamination et qu'elle était par conséquent visée par la définition d'un créancier ayant une réclamation pécuniaire.

Subjecting such orders to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay a debt. It merely ensures that the Province's claim will be paid in accordance with insolvency legislation. Full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors and replace the polluter-pay principle with a "third-party-pay" principle. Moreover, to subject environmental protection orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities. Reorganization made necessary by insolvency is hardly ever a deliberate choice, and when the risks corporations engage in materialize, the dire costs are borne by almost all stakeholders.

Le fait d'assujettir ces ordonnances au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers et substituerait au principe du pollueur-payeur celui du « tiers-payeur ». En outre, l'assujettissement des ordonnances environnementales à la procédure de réclamations n'équivaut pas à convier les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales. Une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré, et lorsque les risques auxquels s'exposent les sociétés se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en supportent les terribles coûts.

Because the provisions on the assessment of claims in insolvency matters relate directly to Parliament's jurisdiction, the ancillary powers doctrine is not relevant to this case. The interjurisdictional immunity doctrine is also inapplicable, because a finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities; its claim is simply subject to the insolvency process.

L'application de la doctrine des pouvoirs accessoires n'est pas pertinente en l'espèce car les dispositions régissant l'évaluation des réclamations en matière d'insolvabilité sont directement reliées à la compétence du législateur fédéral. La doctrine de la protection des compétences exclusives ne s'applique pas non plus parce qu'une conclusion selon laquelle un créancier œuvrant dans le domaine de l'environnement détient une réclamation pécuniaire ne modifie en rien les activités de ce créancier; sa réclamation est simplement assujettie au processus d'insolvabilité.

Per McLachlin C.J. (dissenting): Remediation orders made under a province's environmental protection

La juge en chef McLachlin (dissidente) : Les ordonnances exigeant la décontamination émises aux termes legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. They may only be reduced to monetary claims which can be compromised under *CCAA* proceedings in narrow circumstances where a province has done the remediation work, or where it is "sufficiently certain" that it will do the work. This last situation is regulated by the provisions of the *CCAA* for contingent or future claims. The test is whether there is a likelihood approaching certainty that the province will do the work. "Likelihood approaching certainty" recognizes that the government's decision is discretionary and may be influenced by competing political and social considerations, which are not normally subject to judicial consideration. Insofar as this determination touches on the division of powers, I am in substantial agreement with Deschamps J.

d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. Ces ordonnances ne peuvent être converties en réclamations pécuniaires pouvant faire l'objet de transactions dans le cadre de procédures engagées aux termes de la *LACC* que dans certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux. Cette deuxième situation est prévue par les dispositions de la *LACC* relatives aux réclamations éventuelles ou futures. Le critère consiste à déterminer s'il existe une probabilité proche de la certitude que la province exécutera les travaux. Une « probabilité proche de la certitude » reconnaît que la décision du gouvernement est discrétionnaire et peut être influencée par des considérations politiques et sociales concurrentes qui sont normalement soustraites à l'examen judiciaire. Dans la mesure où cette décision touche le partage des pouvoirs, je souscris pour l'essentiel à l'opinion exprimée par la juge Deschamps.

Apart from the orders related to the work done or tendered for on the Buchans property, the orders for remediation in this case are not claims that can be compromised. The *CCAA* maintains the fundamental distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy. The *CCAA* judge never asked himself the critical question of whether it was "sufficiently certain" that the Province would do the work itself. His failure to consider that question requires this Court to answer it in his stead. There is nothing on the record to support the view that the Province will move to remediate the properties. It has not been shown that the contamination poses immediate health risks which must be addressed without delay. It has not been shown that the Province has taken any steps to do any work. And it has not been shown that the Province has set aside or even contemplated setting aside money for this work. The Province retained a number of options, including leaving the sites contaminated, or calling on Abitibi to remediate following its emergence from restructuring. There is nothing in the record that makes it more probable, much less establishes "sufficient certainty", that the Province will opt to do the work itself.

À l'exception des ordonnances relatives aux travaux sur le site de Buchans déjà exécutés ou à l'égard desquels des appels d'offres ont été lancés, les ordonnances exigeant la décontamination en l'espèce ne constituent pas des réclamations pouvant faire l'objet de transactions dans le cadre d'une restructuration. La *LACC* établit une distinction fondamentale entre les exigences réglementaires découlant d'une loi d'application générale visant la protection du public, d'une part, et les réclamations pécuniaires pouvant faire l'objet d'une transaction dans le cadre d'une restructuration engagée sous le régime de la *LACC* ou en matière de faillite, d'autre part. Le juge de première instance ne s'est jamais posé la question cruciale de savoir s'il était « suffisamment certain » que la province exécuterait elle-même les travaux. Le fait qu'il n'ait pas examiné cette question oblige notre Cour à y répondre à sa place. Aucune preuve au dossier ne laisse croire que la province entreprendra la décontamination des sites. Il n'a pas été démontré que la contamination pose pour la santé des risques immédiats exigeant la prise de mesures dans les plus brefs délais. Il n'a pas été démontré que la province a pris quelque mesure que ce soit pour réaliser des travaux. Et il n'a pas été démontré que la province a prévu des sommes d'argent pour ces travaux ou qu'elle a même songé à en prévoir. La province a conservé un certain nombre de choix, notamment laisser les sites contaminés, ou demander à Abitibi d'exécuter les travaux lorsqu'elle aura complété sa restructuration. Rien au dossier n'indique qu'il est plus probable, et encore moins qu'il est « suffisamment certain », que la province choisira d'exécuter elle-même la décontamination.

[23] Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Section 2 of the *BIA* defines a claim provable in bankruptcy:

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

[24] This definition is completed by s. 121(1) of the *BIA*:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[25] Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121. . . .

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135. . . .

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

[23] L'article 12 de la *LACC* renvoie aux règles de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). L'article 2 de la *LFI* définit ainsi une réclamation prouvable en matière de faillite :

« réclamation prouvable en matière de faillite » ou « réclamation prouvable » Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier.

[24] Cette définition est complétée par le par. 121(1) de la *LFI* :

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[25] Les paragraphes 121(2) et 135(1.1) de la *LFI* donnent des indications additionnelles lorsqu'il s'agit de déterminer si une ordonnance constitue une réclamation prouvable :

121. . . .

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

135. . . .

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

[26] Ces dispositions font ressortir trois conditions pertinentes à la présente affaire. Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. Je vais examiner chacune de ces conditions à tour de rôle.

[27] The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

[28] The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

11.8 . . .

(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

[29] The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases,

[27] La définition de réclamation prouvable établie par la *LFI* et incorporée par renvoi à la *LACC* exige qu'une personne ait qualité de créancier. Les lois régissant l'environnement pourvoient généralement à la création d'un organisme chargé de voir au respect des obligations qui y sont prévues. La plupart des organismes administratifs peuvent agir à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois. À cette première étape qui consiste à déterminer si un organisme administratif est un créancier, il n'est pas encore pertinent de décider si l'obligation peut être formulée en termes pécuniaires. Cette question sera abordée à un stade ultérieur. À cette étape, la seule question à trancher est de savoir si l'organisme administratif a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. Lorsqu'il le fait, il s'identifie alors comme créancier et la condition de cette étape est espectée.

[28] L'examen de la seconde condition repose sur le par. 121(1) de la *LFI* qui impose que la réclamation ait pris naissance dans un délai donné. Celle-ci doit se fonder sur une obligation « contractée antérieurement à cette date [la date à laquelle le failli devient failli] ». Comme il est souvent difficile d'établir la date à laquelle un dommage lié à l'environnement est survenu, le par. 11.8(9) de la *LACC* prévoit une certaine flexibilité pour ce qui est des réclamations en matière d'environnement :

11.8 . . .

(9) La réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un bien immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

[29] La réclamation du créancier sera exemptée de l'exigence découlant de la procédure unique si l'obligation correspondante du débiteur n'a pas pris naissance dans le délai fixé pour que la réclamation soit incluse dans le processus d'insolvabilité. À titre d'exemple, cela pourrait s'appliquer aux obligations que la loi impose à un débiteur concernant

the damage continues to be sustained after the reorganization has been completed.

[30] With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

[31] However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update" (1998), 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

[32] Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No. 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority (s. 11.8(8) *CCAA*). Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third-party creditors in being treated equitably.

ses activités polluantes qui se poursuivent après la réorganisation, parce qu'en pareilles circonstances, des dommages sont encore causés après que la réorganisation ait été complétée.

[30] En ce qui concerne la troisième condition, soit qu'il doit être possible d'attribuer à l'obligation une valeur pécuniaire, la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes. Je souligne que lorsqu'un organisme administratif réclame une somme qui est due à la date pertinente, il formule ainsi son ordonnance en termes pécuniaires. Le tribunal n'a alors aucune détermination à faire à cette étape car ce qui est réclamé est une « dette » et est, par conséquent, clairement visé par la définition d'une « réclamation » prévue au par. 12(1) de la *LACC*.

[31] Toutefois, parce qu'elles sont utilisées pour traiter divers enjeux environnementaux, les ordonnances peuvent se présenter sous plusieurs formes et peuvent viser notamment la cessation ou le contrôle d'une activité, la prévention et la décontamination (D. Saxe, « Trustees' and Receivers' Environnmental Liability Update » (1998), 49 C.B.R. (3d) 138, p. 141). Lorsqu'ils analysent une ordonnance qui n'est pas formulée en des termes pécuniaires, les tribunaux doivent en examiner la substance et appliquer les règles régissant l'évaluation des réclamations.

[32] Le législateur fédéral reconnaît que les organismes administratifs doivent à l'occasion exécuter des travaux de décontamination (voir Chambre des communes, *Témoignages du Comité permanent de l'industrie*, n^{o} 16, 2^{e} sess., 35^{e} lég., 11 juin 1996). En pareil cas, la réclamation relative aux frais de décontamination est assujettie à la procédure de réclamations en matière d'insolvabilité mais elle est garantie par une charge réelle grevant l'immeuble contaminé et certains immeubles connexes et bénéficie d'un rang prioritaire (par. 11.8(8) *LACC*). Ainsi, le législateur a établi un équilibre entre l'intérêt du public à l'égard de l'application de la réglementation environnementale et les intérêts des tiers créanciers qui doivent être traités de façon équitable.

[33] If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets. In light of the legislative history and the purpose of the reorganization process, the fact that the Crown's priority under s. 11.8(8) of the *CCAA* is limited to the contaminated property and certain related property leads me to conclude that to exempt environmental orders would be inconsistent with the insolvency legislation. As deferential as courts may be to regulatory bodies' actions, they must apply the general rules.

[33] Si le législateur fédéral avait eu l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination, il aurait accordé à l'État une priorité applicable à la totalité des actifs du débiteur. Compte tenu de l'historique des dispositions législatives et des objectifs du processus de réorganisation, le fait que la priorité de l'État aux termes du par. 11.8(8) de la *LACC* soit limitée au bien contaminé et à certains biens liés m'amène à conclure qu'une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Aussi respectueux soient-ils des mesures prises par les organismes administratifs, les tribunaux sont tenus d'appliquer les règles générales.

[34] Unlike in proceedings governed by the common law or the civil law, a claim may be asserted in insolvency proceedings even if it is contingent on an event that has not yet occurred (for the common law, see *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79, at paras. 17-18; for the civil law, see arts. 1497, 1508 and 1513 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Thus, the broad definition of "claim" in the *BIA* includes *contingent* and *future* claims that would be unenforceable at common law or in the civil law. As for unliquidated claims, a *CCAA* court has the same power to assess their amounts as would a court hearing a case in a common law or civil law context.

[34] Contrairement à l'approche qui prévaut dans le contexte des procédures régies par la common law ou le droit civil, il est possible de faire valoir une réclamation dans le cadre de procédures d'insolvabilité même si elle dépend d'un événement non encore survenu (en common law, voir *Canada c. McLarty*, 2008 CSC 26, [2008] 2 R.C.S. 79, par. 17-18; en droit civil, voir les art. 1497, 1508 et 1513 du *Code civil du Québec*, L.Q. 1991, ch. 64). Ainsi, la définition générale de « réclamation » de la *LFI* englobe des réclamations éventuelles et *futures* qui seraient inexécutoires en common law ou en droit civil. En ce qui concerne les réclamations non liquidées, le tribunal chargé de l'application de la *LACC* a le même pouvoir d'évaluer leur montant qu'un tribunal saisi d'une affaire sous le régime de la common law ou du droit civil.

[35] The reason the *BIA* and the *CCAA* include a broad range of claims is to ensure fairness between creditors and finality in the insolvency proceeding for the debtor. In a corporate liquidation process, it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to

[35] C'est pour assurer l'équité entre les créanciers ainsi que, pour le débiteur, le caractère définitif de la procédure d'insolvabilité que la *LFI* et la *LACC* englobent un large éventail de réclamations. Dans le cadre de la liquidation d'une société, il est plus équitable de permettre au plus grand nombre possible de créanciers de participer au processus et de se partager le produit de la liquidation. Cela permet d'inclure les créanciers dont les réclamations ne sont pas venues à échéance lorsque le débiteur corporatif devient failli, et ainsi éviter que, ayant cessé ses activités, le débiteur ne puisse pas satisfaire à un jugement rendu en leur faveur. L'approche est quelque peu différente dans

ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

le contexte d'une proposition concordataire présentée par une société ou d'une réorganisation. Dans ces cas, l'objectif que sous-tend une interprétation large est non seulement de garantir l'équité entre créanciers, mais aussi de permettre au débiteur de prendre un nouveau départ dans les meilleures conditions possibles à la suite de l'approbation d'une proposition ou d'un arrangement.

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[36] Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité.

[37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met. For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude

[37] Lorsqu'il détermine si une ordonnance constitue une réclamation prouvable, le tribunal chargé de l'application de la *LACC* doit, dans une certaine mesure, examiner les actes posés par l'organisme administratif. Cet examen se rapproche à certains égards de celui d'un contrôle judiciaire. La différence se situe, toutefois, au niveau de l'objet de l'évaluation que doit faire le tribunal. Son examen ne porte pas sur l'exercice du pouvoir discrétionnaire par l'organisme administratif. Il doit plutôt déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Par exemple, si le débiteur continue d'exercer les activités faisant l'objet de l'intervention de l'organisme administratif, il est fort possible que le tribunal conclue que l'ordonnance ne peut être incorporée au processus d'insolvabilité parce que ces activités et les dommages en découlant se poursuivront après la réorganisation et qu'elles excéderont donc le délai prescrit pour la production d'une

that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain that the regulatory body will have to perform the work.

réclamation. Par contre, si l'organisme administratif, n'ayant aucune solution réaliste autre que celle d'effectuer lui-même les travaux de décontamination, ne fait que retarder la production d'une réclamation pécuniaire dans le but d'améliorer sa position par rapport à celle des autres créanciers, le tribunal pourrait conclure que cette démarche n'est pas compatible avec le régime d'insolvabilité et décider que l'ordonnance doit être traitée dans le cadre du processus de réclamations. De même, si le débiteur n'exerce aucun contrôle sur le bien et ne dispose pas, ni ne disposera, de façon réaliste, des moyens pour effectuer les travaux de décontamination, le tribunal pourrait conclure de façon suffisamment certaine que l'organisme administratif devra exécuter les travaux.

[38] Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

[38] Il est ainsi possible de discerner, grâce au libellé des dispositions et à leur contexte, certains indicateurs qui permettent de guider le tribunal au moment de déterminer si l'ordonnance constitue une réclamation prouvable, notamment si les activités se poursuivent, si le débiteur exerce un contrôle sur le bien et s'il dispose des moyens de se conformer à l'ordonnance. Il est également possible pour le tribunal de prendre en compte les conséquences qu'entraînerait sur le processus d'insolvabilité le fait d'exiger du débiteur qu'il se conforme à l'ordonnance. Puisque l'analyse qu'il convient de réaliser est fondée sur les faits propres à chaque cas, il n'est pas nécessaire que tous ces indicateurs soient présents, et d'autres peuvent également devenir pertinents.

[39] Having highlighted three requirements for finding a claim to be provable in a *CCAA* process that need to be considered in the case at bar, I must now discuss certain policy arguments raised by the Province and some of the interveners.

[39] Après avoir souligné les trois conditions qui permettent en l'espèce de conclure qu'une ordonnance constitue une réclamation prouvable dans le cadre d'un processus régi par la *LACC*, il me faut examiner certains arguments de principe que la province et certains intervenants ont fait valoir.

[40] These parties argue that treating a regulatory order as a claim in an insolvency proceeding extinguishes the debtor's environmental obligations, thereby undermining the polluter-pay principle discussed by this Court in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24. This objection

[40] Ils ont plaidé que le fait d'assimiler une ordonnance d'un organisme administratif à une réclamation dans le cadre de procédure en insolvabilité éteint les obligations environnementales auxquelles le débiteur est tenu, minant par le fait même le principe du pollueur-payeur examiné par notre Cour dans l'arrêt *Cie pétrolière Impériale*

demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

[41] Nor does subjecting the orders to the insolvency process amount to issuing a licence to pollute, since insolvency proceedings do not concern the debtor's future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colourful analogy of two American scholars, "Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute" (D. G. Baird and T. H. Jackson, "Comment: *Kovacs* and Toxic Wastes in Bankruptcy" (1984), 36 *Stan. L. Rev.* 1199, at p. 1200).

[42] Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure

ltée c. Québec (Ministre de l'Environnement), 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24. Cet argument démontre une mauvaise compréhension de la nature des procédures en matière d'insolvabilité. Le fait d'assujettir une ordonnance au processus de réclamations n'éteint pas les obligations environnementales qui incombent au débiteur, pas plus que le fait de soumettre à ce processus les réclamations des créanciers n'éteint l'obligation du débiteur de payer ses dettes. Le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. De plus, le respect intégral des ordonnances dont la nature pécuniaire est reconnue transférerait le coût de la décontamination aux tiers créanciers, y compris aux créanciers involontaires, par exemple les créanciers en responsabilité délictuelle ou extra-contractuelle. Dans un contexte d'insolvabilité, la position de la province aurait comme résultat de lui accorder non seulement une super-priorité, mais aussi de reconnaître l'application d'un principe du « tiers-payeur » plutôt que celui du pollueur-payeur.

[41] Par ailleurs, l'assujettissement des ordonnances au processus d'insolvabilité n'autorise pas une personne à polluer, car la procédure en insolvabilité ne touche pas les actes que le débiteur posera dans le futur. Le débiteur réorganisé doit se conformer pour l'avenir à la réglementation environnementale, comme le ferait toute autre personne. Pour citer une analogie haute en couleurs de deux universitaires américains, [TRADUCTION] « [l]es débiteurs en faillite n'ont pas — et ne devraient pas avoir — une autorisation plus étendue de polluer en violation d'une loi qu'ils n'en ont de vendre de la cocaïne » (D. G. Baird et T. H. Jackson, « Comment : *Kovacs* and Toxic Wastes in Bankruptcy » (1984), 36 *Stan. L. Rev.* 1199, p. 1200).

[42] En outre, il arrive que des sociétés exercent des activités comportant des risques. Peu importe les risques en cause, une réorganisation rendue nécessaire par l'insolvabilité de la société peut difficilement être assimilée à un choix délibéré. Lorsque les risques se concrétisent, la quasi-totalité des personnes ayant des intérêts dans la société en

TAB 19

In the Court of Appeal of Alberta

Citation: Peters v. Remington, 2004 ABCA 5

Date: 20040113
Docket: 01-00346
Registry: Calgary

Between:

R. Kent Remington, a.k.a. B. Kent Remington, a.k.a. Barry Kent Remington

Appellant (Defendant)

- and -

Robert G. Peters

Respondent (Plaintiff)

The Court:

The Honourable Madam Justice Picard
The Honourable Mr. Justice Wittmann
The Honourable Mr. Justice Ritter

Reasons for Judgment of The Honourable Mr. Justice Wittmann
Concurred in by the Honourable Madam Justice Picard
and Concurred in by the Honourable Mr. Justice Ritter

Appeal from the Judgment by The Honourable Madam Justice C. A. Kent
dated the 20th day of August, 2001; Filed the 5th day of September, 2001

Reasons for Judgment of
The Honourable Mr. Justice Wittmann

Introduction

[1] When a guarantor, not yet found liable on his guarantee, claims against a co-guarantor who has made a proposal in bankruptcy and the claim is denied as offending the "rule against double proofs", can the guarantor pursue the co-guarantor successfully after the proposal has been accepted?

Facts

[2] In 1990, the respondent, Peters, and the appellant, Remington, pursuant to separate guarantees, each guaranteed the same loan from Metropolitan Trust Company of Canada (Met Trust) in the sum of $1,250.000.00. They both agreed to indemnify each other for 50 percent of the guarantees and all damages, liabilities, costs, charges and expenses incurred in connection with the guarantees, pursuant to a written indemnity agreement.

[3] In 1993, after default on the loan, Met Trust commenced an action against Peters and Remington based on the guarantees. Summary judgment was awarded against Remington. Peters vigorously defended the action and consequent interest and costs increased the overall debt owed to Met Trust.

[4] On April 24, 1996, Remington lodged a formal Proposal under the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, as amended (***BIA***), with BDO Dunwoody Ltd. as the trustee named in the Proposal (the Trustee).

[5] Met Trust filed a Proof of Claim in the Proposal dated May 10, 1996, which was accepted by the Trustee as a provable claim. Peters filed a Proof of Claim dated May 13, 1996 in the Proposal which was disallowed by the Trustee as a duplication of the Met Trust claim on May 21, 1996. On appeal, this decision of the Trustee was upheld by Bankruptcy Registrar Laycock. A further appeal to Paperny, J., (as she then was) was dismissed. Neither provided additional reasons.

[6] The Proposal under the ***BIA*** was approved by all creditors on August 12, 1996, and approved by the Bankruptcy Court August 27, 1996. The distribution to creditors did not include Peters. Met Trust received a dividend of $189,961.39 under the Proposal. Remington received a Certificate of Full Performance of Proposal November 5, 1996.

[7] On April 21, 1997, Peters negotiated a settlement with Met Trust by paying $600,000 and receiving an assignment of Met Trust's security.

[8] On September 18, 1997, Peters commenced this action in which he demanded payment from Remington under the indemnity agreement for his share as a co-guarantor.

duplication of Met Trust's claim and therefore, it was a provable claim without value.

[17] In evaluating what was decided for the purpose of *res judicata*, the court may look to documentation beyond the formal judgment itself: Lange, *The Doctrine of Res Judicata in Canada*; ***Maynard v. Maynard***, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 at 251-52, leave to appeal to Privy Council denied, [1952] 1 S.C.R. vii; and ***Smode v. Deveaux*** (1996), 216 A.R. 20 at para. 3 (C.A.).

[18] In this case, the Trustee's actions, his testimony in cross-examination and what reasons he gave in disallowing the Peters' claim support the conclusion that he determined that Peters did not have a provable claim.

[19] In the Notice of Disallowance dated May 21, 1996, the Trustee gave the following reason:

> Your claim is a duplicate of the claim being made against the estate by Metropolitan Trust Company. This claim can be advanced only by one party and to be eligible to advance a claim, you would have to pay the claim yourself.

[20] Similarly, Hall, a senior vice president of the Trustee stated in an affidavit as follows:

> I verily believed that had [Peters] discharged all or part of his obligations to Met Trust pursuant to his guarantee, he would have had a claim provable in the proposal proceedings ... Having allowed the Met Proof in full, I verily believed that allowing [Peters'] Proof would have offended the rule against double proofs.

[21] This statement clearly indicates that the Trustee's position was Peters would have had a provable claim only if he discharged all or part of his obligation to Met Trust. The Trustee did not find that Peters' claim was in fact a provable claim. Nor was the finding expressed in terms of Peters not having a provable claim.

[22] When Hall was cross-examined on his affidavit, he stated that Peters did not have a provable claim:

> Q: Sir, Mr. Peters didn't receive a dividend from the Estate of Remington, did he?
>
> A: No.
>
> Q: Was that because he did not have a provable claim?
>
> A: That's right.

[23] Section 135(1.1) of the ***BIA*** requires that "the trustee shall determine whether any contingent claim or unliquidated claim is a provable claim". There is no dispute in this case that Peters' claim

was a contingent one. A contingent claim is "a claim which may or may not ever ripen into a debt, according as some future event does or does not happen": ***Gardner v. Newton*** (1916), 29 D.L.R. 276 at 281, 10 W.W.R. 51 (Man. K.B.). At the time of the Proposal, Remington did not owe a debt to Peters unless and until Peters paid Met Trust part or of all of the debt owed under the guarantee.

[24] Also pursuant to s. 135(1.1), if the trustee determines that a contingent claim is a provable claim, "the trustee shall value it". A trustee is required to value the claim only if it previously determined that the claim was provable.

[25] In this instance, the Trustee did not value Peters' claim, implying that the Trustee determined the claim was not a provable claim, even though this finding was not expressly stated by the Trustee.

[26] Consistent with the Trustee finding that Peters did not have a provable claim, as described in further detail below, the Trustee maintained throughout the bankruptcy proposal proceedings that Peters had no status to participate.

[27] As a result, the Trustee determined the same question: i.e. whether Peters' claim was provable, and the three prerequisites for *res judicata* have been met. What remains is whether there is any reason to exercise the discretion to relieve against the effects of estoppel by *res judicata* in this case.

Discretion

[28] In exercising the discretion, as stated in ***Danyluk*** at 493 quoting the Ontario Court of Appeal in ***Schweneke v. Ontario*** (2000), 47 O.R. (3d) 97, "the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?"

[29] The circumstances relevant to this case are described below.

Peters' Conduct in Remington's Proposal

[30] The evidence in Remington's bankruptcy file shows that Peters made numerous and vigorous efforts to be included as a creditor and to obtain status in Remington's bankruptcy proposal proceedings. Peters believed that there was more money available for Remington's creditors and that Remington was fraudulently concealing assets. Peters consistently sought to advance his claim against Remington and to challenge the bankruptcy proposal proceedings.

[31] After the Trustee disallowed Peters' claim, Peters' counsel attended a creditors' meeting on May 24, 1996, and requested a vote be taken on the Proposal. The Trustee denied the request on the basis that Peters had no status because his claim had been disallowed. Peters was not allowed to participate in any voting on the Proposal. Peters also requested that the Trustee provide notice of the next meeting. Although given informal notice, the Trustee advised he was not obliged to give formal

TAB 20

Attorney General of Alberta *Appellant*

v.

Joseph William Moloney *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan and Superintendent of Bankruptcy *Interveners*

Indexed as: Alberta (Attorney General) *v.* Moloney

2015 SCC 51

File No.: 35820.

2015: January 15; 2015: November 13.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Property and civil rights — Judgment debt owed to province constituted claim provable in debtor's bankruptcy — Debtor obtained absolute discharge in bankruptcy — Federal legislation governing bankruptcy providing for debtor's release from all claims provable in bankruptcy upon discharge — Whether provincial legislation providing for continuing suspension of debtor's driver's licence and motor vehicle permits until payment of judgment debt constitutionally inoperative by reason of doctrine of federal paramountcy — Test for determining whether operational conflict exists — Whether federal and provincial legislation can operate side by side without conflict — Whether operation of provincial law frustrates purpose of federal law — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(2) — Traffic Safety Act, R.S.A. 2000, c. T-6, s. 102.

Procureur général de l'Alberta *Appelant*

c.

Joseph William Moloney *Intimé*

et

Procureur général de l'Ontario, procureure générale du Québec, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan et Surintendant des faillites *Intervenants*

Répertorié : Alberta (Procureur général) *c.* Moloney

2015 CSC 51

N° du greffe : 35820.

2015 : 15 janvier; 2015 : 13 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon et Côté.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Propriété et droits civils — Dette constatée par jugement envers la province constituant une réclamation prouvable lors de la faillite du débiteur — Libération absolue de faillite accordée au débiteur — Loi fédérale sur la faillite prévoyant que le débiteur est libéré de toutes réclamations prouvables en matière de faillite à sa libération — La loi provinciale prévoyant le maintien de la suspension du permis de conduire du débiteur et de ses certificats d'immatriculation jusqu'à ce qu'il acquitte la dette constatée par jugement est-elle inopérante du point de vue constitutionnel en raison de la doctrine de la prépondérance fédérale? — Analyse permettant de décider s'il existe un conflit d'application — La loi fédérale et la loi provinciale peuvent-elles coexister sans conflit? — L'application de la loi provinciale entrave-t-elle la réalisation de l'objet de la loi fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 178(2) — Traffic Safety Act, R.S.A. 2000, c. T-6, art. 102.

M caused a car accident while he was uninsured. The province of Alberta compensated an individual injured in the accident and sought to recover the amount of the compensation from M. Section 102 of Alberta's *Traffic Safety Act* ("*TSA*") allows the province to suspend M's licence and permits until he pays the amount of the compensation. M made an assignment in bankruptcy and was eventually discharged. He listed the province's claim in his Statement of Affairs. The debt was a claim provable in bankruptcy. Section 178(2) of the *Bankruptcy and Insolvency Act* ("*BIA*") provides that, upon discharge, M is released from all debts that are claims provable in bankruptcy. As a result of his bankruptcy and discharge, M did not pay the amount of the compensation in full; because of this failure to pay, Alberta suspended his vehicle permits and driver's licence. M contested this suspension. The Court of Queen's Bench and the Court of Appeal found that there was a conflict between the federal and provincial laws. Relying on the doctrine of federal paramountcy, they declared s. 102 of the *TSA* to be inoperative to the extent of the conflict.

Held: The appeal should be dismissed. Section 102 of the *TSA* is constitutionally inoperative to the extent that it is used to enforce a debt discharged in bankruptcy.

Per Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.: In Canada, the federal and provincial levels of government must enact laws within the limits of their respective spheres of jurisdiction. It is often impossible however for one level of government to legislate effectively within its jurisdiction without affecting matters that are within the other level's jurisdiction. In certain circumstances, the powers of one level of government must be protected against intrusions by the other level. To protect against such intrusions, the Court has developed various constitutional doctrines, including the doctrine of federal paramountcy. Under this doctrine, the federal law prevails when there is a genuine inconsistency between federal and provincial legislation, that is, when the operational effects of provincial legislation are incompatible with federal legislation. To determine whether such a conflict exists, first and foremost, it is necessary to ensure that the overlapping laws are independently valid. If so, then the court must determine whether their concurrent operation results in a conflict. In this case, the impugned provisions are independently valid. The only question is whether their concurrent operation results in a conflict.

M a causé un accident de la route alors qu'il n'était pas assuré. La province d'Alberta a indemnisé une personne blessée dans l'accident et a tenté de recouvrer l'indemnité auprès de M. L'article 102 de la *Traffic Safety Act* de l'Alberta (« *TSA* ») permet à la province de suspendre le permis de conduire et les certificats d'immatriculation de M jusqu'à ce qu'il paie le montant de l'indemnité. M a fait cession de ses biens et a par la suite été libéré. Il a inscrit la réclamation de la province dans son bilan. La dette constituait une réclamation prouvable en matière de faillite. Le paragraphe 178(2) de la *Loi sur la faillite et l'insolvabilité* (« *LFI* ») précise qu'au moment de sa libération, M est libéré de toutes les dettes qui sont des réclamations prouvables en matière de faillite. Par suite de sa faillite et de sa libération, M n'a pas payé intégralement le montant de l'indemnité; en conséquence, l'Alberta a suspendu ses certificats d'immatriculation et son permis de conduire. M a contesté cette suspension. La Cour du Banc de la Reine et la Cour d'appel ont conclu à l'existence d'un conflit entre les lois fédérale et provinciale. S'appuyant sur la doctrine de la prépondérance fédérale, elles ont déclaré l'art. 102 de la *TSA* inopérant dans la mesure du conflit.

Arrêt : Le pourvoi est rejeté. L'article 102 de la *TSA* est inopérant du point de vue constitutionnel dans la mesure où il est utilisé pour recouvrer une dette dont le débiteur a été libéré en matière de faillite.

Les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon : Au Canada, les gouvernements fédéral et provinciaux doivent adopter des lois qui relèvent de leurs sphères de compétence respectives. Il est toutefois souvent impossible pour un ordre de gouvernement de légiférer efficacement dans un domaine relevant de sa compétence sans toucher à des matières relevant de la compétence de l'autre. Dans certaines circonstances, les compétences d'un ordre de gouvernement doivent être protégées contre les empiétements de l'autre ordre de gouvernement. Pour assurer cette protection, la Cour a élaboré diverses doctrines constitutionnelles, y compris celle de la prépondérance fédérale. Selon cette doctrine, la loi fédérale doit prévaloir lorsqu'il existe une incompatibilité véritable entre une loi fédérale et une loi provinciale, soit lorsque les effets d'une législation provinciale sont incompatibles avec une législation fédérale. Pour déterminer si un tel conflit existe, il faut d'abord et avant tout s'assurer que les lois qui se chevauchent sont valides indépendamment l'une de l'autre. Dans l'affirmative, le tribunal doit déterminer si leur application concurrente entraîne un conflit. En l'espèce, les dispositions contestées sont valides indépendamment l'une de l'autre. La seule question en litige est de savoir si leur application concurrente crée un conflit.

A conflict will arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment. The first branch of the test has been described in the jurisprudence as actual conflict in operation as where one enactment says "yes" and the other says "no". The question is whether both laws can operate side by side without conflict or both laws can apply concurrently, and citizens can comply with either of them without violating the other. The assessment under this branch is not limited to the actual words or to the literal meaning of the words of the provisions at issue. Rather, the provisions must be read properly based on the modern approach to statutory interpretation. If there is no conflict under the first branch of the test, one may still be found under the second branch. The question under the second branch is whether operation of the provincial Act is compatible with the federal legislative purpose. The effect of the provincial law may frustrate the purpose of the federal law, even though it does not entail a direct violation of the federal law's provisions.

Under the first or the second branch of the test, the burden of proof rests on the party alleging the conflict. In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws. A provincial intention to interfere with the federal jurisdiction is neither necessary nor sufficient. The focus is instead on the effect of the provincial law. Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly.

Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency. The *BIA* furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation. Equitable distribution of assets is achieved by requiring creditors wishing to enforce a claim provable in bankruptcy to participate in one collective proceeding. Financial rehabilitation is achieved through the discharge of the bankrupt from all claims provable in bankruptcy. From the perspective of the creditors, the discharge means they are unable to enforce their provable claims.

Il y a conflit dans l'une ou l'autre des deux situations suivantes, qui constituent les deux volets de l'analyse fondée sur la doctrine de la prépondérance : (1) il existe un conflit d'application parce qu'il est impossible de respecter les deux lois, ou (2) bien qu'il soit possible de respecter les deux lois, l'application de la loi provinciale entrave la réalisation de l'objet de la loi fédérale. Suivant la jurisprudence traitant du premier volet de l'analyse, il y a un véritable conflit d'application lorsqu'une loi dit « oui » et que l'autre dit « non ». Il s'agit de savoir si les deux lois peuvent coexister sans conflit, ou si les deux législations peuvent agir concurremment et les citoyens peuvent les respecter toutes les deux, sans violer l'une ou l'autre. L'examen qu'implique ce volet ne se limite pas au libellé ou au sens littéral des termes de la disposition en cause. Il convient plutôt d'interpréter les dispositions suivant la méthode moderne d'interprétation des lois. S'il n'y a aucun conflit selon le premier volet de l'analyse, il peut encore en exister un selon le second volet. Au second volet, la question est de savoir si l'application de la loi provinciale est compatible avec l'objet de la loi fédérale. L'effet de la loi provinciale peut empêcher la réalisation de l'objet de la loi fédérale, sans toutefois entraîner une violation directe de ses dispositions.

Sous le premier ou le second volet de l'analyse, le fardeau de la preuve incombe à la personne qui allègue l'existence du conflit. Conformément à la théorie du fédéralisme coopératif, la doctrine de la prépondérance est appliquée avec retenue. En l'absence d'une incompatibilité véritable, les tribunaux favorisent une interprétation de la loi fédérale permettant une application concurrente des deux lois. Il n'est ni nécessaire ni suffisant que la province ait eu l'intention d'empiéter sur la compétence fédérale. L'accent est plutôt mis sur l'effet de la loi provinciale. La détermination de l'effet de la loi provinciale nécessite un examen du fond de la loi et non de sa forme. La province ne peut faire indirectement ce qu'il lui est interdit de faire directement.

Le Parlement a adopté la *LFI* en vertu de sa compétence en matière de faillite et d'insolvabilité. La *LFI* vise deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli. Le partage équitable des biens du failli est réalisé en obligeant les créanciers qui souhaitent faire valoir une réclamation prouvable en matière de faillite à participer à une seule procédure collective. La réhabilitation financière est réalisée en libérant le failli de toutes les réclamations prouvables en matière de faillite. Du point de vue des créanciers, l'ordonnance de libération a pour effet de les empêcher de contraindre le failli à payer leurs réclamations prouvables.

Provincial legislatures have the power to legislate with regard to property and civil rights. This power includes traffic regulation and the authority to set conditions for driver's licences and vehicle permits. The *TSA* is a comprehensive legislative scheme for traffic regulation. A victim injured in an accident may sue for damages. If successful but the uninsured driver does not pay, the victim may apply to the Administrator under the *Motor Vehicle Accident Claims Act* ("*MVACA*") for compensation in the amount of the unsatisfied judgment and the judgment is then assigned to the Administrator. Section 102 of the *TSA*, which complements the *MVACA* program, allows the Registrar of Motor Vehicle Services to suspend the debtor's driver's licence and vehicle permits until the judgment debt is paid or periodic payments in satisfaction of the judgment are being made. It is, in substance, a debt collection mechanism. Since the judgment debt in this case is a claim provable in bankruptcy, the purpose and effect of s. 102 are to suspend a debtor's driving privileges until payment of a provable claim.

The laws at issue give inconsistent answers to the question whether there is an enforceable obligation. One law provides for the release of all claims provable in bankruptcy and prohibits creditors from enforcing them, while the other disregards this release and allows for the use of a debt enforcement mechanism on such a claim by precisely excluding a discharge in bankruptcy. This is a true incompatibility. In a case like this one, the test for operational conflict cannot be limited to asking whether the debtor can comply with both laws by renouncing the protection afforded under the federal law or the privilege he or she is otherwise entitled to under the provincial law. In that regard, the debtor's response to the suspension of his or her driving privileges is not determinative. In analyzing the operational conflict at issue in this case, we cannot disregard the fact that whether the debtor pays or not, the province, as a creditor, is still compelling payment of a provable claim that has been released, which is in direct contradiction with s. 178(2) of the *BIA*. Neither can the question under the operational conflict branch of the paramountcy test be whether it is possible to refrain from applying the provincial law in order to avoid the alleged conflict with the federal law. Such an approach would render the first branch of the paramountcy test meaningless, since it is virtually always possible to avoid the application of a provincial law so as not to cause a

Les assemblées législatives provinciales ont le pouvoir de légiférer en matière de propriété et de droits civils. Ce pouvoir comprend notamment celui de réglementer la circulation et de fixer les conditions applicables aux permis de conduire et aux certificats d'immatriculation. La *TSA* est un régime législatif complet en matière de réglementation de la circulation. Une personne blessée lors d'un accident peut poursuivre en dommages-intérêts. Si elle a gain de cause mais le conducteur non assuré ne paie pas, la victime peut demander à l'administrateur en vertu de la *Motor Vehicle Accident Claims Act* (« *MVACA* ») une indemnité correspondant au montant du jugement impayé et l'administrateur est alors subrogé dans les droits de la victime. L'article 102 de la *TSA*, lequel complète le programme régi par la *MVACA*, permet au registraire des véhicules automobiles de suspendre le permis de conduire et les certificats d'immatriculation du débiteur jusqu'à ce que la dette constatée par jugement soit payée ou que les versements périodiques en satisfaction du jugement soient effectués. Il s'agit, en substance, d'un mécanisme de recouvrement de créances. Comme la créance judiciaire en l'espèce constitue une réclamation prouvable en matière de faillite, l'art. 102 a pour objet et pour effet de suspendre les droits de conducteur du débiteur jusqu'au paiement d'une réclamation prouvable.

Les lois en cause offrent des réponses contradictoires à la question de savoir s'il existe une obligation exécutoire. Une loi prévoit que le failli est libéré de toute réclamation prouvable en matière de faillite et interdit aux créanciers d'en exiger le paiement, alors que l'autre loi fait fi de cette libération et permet le recours à un mécanisme de recouvrement de cette créance en excluant expressément la libération de faillite. Il s'agit là d'une véritable incompatibilité. Dans une affaire comme celle en l'espèce, l'analyse relative au conflit d'application ne saurait se limiter à la question de savoir si le débiteur peut se conformer aux deux lois en renonçant soit à la protection que lui offre la loi fédérale, soit au droit dont il bénéficie en vertu de la loi provinciale. À cet égard, la réaction du débiteur à la suspension de ses droits de conducteur n'est pas déterminante. Dans le cadre de l'analyse du conflit d'application en l'espèce, on ne peut faire abstraction du fait que, que le débiteur paie ou non, il reste que la province, en tant que créancier, le contraint quand même à payer une réclamation prouvable dont il a été libéré, ce qui va directement à l'encontre du par. 178(2) de la *LFI*. Sous le volet conflit d'application de l'analyse fondée sur la doctrine de la prépondérance, la question n'est pas non plus de savoir s'il est possible de s'abstenir d'appliquer la loi provinciale pour éviter le prétendu conflit avec la loi fédérale. Une telle approche viderait de tout son sens le premier volet de conflict with a federal law. Furthermore, if it is possible to avoid operational conflict simply by declining to apply the provincial law, the same could be done to avoid any frustration of the federal purpose under the second branch of the paramountcy test. In this case, it is impossible for the province to apply s. 102 without contravening s. 178(2). In effect, s. 102 creates a new class of exempt debts that is not listed in s. 178(1) of the *BIA*. Hence, the provincial law allows the very same thing that the federal law prohibits. The result is an operational conflict.

Section 102 also frustrates the financial rehabilitation of the bankrupt. The crushing burden of the province's claim against M was the main reason for his bankruptcy. If s. 102 is allowed to operate despite M's discharge, he is not offered the opportunity to rehabilitate that Parliament intended to give him. Had Parliament intended judgment debts arising from motor vehicle accidents, or the resulting regulatory charges, to survive bankruptcy, it would have stated so expressly in s. 178(1) of the *BIA*. It did not. It is beyond the province's constitutional authority to interfere with Parliament's discretion in that regard. Nor can M's driving privileges serve as fresh consideration for a new binding contract for the repayment of the discharged debt. M need not enter into such a contract in order to recover his driving privileges, because the province has no authority to withhold them.

The *TSA* does not however disrupt the equitable distribution purpose of the *BIA*. This Court has repeatedly cautioned against giving too broad a scope to paramountcy on the basis of frustration of federal purpose. It is always essential to ascertain the exact purpose of the specific provision of the federal law that is at issue. Although it is clear that the purpose of s. 178(2) is to ensure the debtor's financial rehabilitation and that s. 102 frustrates that purpose, it cannot be concluded that the operation of the provincial scheme in the context of this case interferes with the equitable distribution of assets.

Per McLachlin C.J. and Côté J.: Section 102 of the *TSA* frustrates the purpose of financial rehabilitation of the bankrupt that underlies s. 178(2) of the *BIA*. It is accordingly inoperative to the extent of the conflict by

l'analyse fondée sur la doctrine de la prépondérance, car il est presque toujours possible d'éviter l'application d'une loi provinciale pour ne pas causer de conflit avec une loi fédérale. En outre, s'il est possible d'éviter un conflit d'application simplement en refusant d'appliquer la loi provinciale, on pourrait faire la même chose pour éviter toute entrave à la réalisation de l'objet fédéral sous le second volet de l'analyse fondée sur la doctrine de la prépondérance. En l'espèce, il n'est pas possible que la province applique l'art. 102 sans contrevenir au par. 178(2). En fait, l'art. 102 crée, pour ce qui est des dettes dont le failli n'est pas libéré, une nouvelle catégorie de dettes qui ne figure pas au par. 178(1) de la *LFI*. En conséquence, la loi provinciale autorise la chose même qu'interdit la loi fédérale. Il en résulte un conflit d'application.

L'article 102 entrave aussi la réhabilitation financière du failli. L'écrasant fardeau de la réclamation de la province contre M constituait la principale raison de sa faillite. Si l'on permet que l'art. 102 s'applique en dépit de la libération de M, celui-ci se voit privé de la possibilité de se réhabiliter que le Parlement a voulu lui donner. Si le Parlement avait voulu que les dettes constatées par jugement découlant d'accidents automobiles, ou les charges réglementaires en résultant, survivent à la faillite, il l'aurait indiqué expressément au par. 178(1) de la *LFI*, ce qu'il n'a pas fait. S'immiscer dans l'exercice du pouvoir discrétionnaire du Parlement à cet égard outrepasse la compétence constitutionnelle de la province. Les droits de conducteur de M ne peuvent non plus servir de nouvelle contrepartie pour conclure un nouveau contrat exécutoire en vue du remboursement de la dette dont il a été libéré. M n'a pas à conclure un tel contrat pour recouvrer ses droits de conducteur, car la province n'a pas le pouvoir de l'en priver.

La *TSA* n'entrave cependant pas la réalisation de l'objet de la *LFI* que constitue le partage équitable des biens. La Cour a à maintes reprises mis en garde contre le fait de conférer à la doctrine de la prépondérance une portée trop large dès qu'il y a entrave à l'objectif fédéral. Il est toujours essentiel d'établir avec précision l'objet de la disposition de la loi fédérale en cause. S'il est clair que le par. 178(2) vise la réhabilitation financière du débiteur et que l'art. 102 entrave la réalisation de cet objet, on ne peut conclure que l'application du régime provincial dans le contexte de la présente affaire fait obstacle au partage équitable des biens.

La juge en chef McLachlin et la juge Côté : L'article 102 de la *TSA* entrave la réhabilitation financière du failli, qui est l'objectif du par. 178(2) de la *LFI*. Il est donc inopérant dans la mesure du conflit en raison de la reason of the doctrine of federal paramountcy. As the frustration of one federal purpose is sufficient to trigger the application of the doctrine of federal paramountcy, it is not necessary to address the purpose of equitable distribution.

There is no operational conflict to speak of in this case. The majority's analysis contrasts with the clear standard that has been adopted for the purpose of determining whether an operational conflict exists in the context of the federal paramountcy test: impossibility of dual compliance as a result of an express conflict. Impossibility of dual compliance is the undisputed standard for determining whether an operational conflict exists and it is one that very few cases will meet. In the jurisprudence, impossibility of dual compliance has become synonymous with operational conflict. The requirement of an express contradiction is inseparable from impossibility of dual compliance. For the two laws to conflict, each one has to say exactly the opposite of what the other says. A less direct conflict is not enough. In the absence of an express conflict, the two laws are deemed to be capable of operating side by side. In light of the modern jurisprudence, this restrained approach to operational conflict is inescapable. Such a high standard is consistent with co-operative federalism. If, in practice, the wording of the statutes makes it possible to comply with both of them, then co-operative federalism requires a court to find that the federal and provincial statutes are compatible, at least at the first stage of the analysis.

The two branches of the modern federal paramountcy test relate to two different forms of conflict. A finding of an operational conflict in the first branch will not necessarily entail a finding of frustration of a federal purpose in the second branch. The first branch is concerned with an incompatibility that is evident on the face of the provisions themselves. Even a superficial possibility of dual compliance will suffice for a court to conclude that there is no operational conflict. If the federal law is prohibitive, as in the case at bar, the question becomes what exactly it prohibits. If the provincial law allows the very same thing the federal law prohibits, there is an operational conflict. In many cases, the two branches of the test have been confused. Although this Court's past decisions are not always helpful when it comes to drawing a distinction between the two branches, they do support three propositions: (1) that the applicable standard for the first branch is impossibility of dual compliance caused by an express conflict, (2) that this is a high standard that should be applied with restraint, and only in

doctrine de la prépondérance fédérale. Comme l'entrave à la réalisation d'un objectif fédéral suffit pour que s'applique la doctrine de la prépondérance fédérale, il n'est pas nécessaire de se prononcer sur l'objectif du partage équitable des biens.

Il n'y a aucun conflit opérationnel en l'espèce. L'analyse des juges majoritaires tranche avec la norme claire que la Cour a retenue en vue de déterminer, dans le cadre de l'analyse fondée sur la doctrine de la prépondérance fédérale, s'il existe un conflit opérationnel : l'impossibilité de se conformer aux deux lois en raison d'un conflit exprès. L'impossibilité de se conformer aux deux lois constitue la norme incontestée pour déterminer s'il existe un conflit opérationnel, et très peu de cas pourront satisfaire à cette norme. Dans la jurisprudence, l'impossibilité de se conformer aux deux lois est devenue synonyme de conflit opérationnel. L'exigence d'un conflit exprès est indissociable de l'impossibilité de se conformer aux deux lois. Pour que les deux lois entrent en conflit, chacune doit dire exactement le contraire de ce que dit l'autre. Un conflit moins direct ne suffit pas. En l'absence d'un conflit exprès, les deux lois sont réputées pouvoir coexister. La jurisprudence moderne rend inéluctable cette façon modérée d'aborder le conflit opérationnel. Une norme aussi élevée est conforme au fédéralisme coopératif. S'il est possible en pratique de respecter les deux lois en raison de leur libellé, alors le fédéralisme coopératif oblige le tribunal à conclure que les lois fédérale et provinciale sont compatibles, du moins à la première étape de l'analyse.

Les deux volets de l'analyse moderne de la doctrine de la prépondérance fédérale ont trait à deux formes de conflit différentes. La constatation d'un conflit opérationnel au premier volet de l'analyse n'entraînera pas nécessairement au second volet une conclusion que la réalisation d'un objet fédéral a été entravée. Le premier volet concerne une incompatibilité ressortissant à première vue des dispositions elles-mêmes. Même une possibilité superficielle de se conformer aux deux lois suffit pour qu'un tribunal conclue à l'absence de conflit opérationnel. Si la loi fédérale est prohibitive, comme en l'espèce, il faut alors se demander ce qu'elle interdit exactement. Si la loi provinciale autorise la chose même qu'interdit la loi fédérale, il existe un conflit opérationnel. Dans de nombreux arrêts, la Cour a confondu les deux volets de l'analyse. Bien que la jurisprudence antérieure de notre Cour n'aide pas toujours à distinguer le premier volet du second, trois propositions s'en dégagent : (1) la norme applicable au premier volet est celle de l'impossibilité de se conformer aux deux lois en raison d'un conflit very few cases, and (3) that the two branches are distinct and address different forms of conflict.

exprès, (2) la norme est élevée et ne devrait être appliquée qu'avec retenue, et dans très peu de cas seulement, et (3) les deux volets sont distincts et s'appliquent à des formes différentes de conflit.

Consequently, at the first stage, the determining question is whether the province's legislation provides a path on which dual compliance is possible. A high standard at the first stage merely means that in most cases, the purpose and effects of the legislation at issue will need to be analyzed at the second stage. Requiring courts to deal with the issue in the second branch has many advantages. For the frustration of purpose analysis, the federal legislative intent must be established by the party relying on it. The court can proceed with a careful analysis of Parliament's intent and, if possible, interpret the federal law so as not to interfere with the provincial law. The impossibility standard, if applied strictly, will not render the first branch of the federal paramountcy test meaningless. If the provincial law allows or requires something that the federal law explicitly prohibits, or if the conflict is direct rather than indirect, there will be an operational conflict.

Par conséquent, sous le premier volet, la question déterminante est de savoir si la loi provinciale laisse la possibilité de se conformer aux deux lois. L'application d'une norme élevée sous le premier volet signifie simplement que dans la plupart des cas, l'objet et les effets de la loi en cause devront être analysés sous le deuxième volet. Obliger les tribunaux à étudier la question au second volet comporte de nombreux avantages. Dans le contexte de l'analyse portant sur l'entrave à la réalisation de l'objet, la partie qui invoque l'intention du législateur fédéral doit établir cette intention. La cour peut analyser attentivement l'intention du Parlement et, si possible, interpréter la loi fédérale de manière à ce qu'elle n'entre pas en conflit avec la loi provinciale. L'application stricte de la norme de l'impossibilité ne rendra pas dénué de sens le premier volet de l'analyse de la doctrine de la prépondérance fédérale. Si la loi provinciale autorise ou exige l'accomplissement d'un acte que la loi fédérale interdit expressément, ou s'il s'agit d'un conflit direct plutôt qu'indirect, il existera un conflit opérationnel.

In the case at bar, it is clear from the provisions themselves that dual compliance is not impossible. The provisions at issue do not expressly conflict; they are different in terms of their contents and of the remedies that they provide. One of them does not permit what the other specifically prohibits. Under s. 178 of the *BIA*, a bankrupt is discharged from claims provable in bankruptcy. That section says nothing more. Section 102 of the *TSA* does not revive an extinguished claim *per se*; if a debtor chooses not to drive, the province simply cannot enforce its claim. He can also opt to voluntarily pay the discharged debt. The bankrupt is still discharged in the literal sense of the words of s. 178(2) of the *BIA*. The two statutes answer different questions. In the end, the literal requirement of the federal statute is, strictly speaking, met. It therefore follows that the two acts can operate side by side without operational conflict, although there is a frustration of purpose.

En l'espèce, il appert clairement des dispositions elles-mêmes que le respect des deux textes de loi n'est pas impossible. Les dispositions en cause ne sont pas expressément en conflit; elles diffèrent de par leur contenu et les recours qu'elles offrent. L'une ne permet pas ce que l'autre interdit expressément. Aux termes de l'art. 178 de la *LFI*, un failli est libéré de toutes réclamations prouvables en matière de faillite. Cet article ne prévoit rien de plus. L'article 102 de la *TSA* ne fait pas revivre une réclamation éteinte en soi; si un débiteur choisit de ne pas conduire, la province ne peut tout simplement pas recouvrer sa créance. Il peut aussi choisir de payer volontairement la dette dont il a été libéré. Le failli demeure libéré au sens littéral du par. 178(2) de la *LFI*. Les deux lois visent des objets différents. En bout de ligne, l'obligation littérale de la loi fédérale est, à proprement parler, respectée. Il s'ensuit donc que les deux lois peuvent coexister sans conflit opérationnel, même en présence d'une entrave à l'objectif fédéral.

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recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

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

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

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

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

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

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

recouvrement global pour tous les créanciers : *Husky Oil*, par. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 3.

[34] Pour assurer la viabilité de ce modèle, les créanciers ne doivent pas être autorisés à faire valoir leurs réclamations prouvables individuellement, c'est-à-dire hors du cadre de la procédure collective. L'article 69.3 de la *LFI* prévoit donc la suspension automatique des procédures engagées contre le failli, laquelle prend effet le premier jour de la faillite :

> **69.3** (1) Sous réserve des paragraphes (1.1) et (2) et des articles 69.4 et 69.5, à compter de la faillite du débiteur, ses créanciers n'ont aucun recours contre lui ou contre ses biens et ils ne peuvent intenter ou continuer aucune action, mesure d'exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite.

(Voir *R. c. Fitzgibbon*, [1990] 1 R.C.S. 1005, p. 1015-1016.)

[35] Il existe toutefois des exceptions au principe du partage équitable. Suivant l'art. 136 de la *LFI*, certains créanciers, les « créanciers privilégiés », sont payés en priorité. Il y a aussi des créanciers qui ne sont payés qu'après désintéressement de tous les créanciers ordinaires : par. 137(1), art. 139 et 140.1 de la *LFI*. De plus, la suspension automatique des procédures n'empêche pas les créanciers garantis de réaliser leur garantie : par. 69.3(2) de la *LFI*; *Husky Oil*, par. 9. Un tribunal peut également autoriser un créancier à introduire une procédure distincte et à contraindre le failli à payer une réclamation : art. 69.4 de la *LFI*. Ces exceptions reflètent les choix de politique générale effectués par le législateur pour permettre la réalisation de cet objectif de la faillite.

[36] Le fait que le débiteur soit libéré de ses dettes à la fin de la faillite permet de réaliser le deuxième objectif de la *LFI*, la réhabilitation financière du débiteur : *Husky Oil*, par. 7. Le paragraphe 178(2) de la *LFI* est rédigé en ces termes :

> (2) Une ordonnance de libération libère le failli de toutes autres réclamations prouvables en matière de faillite.

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

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

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

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

Du point de vue des créanciers, l'ordonnance de libération a pour effet de les empêcher de contraindre le failli à payer leurs réclamations prouvables : *Schreyer c. Schreyer*, 2011 CSC 35, [2011] 2 R.C.S. 605, par. 21. Cela permet en effet à la personne insolvable de [TRADUCTION] « repartir à neuf » car elle est « libérée du fardeau de ses dettes antérieures » : Wood, p. 273; voir aussi *Industrial Acceptance Corp. c. Lalonde*, [1952] 2 R.C.S. 109, p. 120. Ce nouveau départ ne vise pas seulement à assurer le bien-être du débiteur failli et celui de sa famille; la réhabilitation aide le failli libéré à réintégrer sa place dans la vie économique et à devenir un membre productif de la société : Wood, p. 274-275; L. W. Houlden, G. B. Morawetz et J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. rév. (feuilles mobiles)), p. 6-283. Dans de nombreux cas de faillite de consommateur, le débiteur a très peu de biens, voire aucun, à distribuer à ses créanciers. La réhabilitation devient alors l'objectif primordial de la faillite : Wood, p. 37.

[37] Bien qu'elle constitue un objectif important de la *LFI*, la réhabilitation financière a également ses limites. Le paragraphe 178(1) de la *LFI* énumère les dettes dont le failli n'est pas libéré par l'ordonnance de libération et qui subsistent après la faillite. De plus, l'art. 172 prévoit qu'une ordonnance de libération peut être refusée, suspendue ou accordée sous réserve de certaines conditions. Ces dispositions montrent que le législateur a essayé de concilier l'objectif de réhabilitation financière avec d'autres objectifs de politique générale, comme la confiance dans le système de crédit, qui exigent que certaines dettes subsistent après la faillite : Wood, p. 273 et 289.

[38] La libération constitue le principal outil de réhabilitation qu'établit la *LFI*, mais ce n'est pas le seul. Comme le fait remarquer le professeur Wood à la p. 273 :

> [TRADUCTION] La libération est l'un des principaux mécanismes mis en place par le droit de la faillite pour favoriser la réhabilitation financière du débiteur. Cependant, ce n'est pas le seul moyen utilisé pour atteindre cet objectif. L'exclusion de certains biens du patrimoine attribué aux créanciers, les dispositions relatives au revenu

mandatory credit counselling also are directed towards this goal.

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

> The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence.

(*Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417, at p. 430)

[40] In many aspects, the *BIA* is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are distributed to creditors, and how. It then sets out which claims are released on discharge and which claims survive bankruptcy. That said, the fact remains that the operation of the *BIA* depends upon the survival of various provincial rights: *Husky Oil*, at para. 85; *Hall*, at p. 155. In this regard, s. 72(1) of the *BIA* provides:

> **72.** (1) The provisions of this Act shall <u>not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act</u>, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

On the one hand, given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued existence of provincial substantive rights, and thus the continued operation of provincial laws: Wood, at pp. 7-8; *Husky Oil*, at para. 30. The ownership of certain assets and the existence

excédentaire et les services de consultation obligatoire en matière de crédit visent également cet objectif.

[39] La suspension automatique des procédures prévue à l'art. 69.3 de la *LFI* constitue un autre moyen de réhabilitation. Non seulement elle fait en sorte que les créanciers soient réorientés vers la procédure collective décrite précédemment, mais elle les empêche aussi de saisir certains biens exclus du patrimoine attribué aux créanciers. Il s'agit là d'un aspect important de la réhabilitation financière du failli :

> La réhabilitation du failli ne résulte pas seulement de sa libération. Elle commence dès la mise en faillite par des mesures destinées à ménager au failli un minimum vital.

(*Vachon c. Commission de l'emploi et de l'immigration du Canada*, [1985] 2 R.C.S. 417, p. 430)

[40] La *LFI* constitue à maints égards un code complet en matière de faillite. Elle précise les réclamations qui sont considérées comme des réclamations prouvables et les biens qui sont distribués aux créanciers, et la façon dont ils le sont. Elle énonce ensuite les réclamations dont le failli est libéré par une ordonnance de libération et les réclamations qui subsistent après la faillite. Ceci dit, il reste que l'application de la *LFI* dépend de la subsistance de divers droits provinciaux : *Husky Oil*, par. 85; *Hall*, p. 155. À cet égard, le par. 72(1) de la *LFI* prévoit ce qui suit :

> **72.** (1) La présente loi n'a <u>pas pour effet d'abroger ou de remplacer les dispositions de droit substantif d'une autre loi ou règle de droit concernant la propriété et les droits civils, non incompatibles avec la présente loi</u>, et le syndic est autorisé à se prévaloir de tous les droits et recours prévus par cette autre loi ou règle de droit, qui sont supplémentaires et additionnels aux droits et recours prévus par la présente loi.

D'une part, vu la nature procédurale de la *LFI*, le régime applicable en matière de faillite repose largement sur le maintien de l'existence de droits substantiels provinciaux, et partant, sur le maintien en vigueur de lois provinciales : Wood, p. 7-8; *Husky Oil*, par. 30. La propriété de certains biens bar, the question with respect to operational conflict is whether debts incurred while driving uninsured can be enforced even though the debtor has been discharged from bankruptcy. On this question, the two laws directly contradict each other.

les deux lois en cause ne se contredisaient pas; elles se limitaient à imposer des conditions plus strictes à l'exercice d'activités permises par l'autre ordre de gouvernement. En l'espèce, la question qui soulève un conflit d'application est de savoir si les dettes d'un conducteur non assuré résultant d'un accident d'automobile doivent être remboursées même si le débiteur en a été libéré par une libération de faillite. Sur ce point, les deux lois sont directement contradictoires.

[75] I therefore conclude that s. 102 of the *TSA* allows the province, or a third party creditor, to enforce a provable claim that has been released. To that extent, it conflicts with s. 178(2) of the *BIA*. It is impossible for the province to apply s. 102 without contravening s. 178(2) and, as a result, for the respondent to simultaneously be liable to pay the judgment debt under the provincial scheme and be released from that same claim pursuant to s. 178(2): *Lafarge*, at para. 82; *M & D Farm*, at para. 41. Section 178 is a complete code in that it sets out which debts are released on discharge and which debts survive bankruptcy. In effect, s. 102 creates a new class of exempt debts that is not listed in s. 178(1). Hence, in the words used by my colleague in her reasons (paras. 95, 110 and 128), "the provincial law allows the very same thing" — the enforcement of a debt released under s. 178(2) of the *BIA* — that "the federal law prohibits". The result is an operational conflict between the provincial and federal provisions.

[75] Je conclus donc que l'art. 102 de la *TSA* permet à la province, ou à un tiers créancier, de contraindre un failli à payer une réclamation prouvable dont il a été libéré. Dans cette mesure, cet article entre en conflit avec le par. 178(2) de la *LFI*. Il n'est pas possible que la province applique l'art. 102 sans contrevenir au par. 178(2), et en conséquence, que l'intimé soit tenu, sous le régime provincial, de payer une dette constatée par jugement et qu'il soit en même temps libéré de cette même dette en vertu du par. 178(2) : *Lafarge*, par. 82; *M & D Farm*, par. 41. L'article 178 constitue un code complet en ce qu'il précise les dettes dont le failli est libéré par une ordonnance de libération et celles qui survivent à la faillite. En fait, l'art. 102 crée, pour ce qui est des dettes dont le failli n'est pas libéré, une nouvelle catégorie de dettes qui ne figure pas au par. 178(1). En conséquence, pour reprendre les mots qu'utilise ma collègue dans ses motifs (par. 95, 110 et 128), « la loi provinciale autorise la chose même » — l'obligation de payer une dette dont le débiteur a été libéré aux termes du par. 178(2) de la *LFI* — « qu'interdit la loi fédérale ». Il en résulte un conflit d'application entre les dispositions provinciales et fédérales.

[76] Although this conclusion makes it unnecessary to discuss the second branch of the test, I will nonetheless address it in order to respond to the province's arguments.

[76] Bien que cette conclusion rende inutile l'examen du second volet de l'analyse, je vais quand même l'examiner afin de répondre aux arguments de la province.

(b) *Frustration of Federal Purpose*

b) *Entrave à la réalisation de l'objet fédéral*

(i) Financial Rehabilitation

(i) Réhabilitation financière

[77] Like the lower courts, I find that the province's use of its administrative powers relating to

[77] À l'instar des tribunaux d'instance inférieure, j'estime que le recours par la province à ses pouvoirs

driving privileges to burden the respondent until he repays a discharged debt frustrates the financial rehabilitation of the bankrupt. The effect of s. 102 directly contradicts and defeats the purpose of the discharge provided for in s. 178(2):

> The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge of all his or her debts in order that he or she may be able to <u>integrate into the business life of the country as a useful citizen free from the crushing burden of debts</u> . . . . [Emphasis added.]

(Houlden, Morawetz and Sarra, at p. 1-2.1)

As explained already, the language of s. 178(2) makes it clear that the purpose of this provision is to give effect to one of the goals underlying the *BIA* regime — the financial rehabilitation of the debtor — by releasing "the bankrupt from all claims provable in bankruptcy". In other words, s. 178(2) is aimed precisely at providing the bankrupt with a fresh start. The facts of this case establish that the province's use of s. 102 despite the respondent's discharge undermines this purpose.

[78] The respondent was a truck driver. In 1996, after the accident, the province was assigned the judgment rendered against him in the amount of $194,875. In 2008, after attempting to pay the debt in instalments for about 12 years, he made an assignment in bankruptcy. At that time, the outstanding amount of the debt had increased to $195,823; it was, by far, the largest of the respondent's financial liabilities. In 12 years, the respondent had not been able to keep up with his interest payments. The crushing burden of the province's claim against him was the main reason for his bankruptcy. In 2012, at the time his application for discharge was heard, the respondent had only managed to pay the judgment debt down to $192,103.79. By the effect of s. 102, he was exiting bankruptcy while carrying the same financial burden that had caused his bankruptcy four years earlier. If s. 102 is allowed to operate despite the respondent's discharge, the

administratifs en matière de droits de conducteur pour accabler l'intimé jusqu'à ce qu'il rembourse une dette dont il a été libéré entrave la réhabilitation financière du failli. L'effet de l'art. 102 va directement à l'encontre de l'objet de la libération prévue au par. 178(2) :

> [TRADUCTION] La *LFI* permet au débiteur honnête, mais malchanceux, d'obtenir une libération de dettes sous réserve de conditions raisonnables. La *Loi* vise à permettre au failli d'obtenir, après une période donnée, une libération totale de toutes ses dettes de sorte qu'il puisse <u>s'intégrer à la vie économique du pays en tant que citoyen utile soulagé de l'écrasant fardeau des dettes</u> . . . [Je souligne.]

(Houlden, Morawetz et Sarra, p. 1-2.1)

J'ai déjà expliqué que le libellé du par. 178(2) indique clairement que cette disposition a pour objet de donner effet à l'un des objectifs sous-jacents du régime de la *LFI* — la réhabilitation financière du débiteur — en libérant « le failli de toutes autres réclamations prouvables en matière de faillite ». En d'autres mots, le par. 178(2) vise précisément à permettre au failli de repartir à neuf. Les faits de la présente affaire établissent que le recours, par la province, à l'art. 102 en dépit de la libération de l'intimé mine cet objet.

[78] L'intimé était camionneur. En 1996, après l'accident, la province s'est vu céder le jugement rendu contre lui pour la somme de 194 875 $. En 2008, après avoir tenté de payer la dette par versements échelonnés pendant environ 12 ans, il a fait cession de ses biens. À l'époque, le montant de la dette avait augmenté à 195 823 $; il s'agissait, de loin, de la plus importante obligation financière de l'intimé. En 12 ans, l'intimé n'était pas parvenu à payer l'intérêt. L'écrasant fardeau de la réclamation de la province contre lui constituait la principale raison de sa faillite. En 2012, au moment de l'audition de sa demande de libération, l'intimé n'avait réussi à réduire le montant de la dette constatée par jugement qu'à la somme de 192 103,79 $. Par l'effet de l'art. 102, il sortait de la faillite en portant le même fardeau financier que celui qui avait causé sa faillite quatre ans auparavant. Si l'on permet que l'art. 102 s'applique en dépit de la libération de

respondent is not offered the opportunity to rehabilitate that Parliament intended to give him. This is particularly compelling in the respondent's case. As a truck driver, his ability to gain a livelihood is tied to his ability to drive. But more generally, inability to drive can constitute a significant impediment to any person's capacity to earn income: see *Lucar, Re* (2001), 32 C.B.R. (4th) 270 (Ont. S.C.J.), at paras. 22-23.

[79] In furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate: *AbitibiBowater*, at para. 35; *Schreyer*, at para. 19. In 1970, the Study Committee on Bankruptcy and Insolvency Legislation emphasized this concern:

> . . . much of the rehabilitative effect of his discharge and release from debts is lost, when a bankrupt is left with substantial debts after his discharge. Indeed, in some cases, it may almost be regarded as a mockery of the bankruptcy system to take all of the sizable property of a debtor, distribute it among the creditors and then leave the debtor to cope with some of his largest creditors from whose debts he has not been released.

(*Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970), at para. 3.2.085)

When operating in the context of bankruptcy, s. 102 undermines this balancing exercise and imperils the bankrupt's ability to rehabilitate. In effect, s. 102 creates a new class of debts that survive bankruptcy. As such, it leaves the debtor with a substantial financial liability that was not contemplated by Parliament. Had Parliament intended judgment debts arising from motor vehicle accidents, or the resulting regulatory charges, to survive bankruptcy, it would have stated so expressly in s. 178(1) of the *BIA*. It did not. Together, s. 178(1) and (2) are comprehensive. It is beyond the province's constitutional

l'intimé, celui-ci se voit privé de la possibilité de se réhabiliter que le Parlement a voulu lui donner, ce qui est particulièrement impérieux dans le cas de l'intimé. En tant que camionneur, sa capacité de gagner sa vie dépend de sa capacité de conduire, mais de façon plus générale, l'incapacité de conduire peut constituer un obstacle important à la capacité de quiconque de gagner un revenu : voir *Lucar, Re* (2001), 32 C.B.R. (4th) 270 (C.S.J. Ont.), par. 22-23.

[79] Pour favoriser la réhabilitation financière du failli, le législateur a expressément sélectionné les dettes qui survivent à la faillite et celles dont le failli est libéré : par. 178(1) et (2). À cette fin, il a tenu compte de divers objectifs de politique générale, parfois opposés. Il s'agit d'un exercice délicat, car plus le nombre des réclamations qui survivent à la faillite est élevé, plus il devient difficile pour le débiteur de se réhabiliter : *AbitibiBowater*, par. 35; *Schreyer*, par. 19. En 1970, le Comité d'étude sur la législation en matière de faillite et d'insolvabilité a souligné cette préoccupation :

> . . . la libération et la remise des dettes perdent beaucoup de leur raison d'être si le failli demeure chargé de dettes considérables après sa libération. Dans certains cas, n'est-ce pas même caricaturer notre système de faillite que de prendre tous les biens saisissables du débiteur, de les distribuer aux créanciers puis de laisser le débiteur se débrouiller avec quelques-uns de ses créanciers les plus importants, à l'égard desquels il n'a pas été libéré?

(*Faillite et Insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970), par. 3.2.085)

Lorsqu'appliqué dans le contexte d'une faillite, l'art. 102 mine cet exercice de pondération et met en péril la capacité de réhabilitation du failli. En effet, l'art. 102 crée une nouvelle catégorie de dettes qui survivent à la faillite. Le débiteur demeure ainsi chargé d'une obligation financière importante que le Parlement n'avait pas prévue. Si le Parlement avait voulu que les dettes constatées par jugement découlant d'accidents d'automobile, ou les charges réglementaires en résultant, survivent à la faillite, il l'aurait indiqué expressément au par. 178(1) de la *LFI*, ce qu'il n'a pas fait. Ensemble, les par. 178(1) authority to interfere with Parliament's discretion in that regard.

[80] Notwithstanding this, Alberta asserts that, like any creditor, the province is allowed to form a new binding contract with the discharged bankrupt for the repayment of the debt. In its view, the respondent's driving privileges can serve as fresh consideration for such a contract. I disagree. Like the Court of Appeal, I conclude that this alleged fresh consideration is neither genuine nor consistent with the purpose of s. 178(2).

[81] As a general rule, a creditor cannot cause a debtor to revive an obligation from which the debtor was released, unless the creditor offers fresh consideration: Wood, at p. 301. Between private parties, it is arguable that a debtor may freely agree to revive a discharged debt in exchange for the creditor's provision of goods or services. The province, however, is unlike any private creditor. While a private creditor is under no obligation to provide goods or services, the province cannot withhold the respondent's driving privileges arbitrarily. Suspension of privileges by administrative bodies must be based on a legal rule: see *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at pp. 141-42; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 59; *Secession Reference*, at para. 71; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10. In the case at bar, the effect and purpose of s. 102 are to compel payment of a discharged debt, which conflicts with s. 178(2). As a result, s. 102 is, to that extent, inoperative and cannot ground the province's authority to withhold the respondent's privileges. If those privileges are being suspended on the sole basis that the respondent refuses to satisfy a judgment debt that was released in bankruptcy, the province is acting without authority. The province's promise to refrain from doing what it has no authority to do cannot constitute fresh consideration capable of supporting any contract. This includes a contract for the repayment of a discharged debt. More importantly, the respondent need not enter into such a contract in

et (2) sont exhaustifs. S'immiscer dans l'exercice du pouvoir discrétionnaire du Parlement à cet égard outrepasse la compétence constitutionnelle de la province.

[80] Malgré cela, l'Alberta affirme que, comme tout autre créancier, la province a le droit de conclure avec le failli libéré un nouveau contrat exécutoire en vue du remboursement de la dette. À son avis, les droits de conducteur de l'intimé peuvent servir de nouvelle contrepartie pour la conclusion d'un tel contrat. Je ne suis pas d'accord. Comme la Cour d'appel, j'estime que cette prétendue nouvelle contrepartie n'est ni véritable ni compatible avec les objets du par. 178(2).

[81] En règle générale, le créancier ne peut faire en sorte que le débiteur fasse renaître une obligation dont il a été libéré, à moins d'offrir une nouvelle contrepartie : Wood, p. 301. Entre des parties privées, on peut soutenir que le débiteur puisse librement consentir à faire renaître une dette dont il a été libéré en échange de la fourniture de biens ou de services par le créancier. Mais la province n'a rien d'un créancier privé. Si un créancier privé n'est pas tenu de fournir des biens ou des services, la province, elle, ne peut priver arbitrairement l'intimé de ses droits de conducteur. La suspension de droits par les organismes administratifs doit être fondée sur une règle de droit : voir *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 141-142; *Colombie-Britannique c. Imperial Tobacco Canada Ltée*, 2005 CSC 49, [2005] 2 R.C.S. 473, par. 59; *Renvoi relatif à la sécession*, par. 71; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 10. En l'espèce, l'art. 102 a pour effet et pour objet de contraindre le débiteur à payer une dette dont il a été libéré, et il entre en conflit avec le par. 178(2). L'article 102 est donc inopérant dans cette mesure et ne peut servir de fondement à l'exercice, par la province, du pouvoir de priver l'intimé de ses droits. Si ces droits sont suspendus pour le seul motif que l'intimé refuse de payer une dette constatée par jugement dont il a été libéré dans le cadre d'une faillite, la province agit sans pouvoir. La promesse de la province de s'abstenir de faire ce qu'elle n'a pas le pouvoir de faire ne saurait constituer une nouvelle contrepartie pouvant

TAB 21

ALBERTA SECURITIES COMMISSION

INTERIM CEASE TRADE ORDER

Citation: Re CatalX CTS Ltd., 2023 ABASC 167 **Date: 20231221**

CatalX CTS Ltd. (operating as Catalyx) and Jae Ho Lee (the Respondents)

Background

1. Staff (**Staff**) of the Alberta Securities Commission (the **Commission**) have commenced an investigation respecting CatalX CTS Ltd. (operating as Catalyx) (**Catalyx**) and associated parties (the **Investigation**).

2. On the evening of December 21, 2023, Staff sought and were granted an urgent Commission hearing to consider an application for an interim order pursuant to sections 33 and 198 of the *Securities Act* (Alberta) (**the Act**). A hearing was held via videoconference.

3. Staff's application was made with informal notice to counsel for the Respondent Catalyx, and no notice to the Respondent, Jae Ho Lee (**Lee**). Counsel for the Respondent Catalyx participated in the hearing.

4. Given the exigent circumstances, and in accordance with section 2.3 of ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings*, Staff's request to waive or vary the Commission's ordinary procedures to apply for an interim order by Notice of Hearing was granted by the panel.

5. Staff sought an interim order pursuant to sections 33 and 198(1) of the Act that for a period of 15 days, the Respondents must cease trading in or purchasing any securities or derivatives.

6. The Commission received and has considered the *viva voce* and documentary evidence submitted by Staff and the submissions made by both Staff and the Respondent, Catalyx.

7. The Commission notes that counsel for the Respondent Catalyx, has consented to the order sought by Staff; the Respondent Jae Ho Lee was not present.

Order

8. Considering that the length of time required to conduct a hearing or trial and render a decision could be prejudicial to the public interest and that it is in the public interest to make this order, the Commission orders under sections 33(1) and 198(1) of the Act that:

   (a) the Respondents must cease trading in or purchasing any securities or derivatives; and

   (b) until a Notice of Hearing arising from the Investigation is issued, all evidence admitted at the hearing of Staff's application must remain confidential and must not be divulged except in accordance with section 45 of the Act.

9. Pursuant to section 33(2)(b) of the Act, this order takes effect immediately and expires at 10:30 p.m. (MST) on January 5, 2024 unless extended by the Commission.

December 21, 2023

For the Commission:

"original signed by"

Tom Cotter

"original signed by"

Kari Horn

TAB 22

ALBERTA SECURITIES COMMISSION

VARIATION ORDER

Citation: Re CatalX CTS Ltd., 2024 ABASC 178 **Date: 20241119**

CatalX CTS Ltd. (operating as Catalyx) and Jae Ho Lee

Background

1. On December 21, 2023, the Alberta Securities Commission (the **Commission**) issued an order (the **Interim Order**, cited as *Re CatalX CTS Ltd.*, 2023 ABASC 167) pursuant to ss. 33 and 198(1) of the *Securities Act* (Alberta) (the **Act**) that, among other things, CatalX CTS Ltd. (**Catalyx**) and Jae Ho Lee (**Lee**) cease trading in or purchasing any securities or derivatives.

2. On January 5, 2024, the Commission extended the Interim Order for a period of 12 months (*Re CatalX CTS Ltd.*, 2024 ABASC 5).

3. On November 15, 2024, Staff (**Staff**) of the Commission issued a Notice of Application (*Re CatalX CTS Ltd.*, 2024 ABASC 177) seeking to vary the Interim Order to permit Lee to convert certain cryptocurrency into Canadian currency for distribution to Deloitte Restructuring Inc. (the **Receiver**) pursuant to the Receivership Order (defined below) (the **Variation Application**).

4. The Variation Application has been made on the following grounds:

   (a) the Court of King's Bench of Alberta made an order on January 19, 2024 placing the assets of Catalyx into receivership (the **Receivership Order**);
   (b) pursuant to the terms of the Receivership Order, Lee is required to deliver Catalyx assets to the Receiver;
   (c) the Interim Order prevents Lee from converting cryptocurrency into Canadian currency for distribution to the Receiver; and
   (d) Catalyx, Lee, and the Receiver have consented to the variation sought.

5. The Commission has determined that it is not prejudicial to the public interest to grant the Variation Application, having considered the parties' consent to the terms of the order sought and that the Interim Order will otherwise continue in effect.

Order

6. Pursuant to s. 214(1) of the Act, paragraph 8(a) of the Interim Order is varied to permit Lee to convert the cryptocurrency Tether (USDT), that is the property of Catalyx, into Canadian currency, for the sole purpose of distributing the proceeds to the Receiver.

November 19, 2024

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn, K.C.

TAB 23

ALBERTA SECURITIES COMMISSION

SECTION 47 ORDER TO HOLD FUNDS

Docket: ENF-013419

***Securities Act*, RSA 2000, c S-4, as amended (*Act*)**

CatalX CTS Ltd., operating as Catalyx (Catalyx)

WHEREAS:

1. Section 47(2) of the *Act* empowers the Executive Director of the Commission (**Executive Director**) to make an order:

    1.1 directing a person or company having on deposit, under control or for safekeeping any funds, securities, derivatives or other property of Catalyx to hold the funds, securities, derivatives or other property;

    1.2 directing Catalyx to refrain from withdrawing funds, securities, derivatives or other property from any other person or company having any of them on deposit, under control or for safekeeping; and

    1.3 directing Catalyx to maintain funds, securities, derivatives or other property, and to refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds, securities, derivatives or other property.

2. An order under subsection 47(2) of the *Act* may be made where:

    2.1 an investigation is being carried out under section 41 of the *Act* in respect of a person or company;

    2.2 the Commission has made an order under section 198 of the *Act* in respect of a person or company that trading in securities of an issuer or trading in derivatives shall cease; or

    2.3 there is evidence of a contravention by a person or company of Alberta securities laws.

3. On December 21, 2023, the Commission issued an order (**Commission Order**) pursuant to sections 33(1) and 198(1) of the *Act* that Catalyx and Jae Ho Lee (**Respondents**) must cease trading in or purchasing any securities or derivatives until 10:30 p.m. (MST) on January 5, 2024, unless extended by the Commission.

4. Based on the Commission Order and the Notice Compelling Production by a Witness, attached as Exhibit "E" and Exhibit "G", respectively, to the Affidavit of Stuart Mills

(sworn December 27, 2023), the Director, Enforcement of the Commission has issued an Investigation Order in respect of Catalyx and associated parties directing an investigation be commenced pursuant to section 41 of the Act.

5. There is *prima facie* evidence of one or more contraventions of Alberta securities laws by Catalyx, including the following:

5.1 making statements that Catalyx knew or ought to have known, in material respects and at the time and in light of the circumstances in which they were made, were misleading or untrue, or did not state a fact that was required to be stated or that was necessary to make the statement not misleading, and would reasonably be expected to have a significant effect on market price or value of a security, contrary to section 92(4.1) of the *Act*; and

5.2 breach of a written undertaking, contrary to section 93.2 of the *Act*.

6. As set out in in the Affidavit of Stuart Mills, sworn December 27, 2023, there is evidence that:

6.1 Catalyx

6.1.1 is a cryptocurrency trading platform that enables clients to buy, sell, hold, deposit and withdraw crypto assets such as Bitcoin and Ether, among others,

6.1.2 is operating its platform in a manner that involves the trading of instruments or contracts respecting crypto assets that fall within the scope of securities laws, and

6.1.3 had previously filed an enhanced pre-registration undertaking (**PRU**) with the Commission to permit it to operate while Catalyx's application for registration under securities laws was being reviewed;

6.2 the Commission is the principal regulator for Catalyx;

6.3 the Respondent Jae Ho Lee (**Lee**) is the Chief Financial Officer of Catalyx;

6.4 pursuant to the terms of the PRU, Catalyx represented that it was proficient and experienced in holding crypto assets (as defined in the PRU), and that it had established policies and procedures that manage and mitigate custodial risks, including but not limited to, an effective system of controls and supervision to safeguard crypto assets of its clients;

6.5 pursuant to Catalyx's obligations as part of the PRU, Catalyx provided a report to the Commission advising that as of September 30, 2023, it held crypto assets totalling approximately $12.9 million CAD;

6.6 pursuant to Catalyx's obligations as part of the PRU, it was required to inform the Commission of any material breach in respect of its system of controls or supervision, including the loss of any crypto assets impacting its clients;

6.7 between October and December 2023, Staff have received three complaints or inquiries from investors who have been unable to access their crypto assets held at Catalyx or otherwise contact representatives at Catalyx;

6.8 on December 21, 2023, counsel for Catalyx contacted Staff of the Market Regulation division of the Commission and advised Staff that

6.8.1 Catalyx had ceased allowing withdrawals of customer deposits and had ceased paying its employees,

6.8.2 all the balances of customer funds had been withdrawn or transferred out from the digital wallets of Catalyx (**Digital Wallets**), and

6.8.3 Lee is the only individual who can access the Digital Wallets, and is also the only individual who has access to the bank accounts of Catalyx (**Bank Accounts**);

6.9 on December 22, 2023, counsel for Catalyx provided Staff of the Enforcement Division a letter from Lee's lawyer, dated December 21, 2023, advising that

6.9.1 there was about $69,000 USD worth of crypto assets remaining with Catalyx, and

6.9.2 multiple individuals have access to the Digital Wallets and the Bank Accounts;

6.10 Staff are aware of a Catalyx bank account held at Servus Credit Union (Account #650102490290), which currently has a balance of $46,075.69 (**Servus Account**);

6.11 the Catalyx website advertises that customers can fund their accounts by, among other things, depositing funds via INTERAC e-transfers; and

6.12 the Servus Account shows multiple e-transfers from multiple individuals consistent with the advertisement on Catalyx's website.

IT IS HEREBY ORDERED THAT:

7. Pursuant to section 47(2)(a) of the *Act*, Servus Credit Union, and in particular the branch of the Servus Credit Union located at 706 17 Avenue Southwest, Calgary, AB, T2S 0B7, is hereby directed to hold any and all funds on deposit at the time of receipt of this Order in the Servus Account.

8. Pursuant to section 47(2)(b) of the *Act*, Catalyx is hereby directed to refrain from withdrawing any funds from the Servus Account.

9. Pursuant to section 47(2)(b.1) of the *Act*, Catalyx is hereby directed to maintain all funds on deposit at the time of receipt of this Order in the Servus Account and refrain from disposing of, transferring, dissipating or otherwise dealing with or diminishing the value of those funds.

10. Each and all of the directions set out in paragraphs 7, 8, and 9 of this Order remain in force until this Order is revoked in writing or until the Executive Director consents to the release of such funds.

Dated at the City of Calgary in the Province of Alberta this 28th day of December, 2023.	)))))))	ALBERTA SECURITIES COMMISSION Samir Sabharwal Executive Director

6131009

TAB 24

Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Ecojustice Canada Society,
Canadian Association of Petroleum Producers,
Greenpeace Canada,
Action Surface Rights Association,
Canadian Association of Insolvency and Restructuring Professionals and
Canadian Bankers' Association *Interveners*

Indexed as: Orphan Well Association *v.* Grant Thornton Ltd.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

Orphan Well Association et Alberta Energy Regulator *Appelants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

Procureure générale de l'Ontario,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
procureur général de l'Alberta,
Ecojustice Canada Society,
Association canadienne des producteurs pétroliers, Greenpeace Canada,
Action Surface Rights Association,
Association canadienne des professionnels de l'insolvabilité et de la réorganisation et
Association des banquiers canadiens
Intervenants

Répertorié : Orphan Well Association *c.* Grant Thornton Ltd.

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

[134] For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life . . . But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

[135] Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in *Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR

[134] Pour les motifs qui précèdent, on ne peut juger que l'arrêt *Abitibi* a modifié le droit, comme l'a résumé le juge en chef Laycraft. Je fais miennes les remarques qu'il fait au par. 33 de *Northern Badger* :

[TRADUCTION] Les dispositions légales qui exigent l'abandon de puits de pétrole et de gaz font partie du droit commun de l'Alberta et lient chaque citoyen de la province. Toutes les personnes qui acquièrent un permis d'exploitation de puits de pétrole ou de gaz doivent les respecter. Des obligations légales semblables lient les citoyens dans bien d'autres secteurs de la vie moderne [. . .] Mais l'obligation incombant au citoyen n'est pas envers l'agent de la paix ou l'autorité publique qui applique la loi. L'obligation est établie comme une obligation à caractère public qui doit être respectée par l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application du droit commun. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation.

[135] Étant donné l'analyse effectuée dans *Northern Badger*, il est clair que l'organisme de réglementation n'est pas un créancier de l'actif de Redwater. Les obligations de fin de vie que l'organisme de réglementation veut imposer à Redwater sont de nature publique. Ni l'organisme de réglementation ni le gouvernement de l'Alberta ne peuvent bénéficier financièrement de l'exécution de ces obligations. Ces obligations à caractère public sont non pas envers un créancier, mais envers les concitoyens et échappent donc à la portée des « réclamations prouvables ». Je ne veux toutefois pas laisser entendre par là qu'un organisme de réglementation n'est un créancier que s'il se comporte d'une manière identique à la province dans *Abitibi*. Il peut fort bien exister des situations où les agissements d'un organisme de réglementation se situent quelque part entre ceux dans *Abitibi* et ceux en l'espèce. Signalons que, contrairement à certains cas antérieurs, l'organisme de réglementation n'a exécuté aucuns travaux environnementaux lui-même. Je laisse aux tribunaux disposant de dossiers factuels

requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

complets le soin de résoudre pareilles situations à l'avenir. Dans la présente affaire, il est clair que l'organisme de réglementation cherche à faire respecter les devoirs à caractère public de Redwater, que ce soit en rendant les ordonnances d'abandon ou en maintenant les exigences relatives à la CGR. L'organisme de réglementation n'est pas un créancier au sens du critère d'*Abitibi*.

[136] I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed *Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained, *Abitibi* clearly contemplates a place for regulators who are not creditors.

[136] Je rejette la thèse voulant que l'analyse qui précède écarte d'une façon ou d'une autre le premier volet du critère d'*Abitibi*. Les faits de l'affaire *Abitibi* n'étaient pas comparables à ceux de l'espèce. Bien que notre Cour ait examiné l'arrêt *Northern Badger* dans *Abitibi*, elle s'est contentée de mentionner les modifications subséquentes à la *LFI* et n'a pas infirmé l'arrêt antérieur. La Cour a été claire : l'issue finale « doit être fondée sur les faits de chaque affaire » (par. 48). Selon les motifs dissidents, vu l'analyse exposée précédemment, il sera presque impossible de juger que des organismes de réglementation sont des créanciers. L'arrêt *Abitibi* démontre lui-même que ce n'est pas le cas. De plus, comme je l'ai dit, il peut fort bien exister des cas qui se situent entre l'affaire *Abitibi* et celle qui nous occupe. Par contre, si l'on considère qu'*Abitibi* exige uniquement que le tribunal décide si l'organisme de réglementation a exercé un pouvoir d'application, il sera en fait impossible pour un organisme de réglementation de *ne pas* être un créancier. Les motifs dissidents ne nient pas sérieusement cette opinion et donnent seulement à penser que les organismes de réglementation peuvent publier des lignes directrices ou délivrer des permis. L'organisme de réglementation fait les deux mais, selon l'approche adoptée dans les motifs dissidents, il est dépourvu de moyens pour prendre quelque mesure concrète que ce soit dans l'intérêt public à propos de ses lignes directrices ou de permis sans avoir le statut de créancier. Comme je l'ai expliqué, l'arrêt *Abitibi* accorde clairement une place aux organismes de réglementation qui ne sont pas des créanciers.

[137] Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and

[137] Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi. Cependant, d'autres indications sur l'analyse de la certitude suffisante pourraient se révéler utiles à l'avenir. En conséquence, je passe maintenant à l'analyse de l'étape

TAB 25

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025467-150
(500-80-030560-156)

DATE: October 20, 2016

CORAM: THE HONOURABLE CLAUDE C. GAGNON, J.A.
GENEVIÈVE MARCOTTE, J.A.
MARK SCHRAGER, J.A.

CHAMBRE DE LA SÉCURITÉ FINANCIÈRE
APPELLANT – Applicant
v.

JACQUES-ANDRÉ THIBAULT
RESPONDENT – Respondent

JUDGMENT

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[1] On appeal from the judgment rendered on July 6, 2015 by the Court of Québec, District of Montreal (the Honourable Diane Quenneville), dismissing Appellant's motion to homologate a decision of the disciplinary committee of the Chambre de la sécurité financière.

[2] For the reasons of Justice Schrager, with which Justices C. Gagnon and Marcotte concur, **THE COURT**:

[3] **GRANTS** the *de bene esse* motion for leave to appeal without legal costs;

[4] **DISMISSES** the appeal, with legal costs.

CLAUDE C. GAGNON, J.A.

GENEVIÈVE MARCOTTE, J.A.

MARK SCHRAGER, J.A.

Mtre Éric Millette
Chambre de la sécurité financière
For Appellant

Mr. Jacques-André Thibault
Personally

Date of hearing: September 15, 2016

REASONS OF SCHRAGER, J.A.

[5] Appellant has appealed and sought leave *de bene esse* to appeal the judgment rendered on July 6, 2015 by the Court of Quebec, District of Montreal (the Honourable Diane Quenneville),[1] which dismissed Appellant's motion to homologate a decision of the disciplinary committee of the Chambre de la sécurité financière (the "Appellant").

[6] The issue before this Court is whether a fine imposed by a professional disciplinary committee after the date of Mr. Thibault's (the "Respondent") bankruptcy constitutes a claim provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*[2] ("*BIA*"). If the fine is a claim provable, Respondent would be discharged from the obligation to pay such debt by the effect of his bankruptcy.

FACTS

[7] It is not contested that Respondent was at the relevant times subject to Appellant's disciplinary jurisdiction. On March 14, 2011 a disciplinary complaint was lodged against Respondent before the disciplinary committee of the Appellant.

[8] The hearing was held on October 17, 18 and 20, 2011 and February 6, 2012. At the commencement of the hearing, Respondent's attorney filed a written plea of guilty to certain of the counts of the complaint, conditional on other counts being withdrawn. The committee, relying on *dicta* of this Court[3] refused to find Respondent guilty because he did not admit the facts alleged and that gave rise to the complaint. His attorney then left the room and the proceedings continued by default.

[9] On the following day, the Respondent appeared with his attorney with a view to pleading guilty. According to the decision of the disciplinary committee,[4] in answer to the committee's questions, the Respondent did not admit the essential elements of the offences charged and so the committee, once again, refused the Respondent's guilty plea. Respondent and his attorney then left and the hearing continued in their absence.

[10] After the presentation of the proof was completed, the parties were reconvened for argument on February 6, 2012 and Respondent's attorney made submissions based on the Quebec *Charter of Human Rights and Freedoms*.[5]

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1 *Chambre de la sécurité financière c. Thibault*, 2015 QCCQ 6059.
2 *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3.
3 *Duquette c. Gauthier,* 2007 QCCA 863, para. 33.
4 No transcripts have been filed in the record of this Court.
5 *Charter of Human Rights and Freedoms*, CQLR c. C-12 [*Charter*].

[11] The disciplinary committee issued its decision on October 15, 2013, dismissing the *Charter* arguments and finding Respondent guilty of various (but not all) counts as charged and convening the parties to a hearing to make submissions on the sanction to be imposed. This hearing took place on February 26, 2014 and on July 2, 2014 a decision issued imposing fines aggregating $18,000 and a condemnation for costs as well as suspensions.

[12] In the interim, on November 1st, 2012, Respondent filed a voluntary assignment in bankruptcy from which he was eventually discharged on November 24, 2014.

[13] The fines and costs have not been paid so that Appellant has sought enforcement through a homologation motion. That motion was dismissed by the judge who decided that Respondent was discharged from the debt by the effect of the bankruptcy. The judge held that the fines and costs constituted a claim provable in bankruptcy as described in Section 121 *BIA* since the hearing before the disciplinary committee took place prior to the date of the bankruptcy and the monetary sanction was imposed prior to Respondent's discharge from that bankruptcy.

[14] The judge reasoned that the obligation to pay the fine was incurred prior to Respondent's <u>discharge</u> so that it is a claim provable. In so stating the judge erred in law by misreading Section 121(1) *BIA* (quoted at length below), which requires that for a claim to be provable, the bankrupt must be subject to it prior to discharge by reason of an obligation incurred prior to <u>bankruptcy</u>. This error however does not determine the result as a correct reading of Section 121(1) *BIA* leads to the same conclusion as that reached by the judge, given the uncontested facts of this case.

[15] For the reasons which follow, I propose to grant the *de bene esse* motion for leave to appeal. As will become evident in the following discussion, the issue arising from the facts and the subtleties of the recent jurisprudence of the Supreme Court of Canada dictate that the case be heard by this Court. However, I will also propose that the appeal be dismissed.

POSITION OF THE APPELLANT

[16] Appellant contends that Respondent was not liable for the fines and costs until the decision imposing them was rendered, i.e. after the date of the bankruptcy. Appellant adds that contrary to that which is the case concerning future obligations of a contractual or extra-contractual nature, a debt arising from the contravention of professional standards comes into existence only when the fine is imposed and not when the offence occurs. Prior to such time, any monetary sanction is hypothetical since the disciplinary committee may acquit or, if it convicts, may impose a non-monetary penalty. Appellant thus concludes that given the uncertainty that a monetary penalty would be imposed, the claim was not sufficiently probable at the date of the bankruptcy to bring it within the definition of a claim provable under the *BIA*.

DISCUSSION

[17] Section 178 (2) *BIA* establishes the principle that "… an order of discharge releases the bankrupt from all claims provable in bankruptcy."

[18] It is common ground that none of the exceptions enumerated in Section 178 (1) *BIA* are applicable to this case and particularly the exception set forth in Section 178 (1) (a) *BIA* for fines and penalties. The Court has determined that this subsection does not refer to fines imposed by a professional disciplinary committee so that they are not excepted from the general rule.[6]

[19] Sub-Section 121(1) *BIA* describes "claims provable" as follows:

> **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

> **121 (1)** Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[Emphasis added]

[20] It has been stated that in order to come within the definition of "claim provable", the existence of the debt must be, at the date of the bankruptcy, probable and not hypothetical, or not too remote or speculative, as Appellant submits.[7]

[21] In *Chambre de la sécurité financière c. Harton*,[8] this Court, citing the authors Houlden and Morawetz, noted that in order to satisfy Section 121 *BIA*, a future claim (i.e. not actually payable on the date of the bankruptcy) must not be too remote or speculative[9] while underlining that the purpose of Section 121 *BIA* is to include, as far as possible, every kind of claim so that upon discharge the bankrupt is in a position to make a fresh start. Rehabilitation of the debtor is recognized as a fundamental purpose of bankruptcy legislation.[10]

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6 *Québec (Chambre des notaires) c. Dugas*, 2002 CanLII 41280 (QC CA), AZ-50152817; EYB 2002-35787; J.E. 2003-25; [2003] R.J.Q. 1.

7 Denis Brochu, *Précis de la faillite et de l'insolvabilité*, 4th ed., Publications CCH 2012, pp. 94-95.

8 *Chambre de la sécurité financière c. Harton*, 2008 QCCA 269 [*Harton*].

9 *Ibid.*, para. 51.

10 *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327, 2015 SCC 51, paras. 36-38; *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, [2015] 3 S.C.R. 397, 2015 SCC 52, para. 28.

[22] In the *Harton* judgment, this Court cited at length, with approval, the reasons of the judge of the Court of Quebec in *Association des courtiers & agents immobiliers du Québec c. Fuoco*,[11] a decision in which a monetary penalty imposed by a disciplinary committee after bankruptcy was held not to constitute a claim provable because its imposition was only hypothetical at the date of the bankruptcy and the professional could have been acquitted or, if found guilty, subjected to a non-monetary penalty. This is in essence, Appellant's argument before us. This Court decided in *Harton* that, because no disciplinary complaint had yet been lodged by the Appellant on the date of the bankruptcy, it was not sufficiently probable that the bankrupt was subject to such claim on the date of the bankruptcy. Accordingly, the Court concluded that the fine was not a claim provable in bankruptcy. I would add that in *Fuoco*, the professional was charged and pleaded guilty to disciplinary offences approximately one year after his discharge from bankruptcy and two years after the commencement of the bankruptcy. It was only the facts giving rise to the offences charged which had occurred prior to the date of the bankruptcy.[12]

[23] The situation presented by the case at bar is significantly different from the fact patterns in *Harton* and *Fuoco*. As set forth above the facts giving rise to the complaint, the commencement of the disciplinary proceeding, the hearing and the offer to plead guilty all occurred before the date of the bankruptcy. That the committee chose not to accept the guilty plea because it felt that Respondent had not sufficiently acknowledged the facts alleged, does not change the fact that the plea could have been accepted and the penalty could have been imposed prior to bankruptcy so that Respondent could have been subject to the claim as at the date of the bankruptcy, or could have become subject to the claim prior to his discharge, to borrow the wording of Section 121 *BIA*. It was not hypothetical but rather, probable in October 2011 (at the commencement of the hearing) that Respondent would be found guilty given his plea and absence of contestation. Thus, the imposition of some penalty was not hypothetical or remote at the date of the bankruptcy so that the monetary penalties are a claim provable. The judgment is not erroneous in concluding that, given the chronology of events, particularly that the fines were imposed before the discharge from bankruptcy, the debt was one "to which the bankrupt was subject before the bankrupt's discharge by reason of any obligation incurred before bankruptcy", again to borrow the wording of Section 121 *BIA*.

[24] Appellant has attempted to avoid this wording by suggesting that it applies to contractual or even extra-contractual liability but not to statutory liability in the nature of a sanction for a disciplinary matter. I disagree. The committee could have concluded

[11] *Association des courtiers & agents immobiliers du Québec c. Fuoco*, 2007 QCCQ 292 [*Fuoco*].

[12] This was also the fact pattern before the B.C. Supreme Court in *Re Thow*, [2009] B.C.S.C. 1176, where Justice Sigurdson held that the decision to impose a penalty was discretionary so that the professional was not liable until the committee exercised its discretion. Accordingly, he held that the penalty was "not a contingent liability or an obligation" under Section 121 *BIA* as at the date of the bankruptcy (see para. 45 of the judgment).

that Respondent was guilty and imposed a penalty at or shortly following the initial hearing date (i.e. prior to the bankruptcy). In any event, I do not see a fundamental difference between this situation and one reflected in the cases where potential liability from litigation pending at the day of the bankruptcy was considered a provable claim;[13] or where a conditional contractual obligation becomes absolute immediately after bankruptcy;[14] or when a penal clause is triggered after bankruptcy but before discharge pursuant to a contract entered into prior to bankruptcy.[15] All these situations reflect obligations for which the debtor was liable prior to bankruptcy but crystallized after the date of the bankruptcy.

[25] In *Lotfi c. Québec (Procureur général)*[16], referred to in *Harton*, a guarantor was bound conditionally for certain sums in virtue of an immigration sponsorship contract signed before bankruptcy but would only become liable to pay when and if the conditions stipulated in the contract were realized. This occurred after bankruptcy and was claimed from the sponsor after his discharge from bankruptcy. The Superior Court[17] found that since the indebtedness was conditional (as to its existence) and uncertain (as to the amount), it was not sufficiently probable to constitute a claim provable. While dismissing the appeal on other (procedural) grounds, our Court added that the debtor did not become liable to pay the amounts in question until they were claimed which occurred after his discharge from bankruptcy so that they did not constitute claims provable. This is not the case at bar where the penalties were imposed prior to discharge. The Court added that *Re Schacter*[18] did not apply. That was a case where an amount coming due after bankruptcy under a penal clause triggered after the bankruptcy but before discharge pursuant to a contract signed prior to bankruptcy was deemed a claim provable. Such a situation (*Re Schacter*) is analogous to the present one as I have indicated above.

[26] In all cases, an inquiry should be made as to when the obligation was incurred. In this case, I believe the date was the hearing date when Respondent indicated that he was pleading guilty. However, even if that were not the precise date when the obligation was created, I believe that the long delay of the committee in rendering a decision finding Respondent guilty and then imposing the monetary sanction is relevant in determining that the fines imposed were claims provable. In this respect, the decision of the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*[19] is relevant. Speaking through Justice Deschamps, the Court indicated that, in order to

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[13] *Re Confederation Treasury Services Limited (Bankruptcy)*, 1997 96 O.A.C. 76 (Ontario Court of Appeal).

[14] *Re Valewood Products Limited*, 1976 10 OR 2[nd] 672 (Ontario Supreme Court). There was no issue that the sums were payable prior to discharge since the bankrupt was a corporation and, in any event, the sums, as stated, became payable immediately following the bankruptcy.

[15] *Schacter c. Centre d'accueil horizons de la jeunesse*, 1997 R.J.Q. 1828 [*Re Schacter*].

[16] *Lotfi c. Québec (Procureur général)*, 2005 QCCA 980.

[17] *Lotfi c. Québec (Procureur général)*, 2002 CanLII 654 (QC CS).

[18] *Re Schacter*, *supra*, note 15.

[19] *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 S.C.R. 443 [*Abitibi*].

determine whether a claim is a claim provable, a factual inquiry is required to determine whether the conditions for the inclusion of the claim as a claim provable are met.[20] Thus, in this case, it is facile to say that the fines had not yet been imposed on the date of the bankruptcy. The appropriate factual inquiry is whether, at the date of the bankruptcy, the conditions were met in order to affirm that a sanction would probably be imposed. In *Harton* (decided years prior to *Abitibi*) it could be said that the condition was not met. In the present case, not only was the hearing held before bankruptcy but the Respondent indicated that he would plead guilty thus making himself liable to a penalty. Once the committee would not accept his guilty plea, Respondent presented legal arguments based on the *Charter*, but that too occurred eight months prior to the bankruptcy. It is true that the imposition of a fine, as opposed to a purely non-monetary penalty, was discretionary. However, it is not erroneous to consider the imposition of a fine probable or at least more than hypothetical as at the date of the bankruptcy. As such, no palpable error of fact or mixed fact and law appears from the judgment of the Court of Quebec despite the judge's inaccurate reading of Section 121(1) *BIA*.

[27] One last point merits mention with regard to the lapse of time between the hearing and attempt to plead guilty (October 2011) and the decision (October 2013) and the imposition of the fines (July 2014). In *Abitibi*, the environmental regulatory body in Newfoundland issued environmental remediation orders against AbitibiBowater after its insolvency filing under the *CCAA*. The litigation focused on whether any of the claims were monetary and, if so, whether they arose prior to the insolvency filing so as to be characterized as claims provable. The industrial installations in respect of which the orders were issued had been closed and the contamination was known to the government prior to the insolvency filing, yet the orders were only issued after the insolvency filing. Justice Deschamps said this:

> [37] The exercise by the *CCAA* court of its jurisdiction to determine whether an order is a provable claim entails a certain scrutiny of the regulatory body's actions. This scrutiny is in some ways similar to judicial review. There is a distinction, however, and it lies in the object of the assessment that the *CCAA* court must make. <u>The *CCAA* court does not review the regulatory body's exercise of discretion. Rather, it inquires into whether the facts indicate that the conditions for inclusion in the claims process are met.</u> For example, if activities at issue are ongoing, the *CCAA* court may well conclude that the order cannot be included in the insolvency process because the activities and resulting damages will continue after the reorganization is completed and hence exceed the time limit for a claim. If, on the other hand, the regulatory body, having no realistic alternative but to perform the remediation work itself, simply delays framing the order as a claim in order to improve its position in relation to other creditors, the *CCAA* court may conclude that this course of action is inconsistent with the insolvency scheme and decide that the order has to be subject to the claims

[20] *Abitibi*, *supra*, note 19, para. 37.

> process. Similarly, if the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the *CCAA* court may conclude that it is sufficiently certain the regulatory body will have to perform the work.

[28] Drawing on this by analogy, I am of the view that Respondent should not be deprived of his discharge because the disciplinary committee delayed conviction and sentencing for a period exceeding two years in a matter which was not contested on the facts and where at the outset the Respondent indicated that he would plead guilty. The matter could and should have been disposed of in a more timely fashion which would have obviated the debate before us.

[29] The obligation was "incurred" before bankruptcy and the fines were imposed prior to discharge. This, as indicated by the Supreme Court of Canada, is a factual inquiry.[21] On the uncontested facts in this case, it cannot be said that there is reversible error. There is thus no justification for appellate intervention.

[30] Accordingly, I propose that though the motion for leave to appeal should be granted (without legal costs), the appeal should be dismissed with legal costs.

MARK SCHRAGER, J.A.

[21] *Abitibi*, *supra*, note 19, paras. 37, 38, 61 and 62.

TAB 26

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thow (Re),*
2009 BCSC 1176

Date: 20090828
Docket: B051318
Registry: Vancouver

IN BANKRUPTCY AND INSOLVENCY

In the Matter of the Bankruptcy of Ian Gregory Thow

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for Ian Gregory Thow:	R.N. Pelletier, D. Reid
Counsel for British Columbia Securities Commission:	W.L. Roberts
Place and Date of Hearing:	Vancouver, B.C. June 12, 2009
Place and Date of Judgment:	Vancouver, B.C. August 28, 2009

INTRODUCTION

[1] In this case the bankrupt, after becoming bankrupt, was assessed an administrative penalty by the British Columbia Securities Commission ("BCSC") for his conduct as a mutual fund dealer prior to his bankruptcy.

[2] The issues on this application are whether that penalty is a claim provable in his bankruptcy under s. 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ("BIA") and, if so, whether the claim is exempted by s. 178 such that it would not be released by an order of discharge from bankruptcy.

FACTS

[3] The bankrupt, Ian Gregory Thow (the "Bankrupt"), was employed by Berkshire Investment Group Inc. ("Berkshire") as a mutual fund salesperson. The Bankrupt was also an officer, director, and branch manager with Berkshire.

[4] Mr. Thow had hundreds of clients and, through the promotion of securities other than the mutual funds he was registered to sell, he misappropriated millions of dollars of his clients' funds.

[5] In June 2005, the Bankrupt was terminated from his employment with Berkshire. At that time, a number of complaints had been made against him by his clients to the BCSC, and the BCSC was in the process of beginning its investigation.

[6] On July 22, 2005, the Bankrupt filed a notice of intention to make a proposal. Immediately thereafter, the trustee, Wolridge Mahon Limited, determined that there were a number of companies inextricably linked to the Bankrupt's affairs, and applied in the bankruptcy court to be appointed as interim receiver, then to petition the Bankrupt's companies into bankruptcy.

[7] On August 22, 2005, the Bankrupt filed a proposal with the trustee, and, at a meeting of creditors held on September 12, 2005, his proposal was rejected. As such, the Bankrupt was deemed to have made an assignment into bankruptcy

pursuant to s. 57(a) of the *BIA*, with the date of bankruptcy being July 22, 2005 (the date of the filing of the notice of intention to file a proposal).

[8] On June 29, 2006, the BCSC issued a notice of hearing. That hearing was held on various dates in May, June and July 2007.

[9] The evidence before the BCSC included:

(i) Interviews with 26 of the Bankrupt's clients, with their interviews forming part of the record;

(ii) Thirteen of the clients also gave direct testimony at the hearing itself; and

(iii) Evidence by way of expert report from James P. Blatchford Consulting Limited, a forensic accounting firm. Mr. Blatchford's qualifications as an expert included 30 years of forensic accounting, 14 of which were with the RCMP.

[10] On October 16, 2007, the BCSC issued its findings and found that Mr. Thow:

(i) failed to deal fairly, honestly and in good faith with his clients, contrary to s. 14(2) of the *Securities Rules* and the rules of the Mutual Fund Dealers Association, when he lied to them and took their money;

(ii) traded in securities without being registered to do so, contrary to s. 34(1)(a) of the *Securities Act,* when, while registered as a mutual fund salesperson, he traded securities that were not mutual funds;

(iii) made representations, contrary to s. 50(1)(d) of the *Securities Act*, when he made untrue statements for material facts about the securities he offered to his clients, and when he omitted material facts about those securities; and

(iv) perpetrated a fraud, contrary to ss. 57(b) and 57.1(b) of the *Securities Act*, when he made misrepresentations to his clients, and used their funds for his own purposes instead of investing them as his clients intended.

[11] On December 20, 2007, the BCSC issued its decision in relation to the sanctions (the "Decision"). This decision incorporated by reference the findings noted above.

[12] In addition to a number of sanctions prohibiting the Bankrupt from dealing and trading in securities, the BCSC by the Decision ordered the Bankrupt to pay an administrative penalty of $6 million pursuant to s. 162 of the *Securities Act,* R.S.B.C. 1996, c. 418 (the "Penalty").

[13] The Decision was registered in the British Columbia Supreme Court, Vancouver Registry, under action No. L080017, on January 7, 2008, and, by virtue of s. 163 of the *Securities Act*, the Decision became an order of the court on that date.

[14] Subsequently, the British Columbia Court of Appeal reduced the Penalty to $250,000, based on the statutory provisions in force at the time of Mr. Thow's conduct: *Thow v. British Columbia Securities Commission*, 2009 BCCA 46.

NATURE OF THE APPLICATION

[15] The BCSC seeks the following orders:

(i) a declaration that the amounts owing by the Bankrupt to the BCSC pursuant to the Decision are not a provable claim as contemplated by s. 121 of the *BIA*, and thus are a post-filing claim and thereby not subject to s. 69.3 of the *BIA*; and

(ii) if it is a provable claim in Mr. Thow's bankruptcy, then, pursuant to s. 178(1)(a), (d), (e) of the *BIA*, the amount owing by the Bankrupt to the BCSC pursuant to the Decision issued by the BCSC on December 20, 2007, is not released by any order of discharge granted to the Bankrupt.

DISCUSSION

[16] I will first discuss whether this claim, arising from conduct prior to Mr. Thow's bankruptcy but resulting in a penalty after his bankruptcy, is a claim provable in his bankruptcy.

[17] Section 121(1) of the *BIA* provides:

> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

[18] The Securities Commission argues that its claim was not provable under s. 121(1) of the *BIA* at the date of bankruptcy because the regulatory fine did not become an obligation until it was actually assessed, which was after the date of bankruptcy. It says that the imposition of the fine was a discretionary decision and the obligation of Mr. Thow only arose when the Commission chose to exercise its discretion.

[19] The Commission imposed the fine under s. 162 of the *Securities Act*:

> 162 If the commission, after a hearing,
>
> (a) determines that a person has contravened
>
> (i) a provision of this Act or of the regulations, or
>
> (ii) a decision, whether or not the decision has been filed under section 163, and
>
> (b) considers it to be in the public interest to make the order,
>
> the commission may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention.

[20] On the other hand, Mr. Thow argues that an administrative penalty based on conduct before the bankruptcy is a contingent or unliquidated claim under s. 121(2)

and is a claim provable in bankruptcy. His counsel notes that although some claims are so remote and speculative they cannot be considered contingent claims, the potential liability arising out of pending litigation, like this claim by the BCSC, is not one of those types of claims. He says that the date of the impugned conduct is the date giving rise to the Bankrupt's liability to the Commission. His counsel refers to several cases that have found that the fact that a claim does not crystallize until after bankruptcy is immaterial, it is when the obligation arises that is determinative. He argues that the Commission was already investigating Mr. Thow prior to his bankruptcy.

[21] Neither party referred to a decided case where the impugned conduct occurred before bankruptcy but the regulatory penalty was imposed by a discretionary decision after bankruptcy.

[22] The law is clear that fines imposed after the date of bankruptcy are not provable claims if the fine could not have been imposed until after bankruptcy. For example, in *(Re) Wosk's (Ltd.)* (1985), 58 C.B.R. (N.S.) 312 (B.C.S.C.), Cumming J. found that since the fine imposed by Revenue Canada was for the bankrupt's failure to remit taxes, which were due after the bankruptcy, the liability for the penalty did not arise until after bankruptcy and so it was not a provable claim. This is different than the situation in the present case because here both the impugned conduct and the investigation by the Commission into the impugned conduct occurred prior to bankruptcy. Only the hearing and the decision imposing the fine occurred after bankruptcy. Unlike in *(Re) Wosk's Ltd.*, there is nothing to suggest that the Commission's fine could not have been imposed prior to bankruptcy had the hearings been held earlier and the decision rendered before bankruptcy.

[23] Mr. Pelletier, counsel for Mr. Thow, points out that in *(Re) Wosk's Ltd.*, Cumming J. held that Revenue Canada did not have a provable claim because the penalty did not arise from anything which preceded the date of proposal. Mr. Thow's counsel argues that to consider the penalty imposed by the BCSC a post-proposal debt would defeat the purpose of the *BIA*, to permit a debtor to obtain a discharge

from all debts and start afresh, and it would allow provinces to create their own priorities under the *BIA*, which is impermissible constitutionally.

[24] Both counsel referred to *(Re) Air Canada* (2006), 28 C.B.R. (5th) 317 (Ont. S.C.J.), a case that has relevance to both issues on this application. *(Re) Air Canada* was decided under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") rather than the *BIA*.

[25] The question in that case was whether a monetary penalty was a "claim" for the purposes of the *CCAA* and the claims procedure and sanction orders made in that proceeding.

[26] The facts briefly were as follows. The Minister of Transport alleged that on December 23, 2000, an Air Canada aircraft landed at Montreal International Airport (Dorval) at 3:41 a.m. in contravention of the noise abatement requirements under the *Canadian Aviation Regulations*, SOR/96-433. On December 19, 2001, the Minister of Transport issued an assessment of monetary penalty against Air Canada under s. 7.7 of the *Aeronautics Act*, R.S.C. 1985, c. A-2., which read:

> 7.7 (1) If the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister may decide to assess a monetary penalty in respect of the alleged contravention, in which case the Minister shall, by personal service or by registered or certified mail sent to the person at their latest known address, notify the person of his or her decision.

[27] On April 1, 2003, Air Canada applied for protection from its creditors under the *CCAA*, which resulted, *inter alia*, in an immediate stay of all proceedings. The Court issued a claims procedure order on September 18, 2003, which set forth the process by which creditors' claims would be determined. Paragraph 8 provided that any creditor who did not file a proof of claim before the claims bar date was "... forever barred from making or enforcing any Claim against [Air Canada] and the Claim shall be forever extinguished."

[28] The Minister of Transport and Transport Canada did not make a claim in the *CCAA* proceedings even though it had notice of the claims procedure order. The

Court issued a sanction order on August 23, 2004, which provided that a creditor who did not file a proof of claim in accordance with the claims procedure is "forever barred from making any Claim against [Air Canada]".

[29] Air Canada emerged from *CCAA* protection on September 30, 2004.

[30] The first issue was whether the monetary penalty was a claim covered by the claims procedure and sanctions order.

[31] "Claim" was defined, in that case, under the claims procedure order as:

> "Claim" means any right of any Person against one or more of the Applicants in connection with any indebtedness, liability or obligation of any kind of one or more of the Applicants owed to such Person and any interest accrued thereon or costs payable in respect thereof, whether liquidated, un-liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executor or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts existing prior to [the date of Air Canada's application for protection under the *CCAA*] or a Restructuring Claim; provided however, that "Claim" shall not include an Excluded Claim.

[32] Section 12 of the *CCAA* provides that determinations as to whether any unsecured indebtedness, liability or obligation is a "claim" within the meaning of the *CCAA* are made by reference to the *BIA*. Subsection 12(1) of the *BIA* provides:

> 12.(1) For the purposes of the Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act.

[33] The court summarized the position of Air Canada as follows:

> 31 Air Canada submits that the Monetary Penalty is a "claim". It points out that the definition of "claim" in the Claims Procedure Order is broad. It submits that the fact that a claim is contingent, unliquidated or disputed does not change the character of a claim as one provable under the *BIA* so long as the claim is not too remote or speculative. Air Canada submits that given the factual situation at hand, it is clear that a contingent obligation arose on the part of Air Canada prior to the *CCAA* filing and the date of the stay. It submits

> that liability for the alleged penalty arose on or about December 23, 2000 when the Air Canada plane landed at Montreal's Dorval airport allegedly in contravention of the noise abatement regulations. Finally, Air Canada says the fact that the TATC had not yet upheld the imposition of the Monetary Penalty as of the date of the *CCAA* stay does not change the character of the Monetary Penalty as a claim provable in bankruptcy.
>
> 32 I agree with and accept the submissions of Air Canada. I would only add that while it could be said that Air Canada's liability for the Monetary Penalty first arose on December 23, 2000, in my view that liability only became an "obligation" when the Minister of Transport issued the Monetary Penalty on December 19, 2001. Such a liability is not too remote or speculative and is therefore a provable claim under the *BIA*.

[34] Mr. Justice Cumming held that the monetary penalty was a "claim" for the purposes of the *CCAA* and the claims procedure and sanction orders and that the Minister of Transport's right to enforce the monetary penalty was extinguished.

[35] The Commission however relies on Cumming J.'s comment at para. 32 that the regulatory penalty in that case did not become an "obligation" until it was actually assessed, rather than becoming an obligation on the date of the impugned conduct. Like the Commission's decision to impose a fine in the case at bar, the fine imposed by the Minister of Transport in *(Re) Air Canada* was discretionary.

[36] Both parties referred to *(Re) Harvey*, 2004 ABQB 773, 373 A.R. 373, in which Human Resources and Development Canada ("HRDC") sought repayment from Mr. Harvey of an overpayment of employment insurance. HRDC claimed that it had to be repaid after bankruptcy. However, Registrar Smart held, at para. 19, that since all the events which gave rise to the liability to HRDC occurred prior to bankruptcy, all HRDC had to do was review its file, calculate how much was overpaid, and give notice. The liability for repayment to HRDC was under s. 43 of the *Employment Insurance Act*, S.C. 1996, c. 23:

> 43. A claimant is liable to repay an amount paid by the Commission to the claimant as benefits
>
> (a) for any period for which the claimant is disqualified; or
>
> (b) to which the claimant is not entitled

[37] Thus, the bankrupt was liable to the HRDC once he received overpaid benefits; the HRDC did not have to exercise its discretion and demand repayment. Therefore the obligation to pay arose prior to bankruptcy, even though the liability to repay crystallized after bankruptcy.

[38] The present case differs from *(Re) Harvey*, because here the Commission had to do more than merely review a file and calculate the penalty. The Commission had to undertake an investigation, hold a hearing, make findings and reach a decision. Also, unlike in *(Re) Harvey*, in this case the Commission's decision to impose the fine is discretionary.

[39] Both parties also referred to *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (c.o.b. Toys & Wheels) (Trustee of)* (1996), 21 B.C.L.R. (3d) 91, [1996] 7 W.W.R. 652 (S.C.), which is a similar case to *(Re) Harvey*. In *Eland Distributors* all of the employees were fired after bankruptcy and the issue was whether the Director of Employment Standard's claim for severance pay for employees was a provable claim at the time of bankruptcy. Madam Justice Sinclair-Prowse found that the severance pay claim arose from a contractual obligation the employer had assumed long before the company went bankrupt and said at para. 23 that:

> ...the obligation of the employer to pay severance pay upon the happening of specified events was incurred before the bankruptcy and therefore constitutes a debt or liability to which the employer was subject on the day on which it became bankrupt.

[40] The obligation to pay severance arose on the day of bankruptcy automatically by operation of the bankruptcy, because the employees were terminated without cause or notice; there was no exercise of discretion required for the obligation to exist. As a result, I do not think that *Eland Distributors* is applicable to the present case because here there is an exercise of discretion; the Commission's penalty did not automatically follow from the pre-bankruptcy conduct.

[41] The position of the Securities Commission is supported by two cases which held that costs, which are at the court's discretion, are not an obligation under s. 121

of the *BIA* until they are awarded: *Chaloux v. Kingston Fairways Golf Course* (2004), 48 C.B.R. (4th) 237 (Ont. S.C.J.); and *Strini v. Mihalicz*, 2006 ABQB 912, 411 A.R. 202. In *Chaloux*, the plaintiff in a personal injury case made a voluntary assignment into bankruptcy before the issue of costs in favour of a defendant in the matter could be settled (the action was discontinued against that defendant). The issue was whether the costs were a provable claim under s. 121 of the *BIA*. Likewise, the issue of whether costs are a contingent liability was considered in *Strini*.

[42] In both *Chaloux* and *Strini*, the court considered and relied on *Glenister v. Rowe*, [1999] 3 All E.R. 452 (Eng. C.A.), which found that because costs awards are discretionary, they are not a contingent liability under the English equivalent of the *BIA*. In *Chaloux* Belch J. found that *Glenister* is persuasive authority in Canada because the English statute is similar to the *BIA*. In *Glenister*, the English Court of Appeal held that since costs awards are at the discretion of the court, until an order for costs is made there is no “obligation” and there is no liability to pay them and so there is no contingent liability (even if the contingency aspect is there).

[43] In *Strini* Kenny J. said this about *Glenister*:

> 27 The essence of the ruling of the English Court of Appeal is that a claim for costs is purely discretionary and comes into existence only when the court makes the order. At the time of bankruptcy there was merely a risk of costs being awarded at a future date. There was no contingent provable liability. Therefore, the Court of Appeal ruled that the costs order did not fall within the bankruptcy.
>
> 28 Applying *Glenister* the court, in *Chaloux v. Kingston Fairways Golf Course*… awarded costs against an undischarged bankrupt. Here the plaintiff was seeking damages for assault. The action did not proceed. The plaintiff declared bankruptcy. After the plaintiff's discharge from bankruptcy, the defendant sought costs. Such were awarded based on the reasoning in *Glenister*.29 I adopt the reasoning in *Glenister*. Costs are a completely discretionary remedy. There is no obligation until there is an order for payment. I am therefore satisfied that any costs I might award would not be provable in bankruptcy and are therefore not released by the discharge granted...

[44] In both *Strini* and *Chaloux*, the courts found that since costs are completely discretionary there is no obligation until the court orders payment and so costs awarded after an assignment into bankruptcy are not a provable claim.

[45] In my opinion, these cases support the Commission's position. The Commission's decision to impose a penalty was discretionary and so Mr. Thow was not liable to the Commission until it exercised its discretion. Thus the penalty was not a contingent liability or an "obligation" under s. 121 of the *BIA* at the date of his bankruptcy.

[46] In my opinion, the *(Re) Air Canada* case supports the Commission's position that the penalty is not an obligation as contemplated by s. 121 of the *BIA* until the penalty is assessed by the Commission. Likewise, *Chaloux*, *Strini* and *Glenister* also support the Commission's position that because its decision was discretionary, there was not a contingent liability or "obligation" until the Commission actually fined Mr. Thow, which was after the date of his bankruptcy. Therefore, in my opinion the obligation did not arise until after bankruptcy and the Commission's penalty is not a provable claim in this bankruptcy.

[47] Given my conclusion that the penalty imposed by the Securities Commission after the date of bankruptcy is not a claim provable in this bankruptcy, I do not have to go on to decide the next issue, that is, if it was a provable claim, whether it would survive any discharge from bankruptcy.

[48] The application of the Securities Commission for a declaration that the Penalty is not a claim provable in Mr. Thow's bankruptcy is allowed.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson

TAB 27

CITATION: Wing (Re), 2019 ONSC 4063
COURT FILE NO.: BK-17-2200955-0031
DATE: 20190708

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

IN THE MATTER OF THE BANKRUPTCY OF DENNIS ROY WING

BEFORE: Penny J.

COUNSEL: *D. Ullman and A. Teodorescu* for the Bankrupt

Maya Poliak for the Ontario Securities Commission

C. Haddon Murray for Richter Advisory Group Inc., Trustee

HEARD: May 22, 2019

ENDORSEMENT

Overview

[1] The Debtor, Dennis Wing, filed a notice of intention to make a proposal under the BIA in January 2017. In July 2017, Mr. Wing's creditors voted against his proposal and he was deemed to have made an assignment into bankruptcy. Mr. Wing remains undischarged.

[2] There are two motions before me. In the first motion, Mr. Wing seeks an order lifting a freeze direction of the Ontario Securities Commission over his registered retirement saving plan and locked in retirement accounts with a value of about $1.9 million. In the second motion, the OSC seeks an order that certain monetary penalties Mr. Wing was ordered to pay as a result of violations of a cease trade order are not claims provable in bankruptcy, such that the OSC may proceed with enforcement of these claims notwithstanding Mr. Wing's outstanding bankruptcy.

[3] For the reasons that follow, Mr. Wing's motion is dismissed and the OSC's motion is allowed.

Background

[4] The following chronology, which I have taken from the Trustee's factum, summarizes the undisputed relevant factual background:

(a) February 11, 2015 – the OSC issued a decision finding that Mr. Wing had engaged in insider trading and misled OSC staff during an examination;

(b) June 24, 2015 – the OSC issued a sanctions and costs order (the “sanctions order”) imposing the cease trade order (“CTO”) and requiring Mr. Wing to:

(i) pay administrative penalties totaling $1.75 million;

(ii) disgorge money obtained from his insider trading activity of $520,196; and

(iii) pay part of the OSC’s costs of the investigation and hearing of $300,000;

(c) August 24, 2015 – Mr. Wing sold publicly traded shares in violation of the CTO;

(d) September 11, 2015 – the OSC issued the freeze direction, freezing Mr. Wing’s assets including his RRSP and LIR accounts;

(e) September 23, 2015 – Mr. Wing and the OSC entered into an agreement providing that the freeze direction would continue until it is revoked by the OSC or the Court orders otherwise;

(f) October 26, 2016 – the Divisional Court dismissed Mr. Wing’s appeal of the sanctions and costs order;

(g) December 19, 2016 – Mr. Wing initiated proposal proceedings by filing a notice of intention under s. 50.4(1) of the BIA;

(h) January 18, 2017 – Mr. Wing filed his proposal;

(i) February 7, 2017, – the first meeting of creditors was convened but adjourned as a result of questions raised by the OSC regarding undisclosed assets;

(j) May 4, 2017 – the OSC commenced a proceeding against Mr. Wing regarding the alleged violation of the CTO;

(k) May 5, 2017 – the Trustee advised that there were a number of bank accounts with balances in excess of $500,000 that Mr. Wing had not disclosed to the Trustee or in his statement of affairs;

(l) July 28, 2017 – the first meeting of creditors took place. Mr. Wing’s amended proposal was rejected by a vote of his creditors. Accordingly, Mr. Wing was deemed to have made an assignment into bankruptcy;

(m) November 21, 2017 – Justice Conway, in an endorsement, found it was not necessary to decide whether the CTO violation proceeding was caught by the statutory stay of proceedings under s. 69.4 of the BIA on the basis that she would, in any event, lift the stay to permit the OSC to continue with the CTO violation proceeding;

(n) May 18, 2018 – Mr. Wing and the OSC entered into a settlement agreement regarding the CTO violation proceeding, in which Mr. Wing acknowledged the breach of the CTO and that OSC staff would seek an order for monetary penalties; and

(o) May 24, 2018 – the OSC issued an order in the CTO violation proceeding, requiring Mr. Wing to pay a monetary penalty of $120,000 and $5,000 in costs in respect of his violation of the CTO (the "administrative penalty").

Issues

[5] Each motion raises a discrete issue. Mr. Wing's motion is founded essentially on s. 67(1) of the BIA which exempts the RRSP and LIR accounts from "property divisible among" his creditors. On this basis, Mr. Wing argues that these accounts are "exempt from execution or seizure" such that the effect of the OSC freeze direction is spent or, in any event, is over-ridden by s. 67(1) of the BIA. This is because, Mr. Wing argues, all of the Debtor's property has either vested in the Trustee or, as is the case with the RRSP and LIR accounts, is exempt from execution or seizure.

[6] The issue on Mr. Wing's motion is, therefore, whether s. 67(1) requires a finding that the freeze direction is "obsolete" or "no longer serves a purpose" such that a declaration should issue that the freeze direction "is of no force or effect as of the date of bankruptcy."

[7] The OSC motion is founded on s. 121 of the BIA which provides that a liability to which the bankrupt is subject on the date of bankruptcy, or to which the bankrupt may become subject by reason of an obligation incurred *before* the date of bankruptcy, is deemed to be a claim provable in bankruptcy. The OSC argues the administrative penalty resulting from the CTO violation hearing is an obligation incurred *after* the date of bankruptcy and is not, therefore, a claim provable in bankruptcy.

[8] The OSC motion turns on the application of the three-part test established in *AbitibiBowater Inc., Re*, 2012 SCC 67 (as further developed in *Orphan Well Association v. Grant Thornton Ltd.* 2019 SCC 5):

(i) there must be a debt or obligation owed to a creditor;

(ii) which was incurred before the debtor became bankrupt; and

(iii) it must be possible to attach a monetary value to the debt or obligation at the date of bankruptcy.

[9] There is a subsidiary part to this issue as well, which is whether, even if the administrative penalty is not a claim provable in bankruptcy, the OSC is estopped from enforcing

this order before the Trustee's discharge as a result of an undertaking given by the OSC to Mr. Wing and to the Court.

Analysis

1. Debtor's Motion to Declare the Freeze Direction of No Force or Effect

[10] In essence, the Debtor argues that the OSC sanction order requiring a payment of $2,570,196 is indisputably a claim provable in bankruptcy. It was clearly an obligation incurred before bankruptcy; indeed, it is a reasonable inference that the sanction order is precisely what prompted the Debtor's decision to issue a NOI. Likewise, there is no dispute that enforcement of that claim was stayed under the BIA. The OSC used its claim, which was accepted in full by the Trustee, to vote against Mr. Wing's proposal, thereby causing him to become bankrupt on July 28, 2017.

[11] The Debtor goes on to argue that, as a claim provable in bankruptcy, the OSC sanction order can only be recovered through recourse to the Debtor's non-exempt assets in the hands of the Trustee, and even then, only on a *pro rata* basis with all other creditors in accordance with the scheme established under the BIA.

[12] All divisible property of the bankrupt vests with the Trustee. The OSC can only look to the Debtor's divisible property, *pro rata*, for the satisfaction of its claim. With all divisible property already vested in the Trustee, the OSC freeze direction no longer serves any purpose.

[13] The primary mechanism under the BIA to fulfill the rehabilitative policy of the Act is that, upon discharge, a bankrupt is entitled to a release from all claims provable in bankruptcy. Every bankruptcy takes precedence over all judicial or other attachments except those completely executed by payment before the bankruptcy.

[14] In addition, however, the BIA makes the RRSP and LIR accounts exempt assets. This is to ensure that a discharged bankrupt will have the financial means to care for him or herself without becoming a burden on society. This also reflects the rehabilitative policy underlying the BIA.

[15] Mr. Wing argues that the continued existence of the freeze direction frustrates the rehabilitative objective of the BIA. For this reason as well, he asks that the freeze direction be declared of no force or effect.

[16] I am unable to agree with these arguments. It is true that the exempt assets are not divisible among creditors in a bankruptcy. However, as is conceded by the Debtor, the creditors may oppose his discharge. There are two relevant outcomes:

> 1) Mr. Wing may be discharged, in which case his non-exempt property is divisible among creditors and he is entitled to be released from all other claims (excepting s.178(1) claims) on the date of discharge; or

2) the Court refuses Mr. Wing's discharge, in which case, once the Trustee is discharged, the creditors are free to enforce their claims.

[17] Sections 172 and 173 of the BIA make it clear that the conduct of a bankrupt is an important element in determining whether he or she is entitled to receive a discharge. Financial rehabilitation is not without limits. Rehabilitation must be balanced against other factors, including confidence in the credit system, *Alberta (Attorney General) v. Moloney* 2015 SCC 51 at para 37. It is the "honest but unfortunate debtor" whom the BIA favours with a discharge subject to reasonable conditions.

[18] Without in any way prejudicing the issue, which is solely for the Court on the discharge hearing to decide, there is at least a credible prospect of reasonable opposition to Mr. Wing's discharge based on the Trustee's Third Report and other factors set out in the Trustee's factum. This includes:

(a) misconduct which lead to the bankruptcy;

(b) failure to disclose assets;

(c) failure to disclose dispositions of property;

(d) false, evasive and misleading statements;

(e) failure to provide accurate income and expense reports;

(f) failure to provide adequate information about share transfers; and

(g) the structuring of Mr. Wing's affairs so as to put assets beyond the reach of his creditors while enabling him to maintain a lifestyle inconsistent with his stated income.

[19] Further, in the present circumstances, the continued existence of the freeze direction does not frustrate the rehabilitative purpose of preserving certain retirement savings for the discharged bankrupt's use in retirement. The Debtor has advanced no evidence, or arguments, in support of any current need for the exempt assets to fund his retirement. There is no suggestion of execution by or distribution to the OSC or any other creditors of the exempt assets pending the discharge hearing. The purpose for the freeze direction is still in play. Until the question of Mr. Wing's discharge is resolved, it cannot be said there will be a release of creditors' claims against him. If a discharge is refused, on the Trustee's discharge, the OSC will have the right to pursue execution on its claims and the exemption under the BIA will no longer apply to the RRSP and LIR accounts.

[20] The freeze direction was made prior to Mr. Wing's NOI and subsequent bankruptcy. The preservation of the status quo, therefore, would suggest leaving the freeze direction in place so long as it serves any purpose. I find that it does.

[21] If Mr. Wing has current need of access to the exempt property to live on in his retirement, he can apply to the Court for release of the necessary funds. He has not done so. Rather, Mr. Wing seeks release to him of these funds in their entirety, subject to his sole discretion, prior to a determination about his discharge.

[22] I find that Mr. Wing has no legal entitlement to the declaratory relief sought. Nor, I find, should the Court's discretion be exercised to grant such relief at this time. Accordingly, the Debtor's motion for a declaration that the freeze direction is of no force or effect is dismissed.

2. OSC Motion to Declare that the Administrative Penalty and Costs Order is Not a Claim Provable in Bankruptcy

[23] Subsection 121(1) of the BIA establishes the criteria for a provable claim:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[24] Under s. 121(2) of the BIA, a claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A contingent claim is a claim which may or may not ever ripen into a debt according to some future event which does or does not happen. The determination of whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim is to be made in accordance with s. 135 of the BIA. Section 135 provides that the trustee shall determine whether a contingent claim is a provable claim and if so to value it.

[25] As noted above, in *AbitibiBowater Inc., Re*, as further developed in *Orphan Well Association v. Grant Thornton Ltd.*, the Supreme Court of Canada held that in order for any obligation to be a claim provable in bankruptcy, it must meet the following three-part test:

(i) there must be a debt or obligation owed to a creditor;

(ii) which was incurred before the debtor became bankrupt; and

(iii) it must be possible to attach a monetary value to the debt or obligation at the date of bankruptcy.

[26] I shall, therefore, address each of these factors below.

[27] Before doing so, however, it must be said that, as significant as these two Supreme Court decisions are for the resolution of potentially conflicting regulatory and bankruptcy regimes, there are at least two subtle distinctions between the circumstances of the present case and the regulatory orders dealt with in *Abitibi/Orphan Well*. The first is that the regulatory orders in *Abitibi/Orphan Well* did not impose a monetary obligation on the debtor to pay money *to the regulator*. The orders imposed obligations to perform environmental remediation which had

financial implications, to be sure, but the regulatory orders did not require the debtor to pay money directly to the regulator. Under the environmental protection regimes in issue, however, the regulator had the ability to perform the environmental remediation itself and to seek reimbursement of the cost from the debtor. In this case, by contrast, while the initiating event (the statement of allegations and notice of hearing) imposed no obligations of any kind on Mr. Wing, the ultimate OSC decision in the CTO violation proceeding did impose a monetary penalty payable by the Debtor to the OSC.

[28] The second distinction arises from the fact that the pre-date of bankruptcy regulatory orders made in both the Supreme Court cases actually imposed the remediation obligations in issue. That is, these were not notices of a future hearing at which the existence or non-existence of the remediation obligations would be determined. The remediation obligations came into existence immediately upon the regulatory orders being made. In this case, by contrast, the pre-bankruptcy step taken was, as noted above, a statement of allegations and notice of hearing. No obligation to pay the OSC administrative penalty arose (or could arise) until the hearing was held and the OSC rendered a decision.

[29] It will come back to the implications of these distinctions later in my analysis.

[30] The only case more or less directly on point was cited by the OSC. This is a decision of the British Columbia Superior Court in *Re Thow,* 2009 CarswellBC 2293 which, obviously, predates the *Abitibi/Orphan Well* decisions of the SCC. In *Thow*, the BC Securities Commission had undertaken an investigation into alleged violations of the BC *Securities Act* by June 2005. In July 2005, the debtor filed a proposal, which was rejected; the debtor was therefore deemed bankrupt. The BC Securities Commission issued a notice of hearing in July 2006. The hearing was held and, in October 2007, the Commission issued a decision finding the bankrupt had committed *Securities Act* violations. In December 2007 the Commission issued its decision on sanctions which included an order that Thow pay an administrative penalty. This was a discretionary remedy available to the Commission (as it is in Ontario) pursuant to the Commission's powers to act in the "public interest."

[31] The issue for the Court was whether the administrative penalty was a claim provable in bankruptcy. Sigurdson J. concluded that it was not. Justice Sigurdson found that the Commission's decision to impose a penalty was discretionary. The bankrupt was not liable to the Commission until the Commission exercised that discretion.[1] The penalty was, therefore, not a contingent liability or an obligation under s. 121 of the BIA at the date of bankruptcy. The penalty was an obligation that arose after the date of bankruptcy and was not, for this reason, a claim provable in the bankruptcy.

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[1] In doing so, he relied on the decision of Cumming J. in *Air Canada, Re* 2006 CarswellOnt 8175 (Ont. S.C.J.), who held that a potential regulatory liability became an "obligation" under the CCAA when the regulator issued the decision which imposed the penalty.

[32] I will now turn to the three-part test set out by the Supreme Court in *Abitibi/Orphan Well*.

1. Was the Commission a Creditor?

[33] The OSC argues that the Supreme Court in *Orphan Well* distinguished between the claims of regulators seeking to enforce the public interest and proceedings by regulators for recovery of a debt, relying on the following passage from para. 122:

> Abitibi should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of [the bankrupt]. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them…

[34] At the date of Mr. Wing's bankruptcy, the CTO violation proceeding was a proceeding to enforce the public interest, not for recovery of a debt. The OSC imposed the cease trade order as a result of the Commission's conclusion, in the exercise of its discretion in the public interest, that permanent prohibitions against Mr. Wing with respect to trading and acquisition of securities were appropriate. The purpose of the cease trade order was to protect the public interest and deter Mr. Wing (and others) from engaging in contraventions of Ontario securities law. By breaching the cease trade order, Mr. Wing engaged in serious, prohibited conduct. Mr. Wing ultimately admitted there were no mitigating factors. In initiating the CTO violation proceedings, the OSC was again acting as a regulator exercising discretionary powers in the public interest. The OSC was not a creditor of Wing when it initiated this proceeding before the date of his bankruptcy and, as such, the administrative penalty which ultimately resulted does not constitute a claim provable in bankruptcy.

[35] The Trustee supports the position of the OSC. The Trustee relies on the decision of Morawetz J. (as he then was) in *Terrace Bay Pulp Inc. Re*, 2013 ONSC 5111. This case was decided after *Abitibi* but before *Orphan Well*. In *Terrace Bay*, the Court was dealing with a motion for a stay of a Ministry of Labour proceeding against the debtor for violations of health and safety legislation. The incidents giving rise to these proceedings had occurred before the debtor filed under the CCAA.

[36] Justice Morawetz dismissed the motion. He concluded that the health and safety proceedings did not require the debtor to expend any funds or resources. Whether a financial penalty might or might not be imposed had yet to be determined. There would have to be a finding of guilt before any penalty could be imposed, and an exercise of the tribunal's discretion to impose a financial penalty. Accordingly, Justice Morawetz found that the Ministry was not acting as a creditor. He said, "[i]ts activities, at this stage, are regulatory or prosecutorial in nature."

[37] Mr. Wing relies on the Supreme Court decision in *Abitibi*, which held that "the only determination that has to be made at this point [the first step in the three-part test] is whether the regulatory body has exercised enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement at this stage of the analysis is satisfied." Accordingly, because the OSC exercised enforcement powers before the bankruptcy in the form of issuing a notice of hearing to determine whether Mr. Wing had breached the CTO and whether it was in the public interest to levy an administrative penalty against him of up to $1 million, the OSC was a creditor on the date on bankruptcy.

[38] Mr. Wing goes on to argue that the OSC's interpretation of the first step in the *Abitibi* test is inconsistent with its own conduct in this case. The judgment in the original sanction order, even though it too sought to enforce the public interest, is, by the OSC's own admission, a claim provable in Mr. Wing's bankruptcy. The only difference between the original sanction order and the later administrative penalty in the CTO violation proceeding is that the original sanction order was issued before Mr. Wing's bankruptcy and the additional administrative penalty in the CTO violation proceeding was issued after. Mr. Wing argues that the CTO violation proceeding, commenced before the bankruptcy based on conduct which occurred before the bankruptcy, was explicitly a claim for a monetary penalty; this was the only remedial relief sought. As such, it was a contingent claim for $1 million and ought to be treated as such in the bankruptcy. The OSC, as the contingent claimant, must therefore be considered a creditor in respect of that claim as of the date of bankruptcy.

<u>Analysis</u>

[39] The broad, inclusive in approach to the first step taken by the Court in *Abitibi* (and relied on by Mr. Wing, as quoted above) was clearly rejected by the court in *Orphan Well*. In *Orphan Well*, the Court explained that in *Abitibi*, the application judge had made a finding of fact that the province of Newfoundland and Labrador never truly intended that Abitibi would perform the remediation work ordered. Instead, it merely sought a claim that it could use as an offset in Abitibi's NAFTA proceedings based on the province's expropriation of Abitibi's assets. The province of Newfoundland and Labrador was a direct, financial beneficiary of the environmental orders in question. This was not an exercise of independent discretion for the public good. The orders in question were, in substance, not regulatory at all; they were purely financial.

[40] The Court went on to say that while *Abitibi* emphasized the need to consider the substance of provincial regulation, it does not stand for the proposition that "a regulator exercising its enforcement powers is always a creditor." The Supreme Court in *Orphan Well* adopted the following passage from the decision of Laycraft C.J.A. in *Panamericana de Bienes Servicios S.A. v Northern Badge Oil & Gas Ltd.,* 1991 ABCA 181 at para. 33:

> …the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process.

> Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

[41] The same could be said of the OSC when it commenced the CTO violation proceeding. The CTO itself imposed an obligation on Mr. Wing but it was an obligation which was entirely non-monetary in nature. When it commenced the CTO violation proceeding, the OSC was not seeking to enforce a debt. The CTO violation proceeding was commenced in the public interest to enforce the law, i.e., the CTO, to protect the integrity of the capital markets and for the public good. Applying the *Thow* and *Terrace Bay* analysis to the facts of this case, while part of the hearing was to determine whether a further administrative penalty for breach of the CTO would be in the public interest, no such penalty could exist until the OSC determined that: a) the CTO had been breached; and b) in the exercise of its discretion, it was in the public interest to levy a further administrative penalty. Nothing in the SCC's decisions in *Abitibi/Orphan Well* detracts from the authority or logic of *Thow* and *Terrace Bay*. Further, the Trustee could not, in my view, have determined either of those questions under s. 135 of the BIA; they were only for the OSC to decide. The CTO violation proceeding was, therefore, not a contingent claim like any other contingent claim. Any administrative penalty in respect of the CTO violation proceeding could not come into existence until the OSC ordered it to be so.

[42] In addition, the OSC order levying the administrative penalty of $120,000 stipulated that it is "designated for allocation or use by the Commission in accordance with subsection 3.4(2)(b)(i) or (ii) of the" *Securities Act*; that is, for allocation to the benefit of third parties or for the education of investors or enhancing knowledge about the operation of the securities and financial markets. It is, therefore, doubly clear that the OSC was not acting as a creditor but for the enforcement of securities laws for the protection of the public when it initiated the CTO violation proceeding. This was in no way a financial claim for the benefit of the OSC, unlike the provincial government claim found as a fact by the application judge in *Abitibi*.

[43] Finally, the time relevant for the application of the three-part test in *Abitibi* is the date of bankruptcy. While the *Terrace Bay* decision was in respect of a stay of administrative proceedings (and, thus, concerned a time period before any findings or decision had been made by the regulatory authority), that does not matter to the analysis. Each of the three parts of the *Abitibi* test must be met in order for a claim to be provable in bankruptcy. Whether a regulatory authority is or is not a creditor at the date of bankruptcy does not change as a result of any subsequent decision to impose a monetary administrative penalty. Either the enforcement proceedings constitute the regulatory authority as a creditor at the date of bankruptcy or they do not. A monetary penalty imposed post-bankruptcy may well be become an enforceable debt and constitute the regulatory authority as a creditor once it is made but, in the circumstances of this case, that is a liability that arises post-bankruptcy and cannot, therefore, be a claim provable in bankruptcy.

[44] For these reasons, I find that the OSC was not a creditor at the date of bankruptcy. The first part of the *Abitibi* test has not been met. Accordingly, the administrative penalty in the CTO violation proceeding is not a claim provable in bankruptcy.

2. *Was the Order for an Administrative Penalty and Costs an Obligation Incurred Before the Date of Bankruptcy?*

[45] The OSC and the Trustee, again relying on *Thow* and *Terrace Bay*, argue that Mr. Wing did not become subject to any debt, liability or obligation until the Commission made its order requiring Mr. Wing to pay a penalty of $120,000 and costs of $5,000 on May 24, 2018, i.e., after the date of bankruptcy.

[46] Mr. Wing submits that his liability to the OSC was incurred before the date of his bankruptcy. This, he says, is because:

(a) all the events giving rise to his liability in the CTO violation proceeding, including the alleged breach of the CTO, occurred prior to the bankruptcy;

(b) the OSC had conducted an extensive investigation into Mr. Wing's conduct, including his alleged breach of the CTO before his bankruptcy;

(c) the CTO violation proceeding, alleging the breach of the CTO and claiming an administrative penalty of up to $1 million, had been issued and served, and was outstanding, at the time Mr. Wing became bankrupt; and

(d) at the time of bankruptcy the only steps necessary to convert this contingent claim into a certain, monetary claim, were the hearing of the CTO violation proceeding, the finding of guilt and the administration of the penalty.

Analysis

[47] The same analysis which produces the conclusion that the OSC was not a creditor of Mr. Wing in respect of the CTO violation proceeding at the date of bankruptcy dictates the result under part two of the test as well.

[48] Mr. Wing's obligation at the date of his bankruptcy was to comply with the CTO. The CTO violation proceeding was not commenced to enforce any debt but to enforce Mr. Wing's obligation not to trade in securities. Mr. Wing's liability in respect of the additional administrative penalty did not occur until the OSC determined that he had breached the CTO and that an administrative penalty in connection with that breach was in the public interest. That did not occur until well after the date of Mr. Wing's bankruptcy. Accordingly, for these reasons, I conclude that the CTO violation proceeding did not constitute a debt or liability incurred before the date of bankruptcy. The second part of the *Abitibi* test has, therefore, not been established.

3. *Was the Commission's Claim Too Speculative and Remote on the Date of Bankruptcy?*

[49] The OSC and the Trustee argue that the Commission's mandate is to protect investors and promote fair and efficient capital markets and confidence in those markets. This mandate is supported by the grant of authority under s. 127 of the *Securities Act* to impose a wide variety of sanctions to deter conduct that is contrary to the public interest, including administrative

penalties of up to $1 million per incident. Additional sanctions are available under s. 122 for failure to comply with orders of the Commission, including fines up to $5 million and imprisonment for up to five years. There is no formula for the Commission's determination of an administrative penalty. The appropriate sanction depends on a variety of factors, including the seriousness of the misconduct, whether there were repeated breaches, whether the respondent realized any profit as a result of the misconduct and the level of administrative penalties imposed in other cases. With this wide array of discretionary remedial powers and potential outcomes, the Commission says, any outcome as to monetary value was remote or speculative until a settlement was reached or the hearing was held and the decision released making a finding of guilt and determining whether, and if so in what amount, an administrative penalty should be imposed.

[50] Mr. Wing argues that, at the date of his bankruptcy, the OSC had already conducted its investigation into his alleged misconduct. A notice of hearing had issued, alleging a breach of the CTO. The OSC was explicitly seeking an administrative penalty of up to $1 million against Mr. Wing for this breach. Further, an administrative penalty was the primary remedy that could be sought, as Mr. Wing was already subject to a permanent cease trade order and other sanctions. As the OSC's May 24, 2018 decision itself said, "the only effective sanction available to the Commission under section 127 is an administrative penalty."

[51] Relying on *Chambre de la Securite Financiere v. Thibault*, 2016 QCCA 1691, Mr. Wing submits that "the appropriate factual enquiry is whether, at the date of bankruptcy, the conditions were met in order to affirm that a [monetary] sanction would probably be imposed." He argues that it was sufficiently certain at the date of bankruptcy that he would be subject to an administrative penalty – an administrative penalty of up to $1 million was neither remote nor speculative.

<u>Analysis</u>

[52] I am unable to agree with Mr. Wing's argument on this issue. It is based entirely on hindsight. At the date of his bankruptcy, Mr. Wing had not admitted to a breach of the CTO. Whether such a breach could be proved and, if proved, whether it would be determined to be in the public interest to impose an administrative penalty in connection with that breach, were entirely matters for the OSC to decide. Further, the amount of any further administrative penalty was entirely discretionary to the Commission. These facts do not support the conclusion that a monetary sanction would probably be imposed.

[53] For these reasons, the third part of the *Abitibi* test has not been established either.

Is the OSC Estopped From Enforcement of the CTO Violation Order?

[54] On November 21, 2017, Conway J. granted an order allowing the OSC to proceed with the CTO violation hearing. In her endorsement, Justice Conway did not find it necessary to decide whether the CTO violation proceeding involved a claim provable in bankruptcy and was therefore stayed by s. 69(1)(a) of the BIA because she was prepared, in any event, to lift the stay to permit the CTO violation hearing to proceed. In coming to this conclusion, however, she said:

> The OSC has agreed that it will not enforce any monetary penalty versus Mr. Wing until the trustee is discharged, but intends to proceed with its regulatory process with regards to the alleged non-compliance with the CTO.

[55] The OSC has, of course, concluded that hearing and has issued an order approving a settlement in which Mr. Wing admitted to contravening the Commission's CTO and agreed to the imposition of monetary penalty of $120,000 and costs of $5,000. In this motion by the OSC, I have found that the monetary penalty is not a claim provable in bankruptcy.

[56] Mr. Wing maintains that he proceeded on the basis that the OSC's agreement was true and binding. He argues that the Commission, having undertaken not to enforce the monetary penalty until the Trustee is discharged, cannot renege on that undertaking and seek to enforce the monetary penalty before then.

[57] I cannot accept this argument. In the Settlement Agreement signed by Mr. Wing and approved by the OSC, the Commission and Mr. Wing agreed that nothing in the settlement affected Mr. Wing's or the OSC's right to bring a motion for a determination as to whether the administrative penalty and costs arising out of the CTO violation proceeding were claims provable in bankruptcy. The parties agreed that a motion "shall be brought before the Ontario Superior Court of Justice (Commercial List)" to resolve this issue. The parties further agreed that, if the Court determined that the monetary penalty is not a claim provable in bankruptcy, Mr. Wing "shall pay the monetary penalty within 30 days of the Court issuing its decision."

[58] While it may well be true that Mr. Wing relied upon the Commission's undertaking as true and binding from November 21, 2017 to May 18, 2018 (the date of the settlement agreement), on May 18, 2018 Mr. Wing entered into a different agreement with the Commission. The new agreement was that Mr. Wing would pay the monetary penalty within 30 days of this Court making a determination that the monetary penalty is not a claim provable in bankruptcy. That agreement superceded and replaced the Commission's undertaking. Having agreed with the Commission as a term of the settlement of the CTO violation proceeding to pay the monetary penalty within 30 days of this Court's determination as noted above, Mr. Wing cannot now maintain that the Commission's earlier undertaking not to enforce the monetary penalty until the Trustee's discharge remains valid and binding. Accordingly, Mr. Wing has 30 days to pay to the Commission $125,000.

Conclusion

[59] For the reasons set out above, Mr. Wing's motion to set aside the freeze direction is dismissed. The OSC's motion for a declaration that the CTO violation order is not a claim provable in bankruptcy is granted. The administrative penalty and costs shall be paid within 30 days of the release of these Reasons.

Costs

[60] If the parties are unable to agree on the disposition of costs, written submissions seeking costs (limited to two typed, double-spaced pages) together with a bill of costs may be submitted

within seven days of the release of these Reasons. A party wishing to respond to such a submission may do so by way of a written submission of the same length, submitted within a further seven days.

Penny J.

Date: July 8, 2019

TAB 28

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 370**

Date: **2017 12 14**
Docket: BKY 127 of 2017
Estate No.: 22-2144552

IN THE MATTER OF THE BANKRUPTCY OF
DYLAN ALEXANDER JAMES
OF THE CITY OF REGINA
IN THE PROVINCE OF SASKATCHEWAN

Appearing:

Dylan James	the Bankrupt
Pamela Meger	for the Trustee
Amanda Neudorf	for the opposing creditor

JUDGMENT — C. ELAINE THOMPSON
December 14, 2017 — REGISTRAR IN BANKRUPTCY

INTRODUCTION

[1] Dylan James had been drinking before he began operating the vehicle that caused a motor vehicle accident in the early hours of June 24, 2016. Saskatchewan Government Insurance [SGI] processed two claims after the accident; one for property damage and one for personal injury, non-economic loss. The Motor Vehicle Accident Report confirmed that at least two vehicles had sustained moderate damage, rendering them unsafe for use, and that an injury had been reported; there was no damage or injury reported in relation to a third vehicle that had been involved in the accident.

whether liability is sufficiently certain to form a contingent claim that may be provable.

[62] In *Thow,* the bankrupt filed his assignment in bankruptcy after a disciplinary proceeding had been initiated and the disciplinary investigation had begun, but before the hearing had been concluded and before a decision on liability had issued. The court determined that the liability associated with the fine claim was not provable because there was too much uncertainty at the time of bankruptcy to ascertain whether the fine liability would arise and to quantify its value if it did arise.

[63] At the time of the bankruptcy the disciplinary panel in *Thow* had not heard evidence or submissions on the allegations against the bankrupt before the bankruptcy, and the panel was not be in a position to make a finding and exercise its broad discretion without considering the evidence, conducting a legal analysis. The disciplinary process involved a number of steps before the bankrupt's obligation could be ascertained. The *Thow* investigation process included interviews with 26 individuals. At the hearing stage, post-bankruptcy, 13 claimants gave direct testimony and the commission also heard testimony from an expert in forensic accounting. In sum, there was a quasi-trial that had not occurred before the bankruptcy in *Thow*. The assessment of liability and the determination of its value were not a matter of simply applying a calculation, as the court noted.

[64] The decision in *Thow* was recently distinguished by the Quebec Court of Appeal decision in *Chambre de la sécurité financière v Thibault,* 2016 QCCA 1691, 42 CBR (6^{th}) 8 [*Thibault*]. Like *Thow, Thibault* concerned the provability of a claim where a disciplinary fine for pre-bankruptcy conduct had

been imposed post-bankruptcy. *Thibault* is important because it provides an example of an appellate level court applying the sufficiently certain test from *AbitibiBowater* to determine whether a contingent claim is provable, post *Moloney*.

[65] *Thibault* affirmed that although a future claim can only be provable if it is not too remote or speculative, the purpose of s. 121 of the *BIA* (as enunciated in *Moloney*) must be factored into the determination. What should be included, as far as possible, is every kind of claim so that the bankrupt will be in a position to make a fresh start, at para. 21:

> **21** In *Chambre de la sécurité financière c. Harton* [2008 QCCA 269], this Court, citing the authors Houlden and Morawetz, noted that in order to satisfy Section 121 *BIA*, a future claim (i.e. not actually payable on the date of the bankruptcy) must not be too remote or speculative, while underlining that the purpose of Section 121 *BIA* is to include, as far as possible, every kind of claim so that upon discharge the bankrupt is in a position to make a fresh start. Rehabilitation of the debtor is recognized as a fundamental purpose of bankruptcy legislation. (407 *ETR Concession Co. v. Canada* (*Superintendent of Bankruptcy*), [2015] 3 S.C.R. 397, 2015 SCC 52 para. 28.)

[66] Unlike the facts of *Thow*, the *Thibault* bankrupt had pled guilty and the disciplinary hearing had already occurred before the bankruptcy. The disciplinary panel had not been satisfied with the bankrupt's plea and had gone on to decision, which process continued until the panel completed the decision and issued an administrative penalty, after Thibault's bankruptcy. *Thibault* concluded that even though there was a post-bankruptcy exercise of discretion by the disciplinary panel, the bankrupt's pre-bankruptcy guilty plea rendered it "probable, or at least more than hypothetical" on the date of bankruptcy, that a liability in the form of a fine would crystalize.

[67] In making its decision in *Thibault,* the Quebec Court of Appeal referred back to the decision in *AbitibiBowater* to enunciate the test that must be applied to ascertain whether a future claim is provable. It explained that the appropriate factual inquiry is whether at the date of bankruptcy the conditions were met in order to affirm that the sanction would probably be imposed, at para. 26:

> **26** In all cases, an inquiry should be made as to when the obligation was incurred. In this case, I believe the date was the hearing date when Respondent indicated that he was pleading guilty. However, even if that were not the precise date when the obligation was created, I believe that the long delay of the committee in rendering a decision finding Respondent guilty and then imposing the monetary sanction is relevant in determining that the fines imposed were claims provable. In this respect, the decision of the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc*. [2012 SCC 67, [2012] 3 SCR 443] is relevant. Speaking through Justice Deschamps, the Court indicated that, in order to determine whether a claim is a claim provable, a factual inquiry is required to determine whether the conditions for the inclusion of the claim as a claim provable are met.20 Thus, in this case, it is facile to say that the fines had not yet been imposed on the date of the bankruptcy. The appropriate factual inquiry is whether, at the date of the bankruptcy, the conditions were met in order to affirm that a sanction would probably be imposed. In *Harton* [2008 QCCA 269] (decided years prior to *AbitiniBowater* it could be said that the condition was not met. In the present case, not only was the hearing held before bankruptcy but the Respondent indicated that he would plead guilty thus making himself liable to a penalty. Once the committee would not accept his guilty plea, Respondent presented legal arguments based on the Charter, but that too occurred eight months prior to the bankruptcy. It is true that the imposition of a fine, as opposed to a purely non-monetary penalty, was discretionary. However, it is not erroneous to consider the imposition of a fine probable or at least more than hypothetical as at the date of the bankruptcy. As such, no palpable error of fact or mixed fact and law appears from the judgment of the Court of Quebec despite the judge's inaccurate reading of Section 121(1) *BIA*.

actionable. The test from *Thibault* confirms that a future claim must be included as a provable claim, so long as it is probable that the legal debt will arise.

[88] Under the terms of the *AAIA,* Mr. James' liability to SGI existed under s. 45(7) on the date of the bankruptcy as a possible claim. Although the debt claim had not yet crystalized at bankruptcy, the liability existed in the form of a future claim before the bankruptcy, as a condition of the insurance coverage, by statute, and on the evidence which supports a finding that liability would crystalize into an actionable debt claim, on a balance of probabilities. Moreover the incidents of liability occurred pre-bankruptcy. Mr. James caused an accident that caused injury and property damage, while he was operating a vehicle under the influence of alcohol that rendered him incapable of controlling the vehicle, before the bankruptcy.

[89] The evidence of impairment in the Motor Vehicle Accident Report Form, the Notice of Suspension, the Driver Licence Suspension, and the Accident Description; no evidence that Mr. James intended to or could rebut the criminal charges or his liability; the evidence of property damage and injury, caused by the accident, and reported at the time of the accident on the Motor Vehicle Accident Report Form and by the claimant in the Accident Description; SGI's opinion that it would be liable for the property claim identified in the July 11, 2016, s. 45(7) letter; and, based on SGI's conclusion that Mr. James would not be entitled to coverage unless he rebutted liability in the same letter all lead to a finding that the conditions were met to affirm that Mr. James would probably be liable to reimburse SGI.

[90] Based on the foregoing, I find that it was probable and not hypothetical that Mr. James would be liable for the injury and damage, that he would not be covered for the liability by SGI and that he would be liable to reimburse SGI for the settlement of both claims, before the bankruptcy.

2. Was the provable claim still too remote and speculative to be included as a claim in the bankruptcy?

[91] SGI takes the position that both claims were too remote and speculative to be valued and included in the estate, at the time of the bankruptcy. Diverging case law exists on the survival of contingent provable claims that are too remote or speculative to be valued. That issue is not pertinent to this case for reasons that follow.

[92] There is no requirement that a claim be valued prior to bankruptcy, a claim need only be valued before discharge. The *BIA* contemplates future claims at the time of bankruptcy and it provides a process for the trustee to value future claims under s.135, as a part of the bankruptcy administration.

[93] Although the debt had not yet crystalized at the date of bankruptcy, I have determined that the liability arose with the statutory and contractual relationship between Mr. James and SGI, before the bankruptcy and, accordingly, both claims are provable.

[94] I concur with the Trustee in finding that SGI's claim was legitimately admitted as a proven claim in this bankruptcy for the amount of

$22,549.00, and thus was not too remote or speculative to be included as a claim provable in the bankruptcy.

3. What terms of discharge are appropriate under the unique circumstances of this bankruptcy?

[95] As acknowledged in *Moloney,* the purpose of the *BIA* is twofold: to provide creditors with an equitable system to distribute the bankruptcy estate property and to relieve honest but unfortunate debtors from the burden of their debts so that they can become financially rehabilitated contributing members of society.

[96] Section172 of the *BIA* is designed to provide the court with some flexibility. It gives the court the authority to balance the purpose of rehabilitating the bankrupt against other policy objectives. Section 172 sets out the scope of the court's authority to deal with a discharge and s. 172(2) limits the court's authority to ordering a refusal of discharge, a conditional order of discharge, a suspended order of discharge, or a conditional order of discharge including a suspension, in cases where a fact referred to in s. 173 of the *BIA* is established.

[97] SGI submits that Mr. James' assets are not of a value equal to fifty cents on the dollar on the amount of his unsecured liabilities and that Mr. James, thereby, bears the onus of justifying this asset to debt ratio under s. 173(1).

[98] According to SGI this onus can be translated into an onus on Mr. James to establish that he cannot be justly held responsible for liability for the accident and the resulting damages that led to the debt to SGI. SGI cites the

TAB 29

Court of King’s Bench of Alberta

Citation: Taber Water Disposal Inc. (Re), 2024 ABKB 680

Date: 20241119
Docket: B301-060090/25-3060090
Registry: Calgary

In the Matter of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3, as amended

In the Matter of the Notice of Intention to make a Proposal of Taber Water Disposal Inc. and Enerstar Petroleum Corp.

Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Vesting orders are commonplace in contemporary insolvency and restructuring practice. Indeed, there is a template Approval and Vesting Order on the Court’s website. Vesting orders provide purchasers with certainty of title which de-risks assets and encourages purchasers to pay increased prices. In this way, vesting orders are essential to maximizing return for creditors of an insolvent entity. Competing claims to ownership of assets in the possession of the debtor should be identified and resolved prior to their sale in an insolvency proceeding so that the assets may be sold without a cloud over title. But what happens when a third party asserts an ownership interest in property conveyed pursuant to a vesting order in an insolvency proceeding *after* the vesting order has been granted?

[2] The applicant, 2635672 Alberta Ltd (the “Purchaser), purchased a 45% working interest in an Oilfield in southern Alberta from Taber Water Disposal Inc (“Taber Water”) and Enerstar Petroleum Corp (“Enerstar”) (together, the “Debtors”) pursuant to a *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“*BIA*”) proposal process supervised by the Court. After the completion of

(2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances.

[31] I am satisfied that, for the purposes of *BIA* s 4.2, an "interested person" includes a third party with a claim of ownership of assets in the possession of the debtor who has notice of the debtor's insolvency proceedings. Of course, a third party with an ownership claim in respect of a debtor's assets that does not have notice of the debtor's insolvency proceedings would stand on different footing.

[32] Arrow Point and Global were identified as "interested parties" on the service list and were served with materials throughout the proceedings. They were served with the materials for the April 22, 2024 application for declaratory relief concerning ownership of the Oilfield before Yamauchi J. For whatever, reason, they did not respond to the application. Arrow Point and Global were also served with the materials for the AVO application and knew or ought to have known that the Debtor's interest in the Oilfield was to be sold to the Purchaser. Arrow Point and Global were interested persons pursuant to *BIA* s 4.2 and accordingly were subject to a duty of good faith.

[33] Prior to the amendment of the *BIA* adding s 4.2, Professor Janis Sarra wrote an article advocating for a statutorily codified obligation to act in good faith: Janis Sarra, "La bonne foi est une consideration de base – Requiring Nothing Less than Good Faith in Insolvency Law Proceedings" in Janis P. Sarra, ed, *Annual Review of Insolvency Law 2014*, (Toronto: Carswell, 2009) 145. Professor Sarra outlined "principles and best practices" that "court[s] should make clear" which could provide content for a codified obligation of good faith. The principles and best practices identified by Professor Sarra at 182-83 relevant to the present case include:

- The requirement to act in good faith in insolvency proceedings is an obligation of all parties and their professionals, and is an obligation that cannot be contracted out of. The good faith standard also applies to government regulators, interim financiers, plan sponsors, <u>and all other stakeholders involved in the proceeding</u>.

  ...

- In determining good faith, the court will determine if the debtor, creditors, <u>other stakeholders</u> and their professionals have acted candidly, honestly, forthrightly and reasonably in their dealings with one another and the court. Dealings in this respect would include dealings from the commencement of the proceedings to final resolution, including negotiation for, and implementation of, a proposal or plan under the *BIA* or *CCAA*.

- <u>All stakeholders</u> in insolvency proceedings should have appropriate regard for the legitimate interests of the other creditors and stakeholders, "appropriate regard" requiring that the parties not seek to undermine the interests of others in bad faith.

- The good faith obligation includes a duty of creditors <u>and other stakeholders</u> to disclose all of their real economic interests in the insolvency proceedings.

.... [emphasis added]

[34] The *BIA* s 4.2 duty of good faith in the present case required Arrow Point to come forward with its claim to the disputed interest in the Oilfield at the AVO application or before. Arrow Point's silence was contrary to the interests of the Debtor, creditors, and the Purchaser. Moreover, Arrow Point's conduct is anathema to the efficient administration of the insolvency process.

[35] How should Arrow Point's breach of its duty of good faith be addressed by the Court? What is the appropriate remedy now that Arrow Point has sold its disputed interest in the Oilfield to Whitehaven? *BIA* s 4.2(2) provides the Court with broad remedial discretion. The appropriate remedy, in my view, is an adverse inference that Arrow Point did not own the disputed interest in the Oilfield. Arrow Point's non-participation in the insolvency proceedings is consistent with it not having a *bona fide* interest in the Oilfield. And, as will be explained in the following section of these Reasons, even absent the adverse inference, the evidence weighs in favour of finding that Arrow Point did not have a legitimate claim to the Debtor's interest (and now the Purchaser's interest) in the Oilfield.

V. Ownership of the Oilfield

[36] The interest in the Oilfield that is now in dispute was originally wholly owned by Arrow Point. At some point, Arrow Point or Global conveyed a 55% interest in the Oilfield to Whitehaven and Title Shot.

[37] Arrow Point assigned a 45% working interest in the Oilfield to Global. Arrow Point and Global were affiliates, both under the control of Mr. von Gramatzki. Mr. von Gramatzki deposed that he had "no recollection of Whitehaven ever consenting to a transfer of a 45% working interest from Arrow Point to Global One under the joint operating agreement for the oilfield – which as I understand would mean the 45% working interest remains with Arrow Point (being the original purchaser of the oilfield)." Mr. von Gramatzki assumed that Whitehaven was required to consent to such a transfer and offered an opinion with respect to the legal effect of the lack of consent. This is not proper evidence so I do not accept Mr. von Gramatzki's opinion on these points.

[38] The 1990 CAPL Operating Procedure and 1993 CAPL Assignment Procedure that govern the Oilfield and are in evidence before the Court do not require consent when the transfer is between affiliates. Accordingly, Whitehaven was not required to consent to the transfer of the working interest from Arrow Point to Global. Further, Arrow Point and Global entered into an Assignment Agreement dated May 23, 2017 with PrairieSky Royalty Ltd ("PSRL") whereby PSRL as lessor consented to the assignment of a 45% interest in its lease from Arrow Point to Global. The Assignment Agreement with PSRL, an arm's length third party, is strong evidence that the assignment of the 45% interest in the Oilfield from Arrow Point to Global occurred. The subsequent dealings between Global and Enerstar all indicate that Mr. von Gramatzki believed that Global possessed the 45% interest in the Oilfield.

[39] The only evidence before the Court is consistent with the 45% interest in the Oilfield passing from Arrow Point to Global. This is fatal to Whitehaven's position because it asserts that Arrow Point, not Global, was the true owner of the 45% interest in the Oilfield until Whitehaven's recent purported purchase of the interest.

[40] Enerstar acquired the 45% working interest in the Oilfield from Global by way of a Purchase Agreement dated November 8, 2018 that was amended November 19, 2018. Mr. von Gramatzki acknowledged signing both the Purchase Agreement and the Purchase Agreement Amendment in his capacity as President of Global.

[41] According to the closing agenda, the transaction between Enerstar and Global was to close on November 19, 2018. Mr. von Gramatzki signed a document dated November 19, 2018 indicating Global's receipt of $404,000 as payment pursuant to the Purchase Agreement.

[42] Mr. von Gramatzki signed a notice of assignment of Global's interest in the Oilfield to Enerstar dated November 19, 2018. The notice of assignment was provided to Whitehaven and Arrow Point, the other registered working interest participants in the Oilfield at the time. Also on November 19, 2018, Mr. von Gramatzki wrote to PSRL to advise that "Global One GP Limited assigned its entire interest in certain leases to Enstar [*sic*] Petroleum Corp." Pursuant to the notice of assignment, Whitehaven had until January 1, 2019 to object to the assignment.

[43] A week later, Mr. Coney, the President of Enerstar, emailed the President of Whitehaven, Mr. Hosie, seeking his support for replacing Arrow Point as operator of the Oilfield. Mr. Hosie agreed that Arrow Point must be replaced as operator because it was insolvent. The following day, on behalf of Whitehaven, Mr. Hosie signed a notice addressed to Arrow Point removing it as operator of the Oilfield and appointing Enerstar in its place. The joint notice stated, "Whitehaven Beach Capital Corp, as a signatory to this notice, acknowledges and consents to the appointment of Enerstar Petroleum Corp."

[44] On December 27, 2018, Mr. Hosie sent an email to Mr. Coney that, among other things, stated, "[s]ince your 45% working interest started mid November...." Despite this seeming acknowledgement of Enerstar's interest in the Oilfield, four days later Mr. Hosie wrote to Global and Arrow Point objecting to the assignment of Global's working interest to Enerstar ("Notice of Objection"). There is no evidence that Whitehaven's Notice of Objection was contemporaneously provided to Enerstar. Whitehaven's objections were:

> 1) The purported transaction between Global One GP Limited and Enstar [*sic*] Petroleum Corp. is void and inoperative given that Enstar [*sic*] Petroleum Corp. does not exist and that Global One GP Limited is not an Assignor under the Master Agreement or a party to any relevant documentation.
>
> 2) The Notices of Assignment dated November 19, 2018 attached to this letter are fraudulent, void and inoperative.
>
> 3) The purported transaction is not exempt under the 1990 CAPL Operating Procedure.

[45] Whitehaven's first objection appears to be based on a spelling mistake – believing the assignee to be Enstar, not En<u>e</u>rstar – and the mistaken belief that Arrow Point remained the owner of the 45% interest in the Oilfield. The second objection is a bald allegation devoid of particulars. And the third objection, though accurate, neglects to address the fact that under cl 2401, Alternate B, where the objecting party does not elect to purchase the property, pursuant to (e) "consent shall not be unreasonably withheld." The Whitehaven notice of objection to the transfer to Enerstar does not provide a genuine reason for objecting to the transfer.

TAB 30

SUPREME COURT OF CANADA

CITATION: Poonian *v.* British Columbia (Securities Commission), 2024 SCC 28

APPEAL HEARD: December 6, 2023
JUDGMENT RENDERED: July 31, 2024
DOCKET: 40396

BETWEEN:

Thalbinder Singh Poonian and Shailu Poonian
Appellants

and

British Columbia Securities Commission
Respondent

- and -

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Association of Insolvency and Restructuring Professionals, Superintendent of Bankruptcy, Federation of Law Societies of Canada, Alberta Securities Commission, Ontario Securities Commission and Osgoode Investor Protection Clinic
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 116)	Côté J. (Wagner C.J. and Rowe, Jamal and O'Bonsawin JJ. concurring)
REASONS DISSENTING IN PART: (paras. 117 to 142)	Karakatsanis J. (Martin J. concurring)

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

Thalbinder Singh Poonian and
Shailu Poonian *Appellants*

v.

British Columbia Securities Commission *Respondent*

and

Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Association of Insolvency
and Restructuring Professionals,
Superintendent of Bankruptcy,
Federation of Law Societies of Canada,
Alberta Securities Commission,
Ontario Securities Commission and
Osgoode Investor Protection Clinic *Interveners*

Indexed as: Poonian *v.* British Columbia (Securities Commission)

2024 SCC 28

File No.: 40396.

2023: December 6; 2024: July 31.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency — Debts not released by order of discharge — Provincial securities commission imposing administrative penalties and disgorgement orders on bankrupts for breach of securities legislation — Commission applying to prevent release of debts by order of discharge on basis of exceptions set out in federal bankruptcy legislation — Whether commission's administrative penalties and disgorgement orders fall within exceptions provided for in bankruptcy legislation such that they are not released by order of discharge and therefore survive bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(1)(a), (e).

Between 2007 and 2009, the bankrupts engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The British Columbia Securities Commission found that the bankrupts had contravened the province's *Securities Act*. It ordered the bankrupts to pay $13.5 million in administrative penalties; it also ordered them to disgorge approximately $5.6 million, which represented the amounts they obtained as a result of the market manipulation scheme. These sanctions were registered with the Supreme Court of British Columbia pursuant to the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court.

Section 178(1) of the *Bankruptcy and Insolvency Act* sets out a specific list of debts that are not released by an order of discharge and that therefore survive bankruptcy. Relying on some of these exceptions, the Commission applied for a declaration that the amounts owed to it by the bankrupts, who remain undischarged, not be released by any order of discharge. The chambers judge allowed the application, finding that the exceptions in s. 178(1)(a) — "any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail" — and in s. 178(1)(e) — "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation" — both applied and that the bankrupts' debts were exempt from and would survive any discharge. The bankrupts appealed. According to the Court of Appeal, the debts were not exempt from discharge pursuant to s. 178(1)(a) because the Commission's decisions could not be said to have been "imposed" by a court as required by the provision. However, the court upheld the chambers judge's conclusion that both the administrative penalties and the disgorgement orders were exempt under s. 178(1)(e). Given that the debts were still exempt, the appeal was dismissed.

Held (Karakatsanis and Martin JJ. dissenting in part): The appeal should be allowed in part.

Per Wagner C.J. and **Côté**, Rowe, Jamal and O'Bonsawin JJ.: Neither the administrative penalties nor the disgorgement orders are exempt from discharge pursuant to s. 178(1)(a). The words "imposed by a court" in s. 178(1)(a) do not capture orders made by administrative tribunals or regulatory agencies, such as the

Commission, that are subsequently registered as judgments of a court. In addition, the administrative penalties do not come within the exception in s. 178(1)(e), as they did not result directly from the fraudulent scheme; rather, they arose indirectly as a result of the Commission's decision to sanction the bankrupts. The disgorgement orders, however, are captured by the s. 178(1)(e) exception because there is a direct link between them and the bankrupts' fraudulent conduct. Therefore, they will not be released by any possible future order of discharge.

For a debt to survive bankruptcy under s. 178(1)(a), the creditor must establish that the debt is (1) a fine, penalty, restitution order or other order similar in nature, (2) imposed by a court, and (3) imposed in respect of an offence. This provision is not restricted to penalties associated with criminal or quasi-criminal proceedings. However, the word "court" does not capture administrative tribunals or regulatory bodies. If Parliament had wanted fines, penalties, restitution orders or other orders similar in nature imposed by regulatory bodies, administrative tribunals or other administrative decision makers to be exempt from discharge under this section, it could have said so expressly. Moreover, this provision cannot be read so broadly as to include fines imposed by tribunals that are registered in a court. The registration of a decision with a court does not change the fact that it was made and imposed by an administrative decision maker, nor does it overcome the requirement that the exempt debt be imposed by a court. When a decision is registered with a court, the court's involvement is passive, whereas the act of "imposing" a fine, penalty, restitution order or other order similar in nature requires that the court be actively involved in making the decision. In the instant case, the administrative penalties and disgorgement orders were imposed by the Commission, not by a court, and therefore are not captured by s. 178(1)(a).

For a debt or liability to survive bankruptcy under s. 178(1)(e), the creditor must establish three elements: (1) false pretences or fraudulent misrepresentation; (2) a passing of property or provision of services; and (3) a link between the debt or liability and the fraud. To establish the first requirement, the onus is on the creditor to prove that the debts or liabilities were obtained as a result of the debtor's false pretences or fraudulent misrepresentation. A court cannot take judicial notice of fraud, nor can it infer fraud in a cursory manner. When a party relies on the findings and conclusions of an administrative decision maker to establish that the debtor made a fraudulent statement, the court must still make its own determination based on a review of the record, even where the administrative findings of fraud are express. The evidence tendered to prove fraud or dishonesty must be clear and cogent and courts must be consistent and rigorous in assessing the evidence presented to them in this regard. Even where all of the required findings for false pretences or fraudulent misrepresentation have been expressly made by an administrative decision maker, a determination of whether the claim falls within one of the categories of non dischargeable claims must be made by a court.

To establish the second requirement, there must be a loss in the form of a transfer of property or delivery of services, as well as a debt or liability corresponding to that loss. Section 178(1)(e) does not require that the bankrupt be the recipient of the property of which a person was deprived. The property need not have been obtained, or retained, by the bankrupt and may have passed directly or indirectly from the person to a third party at the bankrupt's direction or on his or her behalf. What is required is that the fraudulent misrepresentation induced a person to give the property to the bankrupt or someone associated with the bankrupt.

To establish the third requirement, the debt or liability must have been created as a result of false pretences or fraudulent misrepresentation. This requires a direct link whereby only the debt or liability that represents the value of the property or services obtained by false pretences or fraudulent misrepresentation qualifies as non dischargeable. While in most cases, the claiming creditor will be the party directly victimized by the false pretences or fraudulent misrepresentation, the wording of s. 178(1)(e) does not import a direct victim requirement. A creditor who is not a direct victim is thus not barred from bringing a claim under this section provided that the claim is the result of a person being deprived of property or services after having detrimentally relied on the debtor's false pretences or fraudulent misrepresentation.

In the instant case, the first s. 178(1)(e) requirement is met. The market manipulation was characterized as fraudulent by both the Commission and the chambers judge, because the bankrupts falsely and knowingly misrepresented the price of shares in order to turn a profit. The second requirement is also met, as the bankrupts obtained property or services as a result of their fraudulent misrepresentation. While some of the amounts obtained as a result of the market manipulation scheme were obtained indirectly, it is not necessary that the bankrupt directly obtain or retain the property for the s. 178(1)(e) exception to apply. The property may pass from a person or group of people (the deceived investors) to a third party (another participant) at the direction of the bankrupt.

With respect to the third requirement, it is not met in the case of the administrative penalties, which therefore do not survive a discharge from bankruptcy under s. 178(1)(e). A direct link between the debt or liability and the fraudulent conduct is required and it is only the value of the property or services obtained as a result of that conduct that is not released by an order of discharge. The debt represented by the Commission's administrative penalties did not result directly from the bankrupts' fraudulent misrepresentation, but arose indirectly as a result of the Commission's decision to sanction them for having obtained property through deceitful statements to investors. If the exempt debt or liability is not restricted to the value of the property or services obtained by false pretences or fraudulent misrepresentation, then s. 178(1)(e) has the potential to capture debts or liabilities that are not the direct result of deceit.

However, the Commission's disgorgement orders are captured by the s. 178(1)(e) exception and will not be released by any order of discharge. Where a person has not complied with a provision of the *Securities Act*, the Commission may order that person to pay to it any amount obtained as a result of the failure to comply. The disgorgement orders were made under the *Securities Act* and represent the value of the bankrupts' fraud — the funds that they gained as a result of their market manipulation. There is therefore a direct link between the fraudulent conduct of the bankrupts and the Commission's disgorgement orders.

Per **Karakatsanis** and Martin JJ. (dissenting in part): The appeal should be dismissed. Although there is agreement with the majority that the administrative penalties and the disgorgement orders imposed by the Commission do not survive bankruptcy under s. 178(1)(a), both the disgorgement orders and the administrative penalties properly fall within the narrow scope of s. 178(1)(e) and should not be released by any order of discharge. They are both debts that originate from the bankrupts having obtained property by false pretences or fraudulent misrepresentations. Both are monetary sanctions imposed because of, and thus resulting from, deceitful conduct that Parliament specifically sought to address.

There is disagreement with the majority regarding the scope of the causation requirement contemplated by the words "resulting from" in s. 178(1)(e) and the degree of link required between the debt and the deceitful behaviour. Just as s. 178(1)(e) does not require that there be an exact correlation between the person claiming the exemption and the victims of that deceitful conduct, it does not require that the quantum of the debt or liability be limited by the quantum of the property obtained as a result of that deceitful conduct. Such a requirement is unsupported by the jurisprudence, is not found in the text of the provision, and is inconsistent with the provision's central focus. The central focus is the deceitful conduct at the source of the debt or liability, not the exact gain derived thereby.

A direct causation requirement does not mean that the debt or liability must be limited to the value of the property obtained; rather it means that where only part of a liability can be traced to deceitful conduct, but not the balance, only the part induced by fraudulent conduct will be exempt from discharge. Where a debt or liability is entirely caused by fraudulent conduct, such as punitive damages imposed to sanction the conduct, there is no reason to limit the application of s. 178(1)(e) only to the gain ultimately obtained by the bankrupt. The jurisprudence in fact overwhelmingly shows that punitive damages exceeding the value of the property obtained qualify for the exception as long as they directly result from the deceitful conduct targeted by s. 178(1)(e).

In the instant case, the amounts the Commission submits should survive discharge have as their only source or origin the bankrupts' deceitful conduct. Both the disgorgement orders and the administrative penalties under the *Securities Act* are monetary sanctions for the unlawful conduct. Like punitive damages imposed at private law, the administrative penalties arise directly from the type of conduct that they sanction. To exclude administrative penalties on the basis that they have an element of general deterrence amounts to reading in an additional limitation that is found nowhere in the text of the provision, and is inconsistent with the purpose of the exception.

Parliament has determined that some bankrupts simply do not deserve to be free of particular debts, based on the nature of the conduct giving rise to those debts. It provided for many exceptions to the fresh start principle, in s. 178(1), that are focused

I. Introduction

[1] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), furthers two important purposes: the equitable distribution of a bankrupt's assets among creditors and the bankrupt's financial rehabilitation. Financial rehabilitation means that a debtor will be afforded a "fresh start" when appropriate. The fresh start principle is codified in s. 178(2) of the *BIA*; it allows a bankrupt to be released from outstanding debts at the end of the bankruptcy process. Thus, subject to reasonable conditions, the *BIA* permits an honest but unfortunate debtor to be freed from the burdens of indebtedness and to reintegrate into economic life.

[2] Financial rehabilitation operates as the general rule, such that every provable claim is presumptively swept into the bankruptcy. However, it has its limits. Through s. 178(1) of the *BIA*, Parliament has enacted specific exceptions to this general rule. An order of discharge does not release the bankrupt from a claim captured by a s. 178(1) exception. Indeed, where an exception applies, the fresh start principle yields to certain overriding policy objectives which demand that such a claim survive a discharge from bankruptcy.

[3] This appeal requires our Court to interpret two of these exceptions, codified in s. 178(1)(a) and (e) of the *BIA*. It arises in the context of the application of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418. Our Court must determine whether the administrative financial penalties and/or the disgorgement orders imposed

by the respondent, the British Columbia Securities Commission ("Commission"), survive a discharge from bankruptcy under one of these exceptions.

[4] The appellants, Thalbinder Singh Poonian and Shailu Poonian, are undischarged bankrupts. Between 2007 and 2009, the Poonians engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The Commission found that the Poonians had contravened s. 57(a) (now s. 57(1)(a)) of the *Securities Act*. It ordered the payment of administrative penalties by both Mr. Poonian ($10 million) and Ms. Poonian ($3.5 million). The Commission also issued orders pursuant to s. 161(1)(g) of the *Securities Act* requiring Mr. Poonian to disgorge $1,319,167 as well as $1,126,260 jointly and severally with another participant, and requiring Ms. Poonian to disgorge $3,149,935. The disgorgement orders represent the amounts the Poonians obtained as a result of the market manipulation scheme.

[5] Relying on the exceptions set out in s. 178(1) of the *BIA*, the Commission applied for a declaration that the amounts owed to it by the Poonians not be released by any order of discharge. The question before our Court is whether the administrative penalties and/or the disgorgement orders imposed by the Commission can be characterized as either "any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail" (s. 178(1)(a)) or "any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim"

(s. 178(1)(e)). If so, they will not be released by any order of discharge and will survive bankruptcy.

[6] For the reasons I explain below, I conclude that the administrative penalties imposed by the Commission do not fall within the exceptions set out in either s. 178(1)(a) or (e) and therefore do not survive a discharge from bankruptcy on those bases. I also conclude that the disgorgement orders imposed by the Commission do not fall within the s. 178(1)(a) exception and do not survive a discharge from bankruptcy on that basis. However, they are captured by s. 178(1)(e) and therefore will not be released by any possible future order of discharge.

II. Facts

[7] On August 29, 2014, the Commission found that the Poonians, together with a number of relatives, friends and acquaintances, had engaged in market manipulation, contrary to s. 57(a) of the *Securities Act*. The Poonians had acquired a majority position in a public oil and gas company called OSE Corp. ("OSE") and had then increased the price of OSE's shares by various manipulations, including trades between themselves. Using pseudonyms and multiple nominee accounts, they had artificially inflated the share price from $0.10 to $0.17 per share to a high of near $2.00.

[8] The Commission found that the Poonians, and those working with them in this scheme, had sold the overpriced OSE shares to investors with the assistance of an entity called the Phoenix Group. The Poonians had paid commissions to the Phoenix

Group, which had in turn encouraged its clients, generally unsophisticated investors seeking to escape personal debt through investment in higher-yield vehicles, to purchase OSE shares at the artificially inflated prices.

[9] The Commission described the scheme as "serious misconduct" and as "elaborate, involving layers of deception to conceal the . . . participation [of the Poonians and their associates] in the manipulation" (2015 BCSECCOM 96 ("Sanctions Decision"), at para. 17 (CanLII)). The Commission ordered the payment of administrative penalties by Mr. Poonian ($10 million) and Ms. Poonian ($3.5 million) (para. 96). The Commission later issued orders pursuant to s. 161(1)(g) of the *Securities Act*, which are commonly referred to as disgorgement orders. Mr. Poonian was ordered to disgorge $1,319,167 to the Commission and an additional $1,126,260 on a joint and several basis with another participant in the scheme, and Ms. Poonian was ordered to disgorge $3,149,935 (2018 BCSECCOM 160 ("Reassessment Decision"), at para. 85 (CanLII)). As a result, the Poonians together owe $19,095,362 (plus interest) to the Commission. These sanctions were registered with the Supreme Court of British Columbia pursuant to s. 163 of the *Securities Act*, which provides that, on being filed in a registry of that court, a decision of the Commission has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of that court. The Poonians owe $4,335,252.60 to their next largest creditor, the Canada Revenue Agency.

[10] On April 20, 2018, the Poonians made a voluntary assignment in bankruptcy. On February 13, 2020, they applied for discharge from bankruptcy, which the Commission and the Canada Revenue Agency opposed. The Supreme Court of British Columbia dismissed the Poonians' application on April 8, 2020, and they remain undischarged bankrupts.

III. Judicial History

A. *Supreme Court of British Columbia, 2021 BCSC 555 (Crerar J.)*

[11] The Commission applied to the Supreme Court of British Columbia for a declaration that the debts represented by the administrative penalties and disgorgement orders not be released by any order of discharge, pursuant to s. 178(1)(a), (d) and (e) of the *BIA*. The chambers judge allowed the Commission's application, finding that the debts were exempt from and would survive any discharge. While only one exception had to apply for the debts not to be released, the chambers judge found that the exceptions in s. 178(1)(a) and (e) both applied.

[12] With respect to s. 178(1)(a), the chambers judge rejected the Poonians' argument that it applies only to fines, penalties or restitution orders imposed in criminal or quasi-criminal proceedings. He noted that the inclusion of the words "restitution order" in s. 178(1)(a) implies that the scope of this provision extends beyond monetary orders imposed in a criminal or quasi-criminal context. The chambers judge also rejected the Poonians' argument that an order of the Commission that is subsequently

[52] In the same way, the Commission's disgorgement orders are not captured by s. 178(1)(a). The disgorgement orders were imposed by the Commission, not by a court.

(2) Section 178(1)(e)

[53] The Commission also relies on the s. 178(1)(e) exception:

> **178 (1)** An order of discharge does not release the bankrupt from
>
> . . .
>
> **(e)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

[54] For a debt or liability to survive bankruptcy pursuant to s. 178(1)(e), the creditor must establish three elements: (1) false pretences or fraudulent misrepresentation; (2) a passing of property or provision of services; and (3) a link between the debt or liability and the fraud (*Hennig* (C.A.), at para. 57, citing *McAteer v. Billes*, 2007 ABCA 137, 409 A.R. 143, at para. 16).

[55] My colleague Karakatsanis J. and certain courts have held that s. 178(1)(e) embodies a "morality concep[t]" which "ensures that a deceitful wrongdoer will not be able to use the court system and the state's bankruptcy provisions as a mechanism for avoiding the consequence of his or her actions" (*Cruise Connections Canada v. Szeto*, 2015 BCCA 363, 78 B.C.L.R. (5th) 82, at para. 15; see also *Jerrard*, at p. 206; *Bryant*

v. Benjamin, 2023 QCCA 1021, at para. 42 (CanLII); see Karakatsanis J.'s reasons, at paras. 138-39). While I essentially agree that s. 178(1)(e) targets morally blameworthy conduct, I share the view stated by Professors Girgis and Telfer:

> . . . the common feature that underlies most cases interpreting section 178(1)(e), though sometimes imperfectly expressed, is the protection of creditors who have been victimized by deceitful statements. The case law in this area interprets this provision to target morally blameworthy conduct that <u>gave rise to debt</u>, not simply morally blameworthy conduct. [Emphasis added.]
>
> ((2023), at p. 452; see also *Shaver-Kudell*, at para. 23.)

[56] The Superintendent of Bankruptcy takes a similar view. Intervening on appeal, the Superintendent explains that s. 178(1)(e) "is aimed at making fraud victims whole, rather than at preserving penalties imposed for deterrence purposes" (I.F., at para. 18). By not releasing debts or liabilities that resulted directly from deceit, s. 178(1)(e) prevents debtors "from profiting as a result of their wrongdoing" (*H.Y. Louie Co. v. Bowick*, 2015 BCCA 256, 386 D.L.R. (4th) 117, at para. 47, per Newbury J.A., dissenting, but not on this point). I therefore disagree with my colleague that the "central focus" of s. 178(1)(e) is "deceitful conduct", not the "gain derived" from that conduct (para. 126 (emphasis deleted)). I am of the view that in the interpretation of s. 178(1)(e), "deceitful conduct" and "gain derived" are two inextricably linked concepts.

[57] Furthermore, it is through s. 172 of the *BIA* that Parliament has entrusted bankruptcy courts with broad discretion to decide whether morally reprehensible

TAB 31

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-065381-259

DATE: October 23, 2025

BY THE HONOURABLE LUC MORIN, J.S.C.

<u>IN THE MATTER OF THE PLAN OF ARRANGEMENT OR COMPROMISE OF:</u>

9550-1714 QUÉBEC INC.
-and-
9550-1870 QUÉBEC INC.

Debtors/APPLICANTS

-and-

ERNST & YOUNG INC

Monitor

-and-

PROMAN SERVICES CANADA INC.

Respondent

-and-

THE OTHER PARTIES LISTED IN THE MONITOR'S SERVICE LIST

Impleaded Parties

JUDGMENT[1]

I- OVERVIEW

[1] *"Je me souviens"* that our neighbouring province is *"Open for Business."*

[2] This blend of Quebec and Ontario's respective slogans is a colourful way of illustrating that the issue before the Court is not one of jurisdictional turf or territorial pride, it is, quite simply, a matter of efficiency.

[3] At the core of this matter is a dispute between the four partners behind the Varennes Cellulosic Ethanol waste-to-biofuel project. The backstory needs not be rehashed. Between the Monitor's reports and extensive media coverage, the picture is not pretty: this is a classic tale of ambitious projections colliding with market realities.

[4] As expectations fell short, finger-pointing followed. Three of the four partners[2]— Shell, IQ Equity Holdco, and Suncor— blame the fourth, Proman Canada[3], for not fulfilling its funding commitments under the parties' *Limited Partnership Agreement[4]* ("**LPA**"). Proman Canada, for its part, responds with equal blame.

[5] Each side accuses the other of precipitating the insolvency of the Former CCAA Parties[5]. Approximately **$16,3M** is at stake, i.e. the amount of the unanswered capital-call by Proman Canada.

---

[1] *Les juges de la Cour supérieure doivent soumettre leurs projets de jugement au Service de traduction, mais en raison de contraintes techniques et opérationnelles, une traduction du présent jugement ne peut être jointe immédiatement et sans délai conformément à l'article 10 de la Charte de la langue française. Après vérification auprès du Service de traduction, la traduction du présent jugement devrait être disponible sous peu, mais considérant les enjeux d'affaires importants propres à une affaire soulevant des enjeux d'insolvabilité et de l'impact qu'une incertitude sur la finalité puisse avoir sur le sort réservé à la continuation d'un litige qui se trouve au cœur de la réalisation des actifs restants, le Tribunal émettra le présent jugement en langue anglaise, la traduction sera produite au dossier de la Cour dans les meilleurs délais. En optant pour cette solution, le Tribunal tient à souligner que dans la présente affaire, les procédures et les documents contractuels liant les parties étaient rédigées en anglais.*

[2] *Shell Canada Limited* ("**Shell**"), *9429-8114 Québec Inc.* ("**IQ Equity Holdco**") and *Suncor Energy Inc.* ("**Suncor**").

[3] There are two Proman entities involved: *Proman Services Canada Inc.* ("**Proman Canada**") and its parent company, *Proman GmbH* ("**Proman Switzerland**").

[4] Exhibit R-1.

[5] Because of the RVO structure of the transaction that was approved by this Court on October 6th, the CCAA Parties have been substituted by the Applicants, serving as Residual Cos pursuant to the RVO Approval Order.

[76] Nonetheless, in these circumstances, the Monitor's recommendation should have been more robust, better documented and, importantly, more distanced from any perception of influence.

[77] The politically sensitive context, combined with the Monitor's ongoing efforts to obtain funding from a stakeholder with a vested interest in the outcome, warranted a higher standard of caution and independence.

[78] Unfortunately, this is a case where the Court cannot blindly rely on the Monitor's assessment and follow its recommendation.

(v) The Dispute Should Proceed Through the Arbitration Process

[79] Taken together, these factors only reinforce the conclusion that the arbitration, already well underway, remains the most appropriate and efficient forum for resolving the dispute.

[80] In the Court's view, the evidence submitted by the Applicants and the Monitor does not meet the threshold required to establish, on a balance of probabilities, that it would be faster, cheaper, and more efficient to resolve the dispute through the CCAA Court rather than continuing the already well-advanced arbitration.

[81] Certainly, the evidence does not support that allowing the arbitration to proceed would result in a level of disruption sufficient to jeopardize the restructuring process or seriously impair the CCAA parties' ability to achieve a successful restructuring.

[82] In the end, the Court is of the view that the Applicants have not discharged their heavy burden of establishing that the agreed-upon arbitration process should be set aside and declared inoperative.

[83] The evidence does not support the need for this Court to intervene in the name of efficiency or the public interest in ensuring an orderly and effective restructuring process for the benefit of all stakeholders.

[84] The arbitration is already well advanced, is governed by Ontario law and, now that the RVO Transaction has closed, it should be brought back to the front burner.

(vi) A Cautionary Note on Transparency

[85] During the hearing, the Court expressed concerns regarding the confidentiality inherent to arbitration proceedings. Proman Canada, quite understandably, emphasized that confidentiality is a hallmark of arbitration, one of its defining features.

[86] But as the saying goes, *"democracy dies in darkness."* And if that much is true, then insolvency surely dies in opacity.

[87] If the confidentiality of arbitration is to be preserved fully — even under the purview of the CCAA — this could result in an unacceptable level of opacity in a process that demands transparency.

[88] That cannot be right.

[89] Commercial insolvencies often carry significant consequences: unpaid suppliers, employees facing job losses, creditors falling short on repayment, and shareholders seeing their equity wiped out. The CCAA exists to mitigate such outcomes by encouraging the restructuring of viable businesses and avoiding the destruction of value through a forced liquidation. It is a tool that allows the preservation of going-concern value and aims to bridge the gap between distressed capital and distressed opportunity.

[90] But this process — this remedy — only works in an environment of transparency.

[91] The extraordinary powers granted under Canadian insolvency legislation are not to be exercised in the shadows. The stakes are too high. The pace of restructuring, where decisions must often be made quickly and with limited information, demands a level of openness that ensures all affected stakeholders have confidence in the process. Tactical and strategic advantages that may be available in ordinary commercial disputes are often, and rightly, set aside in favour of broader stakeholder protection.

[92] So, should the arbitration be conducted in complete confidentiality?

[93] Counsel for Proman Canada argued that the final arbitration award will likely become public, either because the Monitor will seek its homologation by the Court or because any resulting distribution will require the decision to be filed in the Court record. They also pointed to an exception granted in the Initial Order allowing Interim Lenders to access documentation exchanged in the arbitration.

[94] These are fair points. But the core of the arbitration dispute goes directly to what may, or may not, have triggered the CCAA filing itself. As such, a wide range of stakeholders may have a legitimate interest in understanding the outcome of that process.

[95] The Court will not resolve this issue today. It is a question for another day, perhaps one best considered by its Officer, who is better placed to assess its implications within the current context.

[96] That said, and to be clear, the Court expects the Monitor, its eyes and ears on the ground, to provide regular updates on the progress of the arbitration and ensure that the interests of transparency and fairness remain protected throughout.

III- CONCLUSION

[97] The Court feels compelled to sound a note of caution regarding the expanding use of the CCAA as a catch-all solution for complex shareholders/partnership disputes with

insolvency features. In hindsight, this CCAA proceeding appears to have served — at least in part — as leverage in a broader partnership dispute.

[98] Some[26] might characterize this as an instance of "artificial insolvency" — a situation where insolvency is strategically triggered to gain an advantage in an underlying shareholder or partnership conflict. While insolvency legislation does not distinguish between "real" and "artificial" insolvency, the extraordinary powers conferred by both the BIA and the CCAA must always be exercised in service of a proper purpose.

[99] There is no need for *"Monday Morning Quarterbacking"* here. We are in the final drive of the fourth quarter of a well-managed restructuring process, led by a stellar cast of insolvency professionals on all sides.

[100] But this judgment provides a full circle moment: it is now time for the parties to resolve the very dispute that led them here today in the forum they initially agreed to.

[101] A well-deserved closing remark: the Court was provided with comprehensive outlines of arguments and supporting authorities well in advance of the hearing. The quality of the written and oral submissions was exemplary, and the Court wishes to acknowledge the stellar work of all counsel involved, which greatly facilitated its understanding and deliberation.

FOR THESE REASONS, THE COURT:

[102] **DISMISSES** the Applicant's *Re-Amended Motion for the Transfer if the Arbitration Proceedings under the present CCAA Proceedings*.

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

LUC MORIN, J.S.C.

Mtre Joseph Reynaud
Mtre Darien Bahry
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Attorneys for the Debtors/APPLICANTS
9550-1714 Québec Inc. and *9550-1870 Québec Inc.*

[26] Guillaume MICHAUD and Charlotte DION, *"Hijacking or Harnessing the CCAA? Revisiting the use of CCAA Restructurings in the Context of Shareholder Disputes and Situations of Artificial Insolvencies"*, Journal of Insolvency In Canada, Vol. 14, 2025 [2025 J.I.I.C.]. See also: Alain RIENDEAU and Brandon FARBER, *"Using the CCAA to Achieve a Global Resolution of Complex Litigation "To infinity and beyond" – Buzz Lightyear Toy Story."*, [2016] Ann. Rev. Insol. L.

TAB 32

SUPREME COURT OF CANADA

CITATION: Peace River Hydro Partners *v.* Petrowest Corp., 2022 SCC 41

APPEAL HEARD: January 19, 2022
JUDGMENT RENDERED: November 10, 2022
DOCKET: 39547

BETWEEN:

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation
Appellants

and

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. and Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd.
Respondents

\- and -

Canadian Commercial Arbitration Center, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and Canadian Federation of Independent Business

Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 189)	Côté J. (Wagner C.J. and Moldaver, Rowe and Kasirer JJ. concurring)
CONCURRING REASONS: (paras. 190 to 199)	Jamal J. (Karakatsanis, Brown and Martin JJ. concurring)

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

Peace River Hydro Partners,
Acciona Infrastructure Canada Inc.,
Samsung C&T Canada Ltd.,
Acciona Infraestructuras S.A. and
Samsung C&T Corporation *Appellants*

v.

Petrowest Corporation,
Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing,
Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting,
Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals,
Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP,
Trans Carrier Ltd. and
Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and
Trans Carrier Ltd. *Respondents*

and

Canadian Commercial Arbitration Center,
Arbitration Place,
Chartered Institute of Arbitrators (Canada) Inc.,
Insolvency Institute of Canada and
Canadian Federation of Independent Business *Interveners*

Indexed as: Peace River Hydro Partners *v.* Petrowest Corp.

2022 SCC 41

File No.: 39547.

2022: January 19; 2022: November 10.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy and insolvency — Court-ordered receivership — Enforceability of arbitration agreement — Receiver commencing civil action for payment of amounts allegedly owed to debtors under agreements that include mandatory arbitration clauses — Defendants seeking stay of proceedings of receiver's action under provincial arbitration legislation on basis that arbitration clauses govern dispute — Receiver opposing stay and arguing that court authorized to assert centralized judicial control over matter under federal bankruptcy and insolvency legislation — Whether receiver's action should be stayed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 183(1), 243(1) — Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.

Peace River is a partnership formed to build a hydroelectric dam in northeastern British Columbia. Peace River subcontracted work to Petrowest, an Alberta-based construction company, and its affiliates. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration ("Arbitration Agreements"). When Petrowest encountered financial difficulties, the Alberta Court of Queen's Bench granted an order ("Receivership Order"), pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*"), appointing a receiver ("Receiver") to manage the assets and property of Petrowest and its affiliates. The Receiver then brought a civil claim against Peace River seeking to collect funds allegedly owed to Petrowest and its affiliates for subcontracted work. Peace River applied under s. 15 of British Columbia's *Arbitration Act* for a stay of proceedings on the ground that the Arbitration Agreements governed the dispute. The chambers judge dismissed the stay application and the Court of Appeal dismissed Peace River's appeal.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, **Côté**, Rowe and Kasirer JJ.: The civil claim brought by the Receiver should be allowed to proceed. Section 15 of the *Arbitration Act* does not require a court, in every case, to stay a civil claim brought by a court-appointed receiver where the claim is subject to a valid arbitration agreement. A court may decline to grant a stay where the arbitration agreement at issue is "void, inoperative or incapable of being performed" within the meaning of s. 15(2). An otherwise valid arbitration agreement may, in some circumstances, be inoperative or incapable of being performed if enforcing it would compromise the integrity of court-ordered receivership proceedings. In the specific circumstances of this case, the chaotic nature of the arbitral proceedings bargained for by the parties would compromise the orderly and efficient resolution of the receivership, to the detriment of affected creditors and contrary to the purpose of the *BIA*. Accordingly, the chambers judge was entitled to refuse to grant a stay.

Competence-competence is a principle that gives precedence to the arbitration process. Generally, arbitrators should be allowed to rule first on their own jurisdiction. The principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law or, as in this case, questions of mixed fact and law requiring only superficial consideration of the evidentiary record.

In a dispute governed by an arbitration agreement with an insolvent or bankrupt counterparty, there is a tension between arbitration law and insolvency law as regards the forum in which the dispute is to be resolved. The modern view expressed in Canadian arbitration legislation is that parties should be held to their contractual agreements to arbitrate, consistent with principles of party autonomy and freedom of contract. Generally speaking, judicial intervention in commercial disputes governed by a valid agreement clause should be the exception, not the rule. On the other hand, insolvency proceedings are creatures of statute subject to close judicial oversight. The role of courts in ensuring the equitable and orderly resolution of insolvency disputes is reflected in the single proceeding model, which favours the enforcement of stakeholder rights through a centralized judicial process. Section 183(1) of the *BIA* confers a broad scope of authority on superior courts to deal with most bankruptcy disputes. Court-ordered receiverships under s. 243 of the *BIA* are one available tool for enhancing the judicial oversight and flexibility underlying Canadian insolvency law, whereby receivers may take various actions to preserve the debtor's assets for the benefit of all creditors. While a court order under s. 243 of the *BIA* gives a receiver wide-ranging powers, the receiver remains under a fiduciary duty to act honestly and in the best interests of all interested parties.

Notwithstanding these differences, arbitration law and insolvency law have much in common. Each prioritizes efficiency and expediency; procedural flexibility is a hallmark of both arbitration and insolvency law; and both often rely on specialized decision makers to achieve their respective objectives. In many cases, these shared interests will converge through arbitration, and parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. Valid arbitration agreements are generally to be respected. The presumption in favour of arbitral jurisdiction is supported by the Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit. However, in certain insolvency matters, it may be necessary to preclude arbitration in favour of a centralized judicial process, when arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. In such a scenario, a court may assert control over the proceedings, both to ensure the timely resolution of the parties' dispute and to protect the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors.

The exercise required to determine if a stay of proceedings should be granted in favour of arbitration is highly factual. It requires the court to review the statutory regimes and arbitration agreements in play, having regard to the principles of party autonomy and freedom of contract and to the policy imperatives underpinning bankruptcy and insolvency law. To guide this exercise, a two-part framework, implicit in provincial arbitration legislation across the country and mirrored in ss. 15(1) and (2) of the *Arbitration Act*, applies. The two general components of this framework are: (1) the technical prerequisites for a mandatory stay of court proceedings; and (2) the statutory exceptions to a mandatory stay of court proceedings. These components ought to remain analytically distinct because the burden of proof shifts between them. The applicant for a stay in favour of arbitration must establish the technical prerequisites. If the applicant discharges this burden, under the second component, the party seeking to avoid arbitration must show that a statutory exception applies.

The first component, technical prerequisites, is concerned with whether the arbitration agreement at issue engages the mandatory stay provision in the applicable provincial arbitration statute. Considerations at this stage may differ depending on the jurisdiction and the nature of the arbitration, i.e. whether it relates to domestic or international arbitration. There are typically four technical prerequisites: an arbitration agreement exists; court proceedings have been commenced by a party to the arbitration agreement; the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and the party applying for a stay does so before taking any step in the court proceedings. The applicant must only establish an arguable case that these prerequisites are met.

For the purposes of the technical prerequisites set out in s. 15(1) of the *Arbitration Act*, a court-appointed receiver may be a party to the debtor's pre-receivership arbitration agreement through the operation of ordinary contract law. First, it is well established that an entity connected with a signatory to a contract may become bound as a party by operation of law; for example, subsidiaries, assignees, trustees and others claiming through or under the named party. There is no principled reason why this should not apply to a court-appointed receiver claiming through a debtor under a contract containing an arbitration agreement. It would violate basic principles of contract law to permit a receiver to enforce a contract on the debtor's behalf while avoiding the burdens, including the obligations to arbitrate contractual disputes. Nor does a receiver's duty as an officer of the court preclude it from being considered a party to an arbitration agreement within the meaning of s. 15(1). To the contrary, a receiver owes a fiduciary duty to all interested parties involving the debtor's assets, property, and undertakings, and may not arbitrarily break contracts entered into by the debtor with third parties prior to the receivership. Second, s. 15(1) does not expressly preclude non-signatories like receivers from being considered parties. Where legislation does not fully address a matter, courts may look to the common law to interpret the statutory language. It is a foundational contractual doctrine that all non-signatories to a contract may claim only through or under a signatory upon stepping into its contractual shoes. Nothing in the legislative record or text of the *Arbitration Act* indicates that the legislature intended to change or displace the common law. Third, effectively preventing arbitration as soon as one of the contracting parties entered receivership would subvert the core arbitral principles of party autonomy, limited court intervention, and competence-competence.

As for determining whether the party applying for a stay took a step in the proceedings, this requires an objective approach. The court must ask itself whether, on the facts, the party should be held to have impliedly affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration. Undertaking to file a defence does not constitute a step in the proceedings, nor does requesting an extension of time to file a defence. In the context of s. 15(1), the very purpose of such a request is to decide whether or not to take a step, and there is no election to proceed with the action.

At the second stage of the analysis, the key question is whether, on a balance of probabilities, one or more of the statutory exceptions set out in the applicable provincial arbitration statute apply. If not, the court must grant a stay. A court should dismiss a stay application on the basis of a statutory exception only in a clear case. One such exception, set out in s. 15(2) of the *Arbitration Act*, is when the arbitration clause is "void, inoperative or incapable of being performed". A court-appointed receiver cannot unilaterally disclaim an arbitration agreement, thereby rendering it void, inoperative or incapable of being performed. Section 15(2) should be interpreted narrowly to prevent parties from avoiding arbitration in favour of what they view as a preferable procedure. Allowing a receiver to avoid arbitration by unilaterally disclaiming a debtor's pre-existing arbitration agreement conflicts with the text and intent of s. 15 and diminishes the presumptive enforceability and predictability of arbitration agreements. As s. 15(2) makes plain, the sole basis upon which a party may sue to enforce a contract and yet avoid the obligation to arbitrate is that the arbitration agreement has been found by a court to be void, inoperative, or incapable of being performed. Preferably, court-appointed receivers should seek such a judicial determination by bringing a motion for directions in the supervising court. However, when a receiver initiates court proceedings without prior judicial approval, the court must decide whether to decline to enforce the agreement under s. 15 of the *Arbitration Act*.

Section 15(2) gives a court the power to refuse a stay by finding that an arbitration agreement has become inoperative or incapable of being performed because of court-ordered receivership proceedings where arbitration would compromise the orderly and efficient resolution of a receivership. There is no conflict between the provincial *Arbitration Act* and the federal *BIA* giving rise to paramountcy concerns. In the typical case, the purposes of the *Arbitration Act* will be served by holding the parties to their agreement to arbitrate through a narrow interpretation of the words "void", "inoperative" and "incapable of being performed". An arbitration agreement will be considered "void" only in the rare circumstances where it is intrinsically defective according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation. The term "inoperative" has no universal common law definition. Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties. The party seeking to avoid arbitration bears the heavy onus of showing that the exception for an inoperative arbitration agreement applies. The making of a winding-up order or a receivership order may be grounds to find an arbitration agreement inoperative. However, the term inoperative may not always cover scenarios where a court-appointed creditor representative initiates court proceedings on behalf of a debtor. This is because insolvency law generally stays legal claims brought against a debtor while permitting claims brought on its behalf to proceed. An arbitration agreement is "incapable of being performed" where the arbitral process cannot effectively be set into motion because of a physical or legal impediment beyond the parties' control. Physical impediments may include inconsistencies, inherent contradictions, or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; the non-availability of the arbitrator specified in the agreement; the dissolution or non-existence of the chosen arbitration institution; or political or other circumstances at the seat of arbitration rendering arbitration impossible. Legal impediments include express legislative overrides of the parties' agreement to arbitrate.

There is statutory jurisdiction arising from ss. 183(1) and 243(1)(c) of the *BIA* for a court to hold that an arbitration agreement is inoperative in the receivership context. It is therefore unnecessary for courts to resort to inherent jurisdiction, which is to be considered only after statutory jurisdiction is determined to be unavailable. The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives. Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters. Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, take any action that the court considers advisable, if the court considers it just or convenient to do so. This very expansive wording has been interpreted as giving judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise in relation to court-ordered receiverships. Section 243(1)(c) thus permits a court to do not only what justice dictates but what practicality demands. Practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Factors that may be relevant in determining whether an arbitration agreement is inoperative under s. 15(2) include: (a) the effect of arbitration on the integrity of the insolvency proceedings; (b) the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; (c) the urgency of resolving the dispute; (d) the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings; and (e) any other factors the court considers material in the circumstances. Each factor may carry more or less weight depending on the circumstances of the case.

In the instant case, the technical prerequisites set out in s. 15(1) of the *Arbitration Act* are met. The impugned civil proceedings are in respect of a contractual dispute covered by valid arbitration agreements. In addition, Peace River has established an arguable case that the Receiver is a party to the Arbitration Agreements and Peace River has not taken a step in the proceedings. As s. 15 is engaged, a stay in favour of arbitration must be granted unless the Arbitration Agreements are found to be void, inoperative or incapable of being performed under s. 15(2). The Receiver has established that the Arbitration Agreements are inoperative. The multiple arbitral processes contemplated in the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the objectives of the *BIA*. While recognizing the importance of party autonomy and freedom of contract, referral to arbitration in the unique circumstances of the instant case would jeopardize the Receiver's ability to maximize recovery for the creditors and to allow Petrowest and its affiliates to move forward with certainty.

Per Karakatsanis, Brown, Martin and **Jamal** JJ.: There is agreement that the appeal should be dismissed as the Arbitration Agreements are inoperative under s. 15(2) of the *Arbitration Act*. However, there is disagreement as to the primary basis for finding the Arbitration Agreements to be inoperative. The analysis should start with the terms of the Receivership Order itself. By suing in court as authorized under the Receivership Order, the Receiver disclaimed the Arbitration Agreements and they were thereby rendered inoperative.

The Receivership Order authorized the Receiver to receive and collect all monies and accounts owed or owing to Petrowest; to exercise all remedies of Petrowest in collecting such monies; to initiate, prosecute, and continue the prosecution of any and all proceedings with respect to Petrowest's property, assets, and undertakings, including all proceeds thereof; and to cease to perform any contracts of Petrowest. An arbitration agreement is a contractual right of a party to have a claim referred to arbitration to the exclusion of the courts and thus could be disclaimed pursuant to the Receivership Order. The combined effect of these terms authorized the Receiver to disclaim the Arbitration Agreements and to sue in court for amounts owing to Petrowest. The terms of the Receivership Order authorized the Receiver to sue, either in court or before an arbitrator, at the Receiver's election, based on what will best promote the orderly and efficient resolution of the receivership under the *BIA*. The legal effect of the Receiver suing in court and not before an arbitrator was undoubtedly to disclaim reliance on the Arbitration Agreements.

There is agreement with the majority that to the extent that the Receivership Order did not authorize the Receiver to sue in court, the *BIA* provided a statutory basis for the chambers judge to declare the Arbitration Agreements inoperative and to dismiss the stay application. Requiring arbitration of the Receiver's collection action would compromise the orderly and efficient resolution of the receivership.

Cases Cited

By Côté J.

Referred to: *Commonwealth Insurance Co. v. Larc Developments Ltd.*, 2010 BCCA 18, 315 D.L.R. (4th) 242; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABCA 293, 275 D.L.R. (4th) 498; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141; *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 3 W.L.R. 42; *Uber Technologies Inc. v. Heller*, 2020 SCC 16; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921; *In re U.S. Lines, Inc.*, 197 F.3d 631 (1999); *Societe Nationale Algerienne v. Distrigas Corp.*, 80 B.R. 606 (1987); *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (1962); *Hofer v. Hofer*, [1970] S.C.R. 958; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978; *Stewart v. LePage* (1916), 53 S.C.R. 337; *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Rosenberg v. Minster*, 2014 ONSC 845, 119 O.R. (3d) 27; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *3GS Inc. v. Altus Group Ltd.*, 2011 ONSC 5755, 96 B.L.R. (4th) 268; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379, 18 B.C.L.R. (6th) 322; *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66

B.C.L.R. (2d) 113; *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, 446 D.L.R. (4th) 626; *Dalimpex Ltd. v. Janicki* (2000), 137 O.A.C. 390, aff'd (2003), 228 D.L.R. (4th) 179; *Ives & Barker v. Willans*, [1894] 2 Ch. 478; *Central Investments & Development Corp. v. Miller* (1982), 133 D.L.R. (3d) 440; *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1996), 135 D.L.R. (4th) 130; *Petro-Canada v. 366084 Ontario Ltd.* (1995), 25 B.L.R. (2d) 19; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *Canada (Attorney General) v. Reliance Insurance Co.* (2007), 87 O.R. (3d) 42; *Heyman v. Darwins, Ld.*, [1942] A.C. 356; *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129; *James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315; *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333; *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162.

By Jamal J.

Referred to: *Dell Computer Corp. v. Union des consommateurs*, 2007

[50] Party autonomy and freedom of contract go hand in hand with the principle of limited court intervention in arbitral proceedings. This latter principle is "fundamental" to modern arbitration law and "finds expression throughout modern Canadian arbitration legislation" (*Wellman*, at paras. 52-55; McEwan and Herbst, at § 10:2; Casey, at ch. 7.1). For instance, s. 4(a) of British Columbia's new *Arbitration Act*, S.B.C. 2020, c. 2, provides that "[i]n matters governed by this Act, <u>a court must not intervene</u> unless so provided in this Act". Similar expressions of principle are found in provincial arbitration legislation across the country. It follows that, generally speaking, judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule.

(2) <u>Dispute Resolution in Insolvency</u>

[51] On the other hand, insolvency proceedings are creatures of statute subject to close judicial oversight.

[52] Insolvency engages broad public interests. It "affects all of the stakeholders of the insolvent business enterprise", including creditors, employees, landlords, suppliers, shareholders, and customers (K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at ¶1.1). In the case of very large companies, an insolvency may even "threaten the existence of whole communities" (¶1.1). Canadian legislation therefore offers stakeholders a wide range of judicial procedures to resolve problems presented by an insolvency (¶¶1.1-1.12).

[53] This procedural flexibility has allowed Canadian courts to become instrumental in (a) providing a forum for the orderly resolution of the competing rights and objectives of individual stakeholders of insolvent business enterprises, and (b) creating mechanisms for the preservation of the value of the insolvent business or its assets for the benefit of all stakeholders (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 2 and 22; McElcheran, at ¶¶1.1-1.14). I elaborate on these two points below.

(a) *Single Proceeding Model*

[54] The central role of courts in ensuring the equitable and orderly resolution of insolvency disputes is reflected in the "single proceeding model".

[55] This model favours the enforcement of stakeholder rights through a centralized judicial process. The legislative policy in favour of "single control" is reflected in Canadian bankruptcy, insolvency, and winding-up legislation (*Century Services*, at paras. 22-23). The single proceeding model is intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights. In other words, the single proceeding model protects the clear "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (*Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 27, citing *Stewart v. LePage* (1916), 53 S.C.R. 337). This Court has held that s. 183(1) of the *BIA* confers a "broad scope of authority" on superior courts to deal with most bankruptcy disputes, as "[a]nything less

would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs" (*Sam Lévy*, at para. 38).

(b) *Court-Ordered Receiverships Under the BIA*

[56] Court-ordered receiverships under s. 243 of the *BIA*, like the receivership in the present case, are one available tool for enhancing the judicial oversight and flexibility underlying Canadian insolvency law. Section 243(1) of the *BIA* confers broad authority on a court to appoint a receiver if the court "considers it to be just or convenient to do so". Under s. 243(1), a court may appoint a receiver to do any of the following, with a view to enhancing and facilitating the preservation and realization of the debtor's assets for the benefit of all creditors: (a) take possession of all or substantially all of the debtor's inventory, accounts receivable or other property that was acquired for or used in relation to a business carried on by the debtor; (b) exercise any control that the court considers advisable over that property and over the debtor's business; or (c) take "any other action that the court considers advisable" (R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 553-54).

[57] Given the breadth of their powers, court-appointed receivers are necessarily subject to close judicial oversight. Receivers represent neither a security holder nor the debtor; they are officers of the court whose "sole authority is derived from . . . Court appointment and from the directions given [to them] by the Court" (*Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (H.C.), at p. 286). In

TAB 33

Spencer Dean Bird *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Aboriginal Legal Services Inc., David Asper Centre for Constitutional Rights and Canadian Civil Liberties Association *Interveners*

Indexed as: R. *v.* Bird

2019 SCC 7

File No.: 37596.

2018: March 16; 2019: February 8.

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

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Administrative orders — Collateral attack — Accused charged criminally with breaching Parole Board long-term supervision order requiring that he reside at community correctional centre — Accused defending charge at trial on basis that residency condition was not within Board's statutory authority and violated his constitutional right to liberty — Whether accused could collaterally attack residency condition — If so, whether residency condition arbitrary in respect of purpose of long-term offender regime — Canadian Charter of Rights and Freedoms, s. 7 — Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 134.1(2).

B was found to be a long-term offender and received a sentence comprised of a prison term and a period of long-term supervision in the community. Pursuant to s. 134.1(2) of the *Corrections and Conditional Release Act* ("*CCRA*"), the Parole Board imposed a residency condition as part of B's long-term supervision order ("LTSO"). This condition

Spencer Dean Bird *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada, procureure générale de l'Ontario, Aboriginal Legal Services Inc., David Asper Centre for Constitutional Rights et Association canadienne des libertés civiles *Intervenants*

Répertorié : R. *c.* Bird

2019 CSC 7

N° du greffe : 37596.

2018 : 16 mars; 2019 : 8 février.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit criminel — Ordonnances administratives — Contestation incidente — Accusé inculpé au criminel de ne pas s'être conformé à une ordonnance de surveillance de longue durée rendue par la Commission des libérations conditionnelles l'obligeant à demeurer dans un centre correctionnel communautaire — Contestation de l'accusation par l'accusé lors du procès au motif que l'assignation à résidence ne relevait pas de la compétence conférée par la loi à la Commission et qu'elle portait atteinte à son droit constitutionnel à la liberté — L'accusé pouvait-il contester incidemment l'assignation à résidence? — Dans l'affirmative, l'assignation à résidence était-elle arbitraire eu égard à l'objectif du régime applicable aux délinquants à contrôler? — Charte canadienne des droits et libertés, art. 7 — Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, c. 20, art. 134.1(2).

B, déclaré délinquant à contrôler, a été condamné à une peine d'emprisonnement suivie d'une période de surveillance de longue durée dans la collectivité. En vertu du pouvoir que lui confère le par. 134.1(2) de la *Loi sur le système correctionnel et la mise en liberté sous condition* (« *LSCMLSC* »), la Commission des libérations required that he reside at a community correctional centre, community residential facility or other residential facility approved by the Correctional Service of Canada. B was placed in Oskana Centre, a community correctional centre. Less than a month after his long-term supervision commenced, B left Oskana Centre and did not return. He was eventually apprehended and charged with having breached the residency condition of his LTSO.

conditionnelles a assorti l'ordonnance de surveillance de longue durée (« OSLD ») de B d'une assignation à résidence. Cette condition obligeait B à demeurer dans un centre correctionnel communautaire, un centre résidentiel communautaire ou tout autre établissement résidentiel approuvé par le Service correctionnel du Canada. B a été placé au centre Oskana, un centre correctionnel communautaire. Moins d'un mois après le début de sa surveillance de longue durée, il a quitté le centre et n'y est pas retourné. Il a par la suite été arrêté et accusé de ne pas s'être conformé à l'assignation à résidence prévue dans l'OSLD à laquelle il était assujetti.

B defended the charge at trial on the basis that the residency condition of his LTSO was not within the Board's statutory authority and violated his right to liberty under s. 7 of the *Charter*. The trial judge agreed and acquitted B, finding that the residency condition was invalid. The Court of Appeal rejected this finding, set aside B's acquittal, entered a conviction on the charge and remitted the matter for sentencing. B appeals, renewing his s. 7 *Charter* attack on the residency condition and raising for the first time that the condition violates his *Charter* rights under ss. 9 and 11(*h*).

Lors du procès, B s'est défendu contre l'accusation dont il faisait l'objet, en alléguant que l'assignation à résidence prévue dans son OSLD ne relevait pas de la compétence conférée par la loi à la Commission et que cette condition contrevenait à son droit à la liberté garanti par l'art. 7 de la *Charte*. Le juge de première instance s'est dit du même avis et a acquitté B, en concluant que l'assignation à résidence était invalide. La Cour d'appel a rejeté cette conclusion, annulé l'acquittement de B, inscrit une déclaration de culpabilité à l'égard de l'accusation et renvoyé l'affaire à la Cour provinciale pour détermination de la peine. B se pourvoit, conteste de nouveau l'assignation à résidence sur le fondement de l'art. 7 de la *Charte* et soutient pour la première fois que cette assignation contrevient aux droits que lui garantissent l'art. 9 et l'al. 11*h*) de la *Charte*.

Held: The appeal should be dismissed.

Arrêt : Le pourvoi est rejeté.

Per Wagner C.J. and Abella, Moldaver, Côté, Brown and Rowe JJ.: B was not permitted to collaterally attack the residency condition of his LTSO. Thus, it is unnecessary to consider whether the residency condition violates his *Charter* rights.

Le juge en chef Wagner et les juges Abella, Moldaver, Côté, Brown et Rowe : B ne pouvait pas contester incidemment l'assignation à résidence prévue dans l'OSLD prononcée contre lui. Par conséquent, il n'est pas nécessaire d'examiner son argument selon lequel l'assignation à résidence porte atteinte à ses droits garantis par la *Charte*.

In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, and in the companion case, *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737, the Court developed a distinct approach for determining whether a person who is charged criminally with breaching an administrative order can collaterally attack that order. This determination is made by focussing on the legislature's intention: the court must inquire into whether the legislature intended to permit collateral attacks on the order, or intended instead that a person should challenge the order by way of other review mechanisms. In focussing on the legislature's intention, the *Maybrun* framework balances two principles: (1) ensuring that the legislature's decision to assign decision-making powers to administrative bodies is not undermined and (2) ensuring that individuals have an effective means

Dans l'arrêt *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706, et dans l'arrêt connexe *R. c. Al Klippert Ltd.*, [1998] 1 R.C.S. 737, la Cour a élaboré une approche distincte pour déterminer si une personne accusée au criminel d'avoir contrevenu à une ordonnance administrative peut contester cette ordonnance de manière incidente. Pour ce faire, il faut s'intéresser à l'intention du législateur : le tribunal doit se demander si ce dernier avait l'intention de permettre la contestation incidente de l'ordonnance, ou s'il avait plutôt l'intention que la personne visée par l'ordonnance puisse la contester au moyen d'autres mécanismes d'examen. Vu le poids donné à l'intention du législateur, le cadre d'analyse de l'arrêt *Maybrun* met deux exigences en balance : (1) veiller à ce que la décision du législateur de conférer des pouvoirs décisionnels à des organismes available to them to challenge administrative orders, particularly when these orders are challenged on the basis that they are not *Charter* compliant. In the *Charter* context, this means that the person challenging an order must be able to receive an effective remedy that will vindicate his or her *Charter* rights. Where no such remedies are available, it must be inferred that the intention of the legislature is to permit a collateral attack. To determine the legislator's intention as to the appropriate forum for challenging the validity of an administrative order, *Maybrun* identifies five non-exhaustive factors that may be considered by a court: (1) the wording of the statute under the authority of which the order was issued; (2) the purpose of the legislation; (3) the existence of a right of appeal; (4) the kind of collateral attack in light of the expertise or *raison d'être* of the administrative appeal tribunal; and (5) the penalty on a conviction for failing to comply with the order. The factors are not independent and absolute criteria, but important clues, among others, for determining the legislature's intention.

On balance, with the exception of the final *Maybrun* factor, the other factors strongly indicate that Parliament did not intend to permit collateral attacks in circumstances like those existing in this case. With respect to the first two factors, it would undermine the purposes of long-term supervision if offenders were allowed to take a "breach first, challenge later" approach to the conditions of their LTSOs. The conditions of an LTSO are imposed to reduce to an acceptable level the elevated risk posed by long-term offenders and dangerous offenders in the community. When offenders breach these conditions, they expose the public to this risk. Permitting a "breach first, challenge later" approach in this context undermines not only the community's interests, but also those of the offenders, by compromising the offender's rehabilitative prospects. This outcome is inconsistent with the objectives of the long-term supervision regime.

The third factor permits a court to consider not only the existence of a right of appeal to an administrative appeal tribunal, but also the existence of other effective mechanisms or forums for challenging the order at issue. Although there is no right of appeal under the *CCRA* from a decision of the Board concerning the conditions of an LTSO, the record indicates that there were mechanisms available to B that would have provided him with an effective means to challenge the residency condition. He could

administratifs ne soit pas contrecarrée, et (2) veiller à ce que les justiciables disposent d'un moyen efficace de contester les ordonnances administratives, surtout si elles sont contestées au motif qu'elles ne sont pas conformes à la *Charte*. Dans le contexte de la *Charte*, cela signifie que la personne qui conteste une ordonnance doit pouvoir disposer d'un recours efficace qui lui permettra de faire valoir ses droits protégés par la *Charte*. À défaut d'un tel recours, il faut conclure que le législateur entendait permettre la contestation incidente. S'agissant de déterminer l'intention du législateur quant au forum approprié pour contester la validité d'une ordonnance administrative, l'arrêt *Maybrun* énumère cinq facteurs non exhaustifs qui peuvent être pris en considération par un tribunal : (1) les termes de la loi dont découle le pouvoir de rendre l'ordonnance; (2) l'objectif de la loi; (3) l'existence d'un droit d'appel; (4) la nature de la contestation incidente, eu égard à l'expertise et à la raison d'être de l'instance administrative d'appel; et (5) la sanction imposable pour défaut d'avoir respecté l'ordonnance. Ces facteurs ne représentent pas des critères autonomes et absolus, mais plutôt des indices importants, parmi d'autres, permettant de cerner l'intention législative.

Tout bien considéré, les facteurs énoncés dans l'arrêt *Maybrun*, hormis le dernier, donnent fortement à penser que le législateur n'avait pas l'intention de permettre les contestations incidentes dans des circonstances comme celles de la présente affaire. Pour ce qui est des deux premiers facteurs, permettre aux délinquants d'adopter une approche qui consisterait à contrevenir aux conditions de l'OSLD d'abord, pour ensuite les contester minerait l'objet de la surveillance de longue durée. Assortir une OSLD de conditions vise à réduire à un niveau acceptable le risque élevé que présentent les délinquants à contrôler et les délinquants dangereux pour la collectivité. Lorsqu'un délinquant enfreint une de ces conditions, il expose le public à ce risque. Le fait de permettre l'approche qui consiste à « contrevenir d'abord, pour ensuite contester » dans ce contexte saperait non seulement les intérêts de la collectivité, mais aussi ceux du délinquant, en compromettant ses chances de réhabilitation. Ce résultat est incompatible avec les objectifs du régime de surveillance de longue durée.

Le troisième facteur permet au tribunal de tenir compte non seulement de l'existence d'un droit d'appel auprès d'un tribunal administratif d'appel, mais aussi de celle d'autres mécanismes efficaces ou forums pour contester l'ordonnance en cause. Bien que la *LSCMLSC* ne prévoie pas de droit d'appel de la décision de la Commission en ce qui a trait aux conditions dont est assortie une OSLD, il appert du dossier qu'il existait des mécanismes qui auraient permis à B de contester efficacement l'assignation have written to the Board to ask it to vary or remove the condition; he could have applied for judicial review in the Federal Court; and he could have applied to the provincial superior court for *habeas corpus*, a remedy that offers simplified procedures that promote greater accessibility by self-represented litigants and persons with limited means. Accordingly, B was not denied the ability to fully defend against the charge of breaching the residency condition, because he had the opportunity to challenge the Board's order through these mechanisms.

The fourth factor permits a court to consider the nature of a collateral attack in light of the expertise or *raison d'être* of other mechanisms or forums for challenging the order. Where the nature of the collateral attack involves considerations that fall squarely within the expertise or *raison d'être* of a particular administrative body or other forum, this may be taken as an indication that Parliament wanted that body to decide the question, as opposed to permitting a collateral attack. In the instant case, s. 134.1(2) of the *CCRA* gives the Board broad discretionary power to impose whichever conditions on long-term supervision it deems "reasonable and necessary to protect society and ensure the successful integration of the offender into society". This provision demonstrates Parliament's intention to rely on the expertise and experience of the Board in determining which conditions are needed in an LTSO to achieve the balance between public safety and the successful reintegration of the offender. Therefore, if B asked the Board to reconsider its decision to impose the residency condition, the Board would consider matters that fall squarely within its expertise. The fact that B's challenge to the residency condition raises constitutional issues does not mean that it raises considerations foreign to the Board's experience and expertise. These issues would also not be unfamiliar to the Federal Court or to provincial superior courts hearing *habeas corpus* applications. Consequently, this factor indicates a legislative intention to have B resort to these mechanisms.

Lastly, the penalty for breaching a condition of an LTSO is significant. However, this final factor is not determinative. When it is viewed not in isolation, but in conjunction with the other factors, it is clear that it is not decisive of Parliament's intention that B be permitted to collaterally attack the Board's order. Given that permitting a "breach first, challenge later" approach in this context

à résidence. Il aurait pu écrire à la Commission pour lui demander de modifier ou d'annuler l'assignation, présenter une demande de contrôle judiciaire à la Cour fédérale, et présenter une demande d'*habeas corpus* devant la cour supérieure provinciale, un recours dont les procédures sont simplifiées et qui favorise donc l'accessibilité à la justice pour les parties qui se représentent elles-mêmes et pour celles dont les moyens sont limités. Puisqu'il pouvait contester l'ordonnance de la Commission en recourant à ces mécanismes, B n'a pas été privé de la possibilité de se défendre pleinement contre l'accusation d'avoir enfreint l'assignation à résidence.

Le quatrième facteur permet au tribunal de tenir compte de la nature de la contestation incidente eu égard à l'expertise du décideur et à la raison d'être d'autres mécanismes ou forums pour contester l'ordonnance. Lorsque la nature de la contestation incidente fait appel à des considérations qui relèvent clairement de l'expertise et de la raison d'être d'un organisme administratif ou d'un autre forum en particulier, on peut considérer qu'il s'agit d'un indice que le législateur souhaitait que cet organisme tranche la question, plutôt que de permettre une contestation incidente. En l'espèce, le par. 134.1(2) de la *LSCMLSC* confère à la Commission un vaste pouvoir discrétionnaire d'imposer les conditions de surveillance de longue durée qu'elle juge « raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant ». Cette disposition témoigne de l'intention du législateur de s'en remettre à l'expertise et à l'expérience de la Commission pour déterminer les conditions dont il convient d'assortir l'OSLD afin de maintenir l'équilibre entre la sécurité du public et la réinsertion réussie du délinquant. En conséquence, si B avait demandé à la Commission de réexaminer sa décision d'imposer l'assignation à résidence, celle-ci se serait penchée sur des questions qui relèvent clairement de son expertise. Ce n'est pas parce que la contestation de B quant à son assignation à résidence soulève des questions constitutionnelles qu'elle soulève des questions ne relevant pas de l'expérience et de l'expertise de la Commission. Ces questions n'échapperaient pas non plus à l'expertise de la Cour fédérale ou des cours supérieures provinciales qui instruisent les demandes d'*habeas corpus*. Par conséquent, ce facteur témoigne de l'intention du législateur que B s'en remette à ces mécanismes.

Enfin, la sanction imposable en cas de manquement à une condition d'une OSLD est lourde. Ce dernier facteur n'est toutefois pas déterminant. S'il est examiné non pas de manière isolée, mais conjointement avec les autres facteurs, il semble évident que ce facteur n'est pas déterminant quant à l'intention du législateur de permettre ou non à B de contester incidemment l'ordonnance de la would pose a real risk to public safety and that effective review mechanisms were available to B, Parliament did not intend that B should be able to circumvent these mechanisms and instead, challenge the residency condition only after breaching it. Rather, Parliament intended that these offenders would ask the Board to vary or remove the condition and/or, if judicial review in the Federal Court would not provide an effective remedy, apply for *habeas corpus*.

Commission. Puisqu'autoriser le recours à l'approche qui consiste à « contrevenir d'abord, pour ensuite contester » dans le présent contexte poserait un véritable risque pour la sécurité du public, et puisque B avait à sa disposition des mécanismes d'examen efficaces, le législateur n'avait pas l'intention qu'il puisse contourner ces mécanismes et ainsi contester l'assignation à résidence uniquement après y avoir contrevenu. Le législateur avait plutôt l'intention que ces délinquants demandent à la Commission de modifier ou d'annuler l'assignation ou, dans l'éventualité où le contrôle judiciaire en Cour fédérale ne constitue pas un recours efficace, qu'ils présentent une demande d'*habeas corpus*.

Per Karakatsanis, Gascon and Martin JJ.: B's constitutional challenge to his LTSO residency condition should have been permitted at his trial for breach of that condition. Nevertheless, once permitted, B's claim under s. 7 of the *Charter* should fail. B's appeal should therefore be dismissed and his conviction upheld.

Les juges Karakatsanis, Gascon et Martin : On aurait dû permettre à B de contester la constitutionnalité de l'assignation à résidence prévue dans son OSLD dans le cadre du procès qu'il a subi pour avoir contrevenu à cette condition. Cela dit, une fois cette contestation permise, la prétention de B fondée sur l'art. 7 de la *Charte* ne saurait tenir. Le pourvoi de B devrait donc être rejeté et la déclaration de culpabilité prononcée contre lui confirmée.

There is agreement with the majority that the factors set out in *Maybrun* should be applied; however, there is disagreement on their application. Unlike the collateral attacks in *Maybrun* and *Klippert*, B's collateral attack puts his *Charter* rights in issue in light of the very real possibility of significant imprisonment. When these constitutional and carceral dimensions of B's cases are examined, it is revealed that Parliament did not intend to prohibit B from challenging at trial the constitutional validity of a condition whose breach carries a maximum penalty of 10 years' imprisonment.

Il y a accord avec les juges majoritaires pour dire qu'il convient d'appliquer les facteurs énoncés dans l'arrêt *Maybrun*, mais il y a désaccord quant à leur application. Contrairement aux contestations incidentes dans les affaires *Maybrun* et *Klippert*, celle de B met en cause les droits que la *Charte* lui garantit compte tenu de la possibilité très réelle d'emprisonnement. Lorsque l'on examine ces dimensions constitutionnelle et carcérale en ce qui a trait à B, il appert que le législateur n'a pas voulu priver B de la possibilité de contester, dans le cadre de son procès, la validité constitutionnelle d'une condition dont la violation le rend passible d'une peine maximale de 10 ans d'emprisonnement.

With respect to the first and second *Maybrun* factors, although the broad authority conferred on the Board by s. 134.1(2) of the *CCRA* does militate against collateral attacks on the Board's LTSO decisions, allowing B's collateral attack is not at odds with the purpose of the long-term offender regime. Permitting B to advance his constitutional challenge to his LTSO condition will not inspire or perpetuate a "breach first, challenge later" attitude among long-term offenders. Framing B's conduct as "breaching first, challenging later" shifts the focus from whether Parliament intended to allow long-term offenders to challenge LTSO conditions when charged with their breach, which is the correct question, to whether Parliament intended to permit LTSO breaches committed for the purpose of challenging the conditions breached. Of course Parliament would not intend to make collateral

En ce qui concerne les deux premiers facteurs de l'arrêt *Maybrun*, bien que le vaste pouvoir que confère le par. 134.1(2) de la *LSCMLSC* à la Commission milite contre les contestations incidentes des OSLD qu'elle rend, le fait d'autoriser B à contester incidemment celle en cause en l'espèce n'est pas incompatible avec l'objet du régime applicable aux délinquants à contrôler. Autoriser B à présenter une contestation constitutionnelle de l'OSLD dont il fait l'objet n'aurait pas pour effet d'inciter ou d'encourager les délinquants à contrôler à « contrevenir d'abord, pour ensuite contester ». Dire que la conduite de B a consisté à agir ainsi met l'accent sur la question de savoir si le législateur a voulu permettre les contraventions aux OSLD commises dans le but de contester les conditions enfreintes plutôt que sur celle de savoir s'il a voulu permettre aux délinquants à contrôler de contester les conditions de attacks available to those who flout their conditions in order to challenge them. Further, and crucially, it is breaches of residency conditions, and not collateral attacks on those conditions, that pose a risk to society.

leur OSLD lorsqu'ils sont accusés d'y avoir contrevenu, la question qu'il convient de se poser. Le législateur ne peut évidemment pas avoir eu l'intention de permettre les contestations incidentes pour ceux qui font fi de leurs conditions dans le but de les contester. Il est par ailleurs crucial de reconnaître que ce sont les contraventions aux assignations à résidence, et non les contestations incidentes de ces conditions, qui présentent un risque pour la société.

When examining the third factor, the three options available to B for challenging the residency condition identified by the majority do not, either individually or in concert, provide effective recourse for adjudicating B's *Charter* claim to the point of illustrating a legislative intent to bar B from arguing that the condition for which he faces a criminal charge is unconstitutional. It cannot be said that Parliament prescribed any one of the three options as the particular forum for raising a constitutional challenge to an LTSO condition. Given their shortcomings, neither internal review by the Parole Board nor judicial review can constitute the only prescribed forum for adjudicating constitutional challenges to LTSO conditions. Assuming its availability and Parliament's awareness of it in this context, *habeas corpus* cannot serve as evidence that Parliament intended to bar collateral attacks on LTSO conditions; like a collateral attack, an application for *habeas corpus* represents an external attack on an LTSO residency condition which disregards the "administrative appeal process" contemplated by the *CCRA*.

Pour ce qui est de l'analyse du troisième facteur, les trois avenues de contestation de l'assignation à résidence dont B disposait selon les juges majoritaires n'offrent aucunement, que ce soit ensemble ou séparément, un moyen efficace de statuer sur les prétentions de B fondées sur la *Charte* au point d'illustrer une intention du législateur de l'empêcher de faire valoir que la condition pour laquelle il fait l'objet d'une accusation criminelle est inconstitutionnelle. On ne saurait dire que le législateur a prescrit l'une ou l'autre d'entre elles comme étant le forum particulier pour contester la constitutionnalité d'une condition prévue dans une OSLD. Compte tenu de leurs lacunes respectives, ni l'examen interne par la Commission ni le contrôle judiciaire ne peut être la seule voie prescrite pour trancher les contestations constitutionnelles des conditions dont sont assorties les OSLD. Si l'on présume que, dans ce contexte, le recours en *habeas corpus* était possible et que le législateur le connaissait, ce recours ne peut servir à prouver l'intention du législateur d'empêcher les contestations incidentes des conditions prévues dans les OSLD; à l'instar d'une contestation incidente, la demande en *habeas corpus* constitue une contestation externe de l'assignation à résidence dont est assortie une OSLD qui ne tient pas compte du « processus d'appel administratif » envisagé par la *LSCMLSC*.

With respect to the fifth factor, the penalty upon a conviction under s. 753.3 of the *Criminal Code* is up to 10 years' imprisonment. To bar B's attack on the constitutionality of the condition is to deny his defence at trial where he is facing a lengthy period of imprisonment. The general rule against collateral attacks flows from rule of law and administration of justice considerations, namely, that it is improper to bypass adjudicative processes established by the legislature. However, when criminal defences are barred in the face of severe sanctions, separate aspects of the rule of law and the administration of justice are clearly invoked. The trial judge's task in cases such as this is to ask whether full answer and defence considerations and fair trial rights outweigh rigid adherence to administrative structures, particularly where those structures are limited. B's challenge to his residency requirement is the only defence he advanced. He could go to jail for a

En ce qui a trait au cinquième facteur, la sanction prévue à l'art. 753.3 du *Code criminel* est une peine maximale de 10 ans d'emprisonnement. Empêcher B de contester la constitutionnalité de la condition revient à le priver de son moyen de défense à un procès dans le cadre duquel il encourt une lourde peine d'emprisonnement. La règle générale interdisant les contestations incidentes découle de considérations relatives à la primauté du droit et à l'administration de la justice — à savoir qu'il ne convient pas de contourner les processus décisionnels établis par le législateur. Or, lorsque des moyens de défense en matière criminelle ne peuvent être présentés à l'encontre de sanctions sévères, des aspects différents de la primauté du droit et de l'administration de la justice peuvent clairement être en jeu. La tâche du juge du procès dans un cas comme l'espèce est de se demander si les considérations relatives à la défense pleine et entière et le droit à un procès équitable significant period of time without ever having the basis for that sentence — the residency condition — reviewed by a court for constitutional validity. The prospect of someone in a situation like B's mounting a meritorious *Charter* claim, yet being ineligible for a corresponding remedy because of the forum in which the claim was advanced, is an affront to both the administration of justice and the accused's *Charter*-protected right to make full answer and defence. Accordingly, this factor weighs heavily in favour of finding that Parliament could not have intended a claim like B's to be barred in these circumstances. B should be allowed to raise his constitutional defence at this time and in this forum.

With respect to B's *Charter* claim, an infringement of liberty will be arbitrary in a manner that infringes s. 7 of the *Charter* where it bears no rational connection to the purpose of the governing law. Long-term supervision is a form of exceptional sentence reserved for individuals who pose an ongoing threat to the public and merit enhanced sentences on preventive grounds. The specific objective of long-term supervision is to ensure that the offender does not reoffend and to protect the public during a period of supervised reintegration into society. The Parole Board's broad discretion to set LTSO conditions under s. 134.1(2) of the *CCRA* is limited only by the requirement that the conditions must aim at protecting society or facilitating the long-term offender's reintegration into society. The text of the provision strongly supports the conclusion that the Board is authorized to impose residency requirements, and the purposes of the long-term offender regime are best achieved by interpreting s. 134.1(2) as authorizing the Board to order residency where it deems fit, including in a community-based residential facility such as Oskana Centre. Oskana Centre's technical status as a "penitentiary" under the *CCRA* does not detract from this conclusion, nor do the adjacent *CCRA* provisions which specifically address residency requirements in other contexts. Accordingly, the text, context, and purpose of s. 134.1(2) confirm that the Board is empowered to set residency conditions like the one imposed on B where they are reasonable and necessary to achieve the objects of the long-term offender regime. The residency condition in this case was informed by B's specific circumstances. Given

l'emportent sur le respect rigoureux des structures administratives, surtout lorsque ces structures sont limitées. La contestation de son assignation à résidence par B constitue son unique moyen de défense. Il pourrait être emprisonné pendant une longue période sans que la validité constitutionnelle du fondement de cette peine — l'assignation à résidence — n'ait jamais été examinée par un tribunal. L'idée qu'une personne se trouvant dans la même situation que lui qui présente une demande fondée sur la *Charte* méritant d'être instruite puisse quand même ne pas être admissible à une réparation correspondante en raison du forum dans lequel la demande a été présentée constitue un affront à la fois à l'administration de la justice et au droit de l'accusé protégé par la *Charte* de présenter une défense pleine et entière. Par conséquent, ce facteur milite fortement pour la conclusion selon laquelle le législateur ne peut avoir eu l'intention d'interdire la présentation d'une demande comme celle de B dans les circonstances de l'espèce. B doit être autorisé à faire valoir son moyen de défense d'ordre constitutionnel à ce moment-ci et devant le présent forum.

En ce qui concerne la demande de B fondée sur la *Charte*, l'atteinte à la liberté est arbitraire d'une manière qui enfreint l'art. 7 de la *Charte* si elle n'a aucun lien rationnel avec l'objet de la loi applicable. La surveillance de longue durée est une forme de peine exceptionnelle qui est réservée aux délinquants qui font peser sur la société une menace permanente de nature à justifier, à titre préventif, une peine plus sévère. La surveillance de longue durée vise précisément la prévention contre la récidive et la protection du public au cours d'une période de réinsertion sociale contrôlée. Le vaste pouvoir discrétionnaire d'établir les conditions dont sont assorties les OSLD que le par. 134.1(2) de la *LSCMLSC* confère à la Commission est limité uniquement par l'exigence selon laquelle les conditions doivent viser à protéger la société ou à favoriser la réinsertion sociale du délinquant à contrôler. Le libellé de la disposition étaye fortement la conclusion selon laquelle la Commission est autorisée à imposer des assignations à résidence, et le meilleur moyen d'atteindre les objectifs du régime applicable aux délinquants à contrôler consiste à interpréter le par. 134.1(2) comme autorisant la Commission à ordonner l'assignation à résidence où bon lui semble, y compris dans un établissement résidentiel communautaire comme le Centre Oskana. La qualité de « pénitencier » de ce centre au sens de la *LSCMLSC* ne change en rien cette conclusion, pas plus que les dispositions connexes de la *LSCMLSC* portant sur les assignations à résidence dans d'autres contextes. Ainsi, le libellé, le contexte et l'objet du par. 134.1(2) confirment que la Commission est habilitée à ordonner des those circumstances — which include a significant history of failures to comply, substance abuse, and a long criminal record — and the purpose of s. 134.1(2) in the context of the long-term offender regime, B's residency condition is not arbitrary under s. 7 of the *Charter*.

assignations à résidence comme celle qu'elle a imposée à B lorsqu'elles sont raisonnables et nécessaires pour atteindre les objectifs du régime applicable aux délinquants à contrôler. L'assignation à résidence imposée en l'espèce reposait sur la situation particulière de B. Compte tenu de cette situation — qui comporte d'importants antécédents en matière de défaut de se conformer, des problèmes de toxicomanie et un casier judiciaire chargé — et de l'objet du par. 134.1(2) dans le contexte du régime applicable aux délinquants à contrôler, l'assignation à résidence imposée à B n'est pas arbitraire au sens où il faut l'entendre pour l'application de l'art. 7 de la *Charte*.

B should not be permitted to raise claims under ss. 9 and 11(*h*) of the *Charter*. While the Court has the discretion to hear new constitutional arguments on appeal, this discretion should only be exercised exceptionally, taking into account all of the circumstances, including the state of the record, fairness to all parties, the importance of having the issue resolved by the Court, its suitability for decision and the broader interests of the administration of justice. B has not demonstrated that this is one of those rare cases that warrants this Court's consideration of his new constitutional arguments on appeal.

B ne devrait pas être autorisé à soulever des prétentions fondées sur l'art. 9 et l'al. 11*h*) de la *Charte*. Bien que la Cour ait effectivement le pouvoir discrétionnaire d'examiner de nouveaux arguments constitutionnels en appel, elle ne doit l'exercer qu'à titre exceptionnel, en tenant compte de l'ensemble des circonstances, dont la teneur du dossier, l'équité envers toutes les parties, l'importance que la question soit résolue par la Cour, le fait que l'affaire se prête ou non à une décision et les intérêts de l'administration de la justice en général. B n'a pas démontré qu'il s'agit de l'un des cas rares qui justifieraient que la Cour examine en appel ses arguments nouveaux de nature constitutionnelle.

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By Moldaver J.

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Jurisprudence

Citée par le juge Moldaver

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En outre, selon lui, la Cour fédérale dispose d'un pouvoir de surveillance exclusif des décisions de la Commission et un délinquant peut demander à cette dernière de modifier ou d'annuler toute condition. Même si la violation d'une OSLD est passible d'une peine sévère, le juge en chef Richards a conclu que le législateur n'avait pas l'intention de permettre aux délinquants de s'opposer aux conditions de leur OSLD en ne s'y conformant pas. Il s'ensuit que le juge de première instance a commis une erreur en permettant à M. Bird de contester incidemment l'ordonnance rendue par la Commission. Compte tenu de cette conclusion, il a jugé inutile d'examiner si l'assignation à résidence portait atteinte aux droits de M. Bird protégés par l'art. 7 de la *Charte*. Il a donc annulé l'acquittement de M. Bird, inscrit une déclaration de culpabilité à l'égard de l'accusation portée en vertu du par. 753.3(1) du *Code criminel* et renvoyé l'affaire à la Cour provinciale pour détermination de la peine.

IV. Issue

[20] In my view, this appeal raises a single issue: Can Mr. Bird collaterally attack the residency condition imposed by the Parole Board on his LTSO in defending against a criminal charge of having breached that condition? Because I would answer this question in the negative, I find it unnecessary to address Mr. Bird's argument that the residency condition violates his *Charter* rights.

IV. Question en litige

[20] Je suis d'avis que le présent appel soulève une seule question : M. Bird peut-il contester incidemment l'assignation à résidence dont la Commission a assorti son OSLD pour se défendre d'une accusation criminelle d'avoir enfreint l'assignation en question? Comme je répondrais à cette question par la négative, j'estime qu'il n'est pas nécessaire que j'examine l'argument de M. Bird selon lequel l'assignation à résidence porte atteinte à ses droits garantis par la *Charte*.

V. Analysis

A. *General Principles Regarding Collateral Attacks*

[21] A collateral attack is an attack on an order "made in proceedings other than those whose specific object is the reversal, variation or nullification of the order" (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at para. 60). This Court has recognized a general rule against collateral attacks on court orders: with limited exceptions, an order issued by a court must be obeyed unless

V. Analyse

A. *Principes généraux en matière de contestations incidentes*

[21] Une contestation incidente est une attaque faite à l'encontre d'une ordonnance « dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance » (*Wilson c. La Reine*, [1983] 2 R.C.S. 594, p. 599; *Canada (Procureur général) c. TeleZone Inc.*, 2010 CSC 62, [2010] 3 R.C.S. 585, par. 60). La Cour a reconnu l'existence d'une règle générale interdisant les contestations incidentes des

it is set aside in a proceeding taken for that purpose (*Maybrun*, at paras. 2-3; *R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 71). In *Maybrun*, the Court held that a different analysis was warranted for collateral attacks on administrative orders. As I will explain, however, similar principles underlie both approaches.

(1) Collateral Attacks on Court Orders

[22] There is a powerful rationale for the general rule precluding collateral attacks on court orders:

> . . . the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal . . . .

(*Maybrun*, at para. 2, quoting *Litchfield*, at p. 349)

As this Court noted in *Maybrun*, the rule against collateral attacks on court orders has been consistently applied in criminal proceedings where the charge involves an alleged breach of a court order (*Maybrun*, at para. 3, citing *R. v. Domm* (1996), 31 O.R. (3d) 540 (C.A.), at p. 547, leave to appeal refused, [1997] 2 S.C.R. viii). The rule has also been applied where the accused alleges that the court order is unconstitutional. In *Domm*, Doherty J.A., writing for the Ontario Court of Appeal, held that "[e]ven orders that are constitutionally unsound must be complied with unless set aside in a proceeding taken for that purpose" (p. 549). As this Court explained in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, "[i]f people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be

ordonnances judiciaires : sauf rares exceptions, une ordonnance rendue par une cour doit être respectée, à moins qu'elle soit annulée à l'issue d'une instance introduite à cette fin (*Maybrun*, par. 2-3; *R. c. Litchfield*, [1993] 4 R.C.S. 333, p. 349; *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, par. 71). Dans l'arrêt *Maybrun*, la Cour a jugé qu'une analyse différente était justifiée dans les cas de contestations incidentes d'ordonnances administratives. Or, comme je l'expliquerai, les deux approches s'appuient sur des principes similaires.

(1) Contestation incidente des ordonnances judiciaires

[22] La règle générale interdisant la contestation incidente des ordonnances judiciaires repose sur un raisonnement solide :

> La règle [. . .] vise à maintenir la primauté du droit et à préserver la considération dont jouit l'administration de la justice. L'incertitude résulterait si on permettait aux parties de gérer leurs affaires suivant la perception qu'ils ont de questions comme la compétence du tribunal qui rend l'ordonnance. De plus, [TRADUCTION] « l'administration ordonnée et pratique de la justice » exige que les ordonnances judiciaires soient considérées comme définitives et ayant force exécutoire à moins d'être annulées en appel . . .

(*Maybrun*, par. 2, citant *Litchfield*, p. 349)

Comme la Cour l'a noté dans l'arrêt *Maybrun*, la règle interdisant la contestation incidente des ordonnances judiciaires est appliquée systématiquement dans les instances criminelles où l'accusation concerne la violation alléguée d'une ordonnance judiciaire (*Maybrun*, par. 3, citant *R. c. Domm* (1996), 31 O.R. (3d) 540 (C.A.), p. 547, autorisation de pourvoi refusée, [1997] 2 R.C.S. viii). Cette règle est aussi appliquée dans les cas où l'accusé allègue que l'ordonnance judiciaire est inconstitutionnelle. Dans l'arrêt *Domm*, le juge Doherty, s'exprimant au nom de la Cour d'appel de l'Ontario, a statué que [TRADUCTION] « [m]ême les ordonnances inconstitutionnelles doivent être respectées, à moins qu'elles soient annulées à l'issue d'une instance introduite à cette fin » (p. 549). Comme la Cour l'a expliqué dans l'arrêt *Canada (Commission des droits*

TAB 34

Her Majesty The Queen *Appellant*

v.

Bryant Floyd Litchfield *Respondent*

INDEXED AS: R. *v.* LITCHFIELD

File No.: 22896.

1993: June 7; 1993: November 18.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Practice — Collateral attack — Sexual assault by practising male physician on female patients — Counts severed and divided by judge in chambers before indictment preferred before trial judge — Three trials to be held depending on whether assault dealt with genitals, breasts or other areas of body — Trial judge refusing to admit evidence between counts — Application for non-suit granted — Whether this Court had jurisdiction to review pre-trial severance order — If so, whether pre-trial severance order should be set aside — Whether any of the evidence excluded at trial should have been admitted — Whether non-suit should have been granted — Criminal Code, R.S.C., 1985, c. C-46, ss. 265(1)(a), (2), (3)(c), 590(3), 591(3)(a), (4), 645(5), 676(1)(a), 686(4)(a), (b)(i), 693(1)(b).

Practice — Non-suit — Sexual assault by practising male physician on female patients — Counts severed and divided by judge in chambers before indictment preferred before trial judge — Three trials to be held depending on whether assault dealt with genitals, breasts or other areas of body — Trial judge refusing to admit evidence between counts — Application for non-suit granted — Whether this Court had jurisdiction to review pre-trial severance order — If so, whether pre-trial severance order should be set aside — Whether any of the evidence excluded at trial should have been admitted — Whether non-suit should have been granted.

Sa Majesté la Reine *Appelante*

c.

Bryant Floyd Litchfield *Intimé*

RÉPERTORIÉ: R. *c.* LITCHFIELD

N° du greffe: 22896.

1993: 7 juin; 1993: 18 novembre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Pratique — Attaque indirecte — Agressions sexuelles perpétrées contre des patientes par un médecin de sexe masculin — Chefs d'accusation séparés et divisés par un juge en chambre avant la présentation de l'acte d'accusation devant le juge du procès — Trois procès devaient être tenus selon que l'agression portait sur les organes génitaux, les seins ou d'autres parties du corps — Refus du juge du procès d'admettre des éléments de preuve touchant les autres chefs d'accusation — Requête en non-lieu accordée — Notre Cour avait-elle compétence pour examiner l'ordonnance de séparation des chefs d'accusation rendue avant le procès? — Dans l'affirmative, y a-t-il lieu d'annuler l'ordonnance de séparation rendue avant le procès? — Y aurait-il eu lieu d'admettre l'un ou l'autre des témoignages écartés au procès? — Le non-lieu aurait-il dû être accordé? — Code criminel, L.R.C. (1985), ch. C-46, art. 265(1)a), (2), (3)c), 590(3), 591(3)a), (4), 645(5), 676(1)a), 686(4)a), b)(i), 693(1)b).

Pratique — Non-lieu — Agressions sexuelles perpétrées contre des patientes par un médecin de sexe masculin — Chefs d'accusation séparés et divisés par un juge en chambre avant la présentation de l'acte d'accusation devant le juge du procès — Trois procès devaient être tenus selon que l'agression portait sur les organes génitaux, les seins ou d'autres parties du corps — Refus du juge du procès d'admettre des éléments de preuve touchant les autres chefs d'accusation — Requête en non-lieu accordée — Notre Cour avait-elle compétence pour examiner l'ordonnance de séparation des chefs d'accusation rendue avant le procès? — Dans l'affirmative, y a-t-il lieu d'annuler l'ordonnance de séparation rendue avant le procès? — Y aurait-il eu lieu d'admettre l'un ou l'autre des témoignages écartés au procès? — Le non-lieu aurait-il dû être accordé?

Jurisdiction — Appellate courts — Pre-trial severance of counts of sexual assault — Three trials to be held depending on whether assault dealt with genitals, breasts or other areas of body — Trial judge refusing to admit evidence between counts — Application for non-suit granted — Whether this Court had jurisdiction to review pre-trial severance order — If so, whether pre-trial severance order should be set aside — Whether any of the evidence excluded at trial should have been admitted — Whether non-suit should have been granted.

Evidence — Sexual assault by practising male physician on female patients — Counts severed and divided by judge in chambers before indictment preferred before trial judge — Three trials to be held depending on whether assault dealt with genitals, breasts or other areas of body — Trial judge refusing to admit evidence between counts — Application for non-suit granted — Whether this Court had jurisdiction to review pre-trial severance order — If so, whether pre-trial severance order should be set aside — Whether any of the evidence excluded at trial should have been admitted — Whether non-suit should have been granted.

Criminal law — Sexual assault — Sexual assault by practising male physician on female patients — Counts severed and divided by judge in chambers before indictment preferred before trial judge — Three trials to be held depending on whether assault dealt with genitals, breasts or other areas of body — Trial judge refusing to admit evidence between counts — Application for non-suit granted — Whether this Court had jurisdiction to review pre-trial severance order — If so, whether pre-trial severance order should be set aside — Whether any of the evidence excluded at trial should have been admitted — Whether non-suit should have been granted.

Respondent, a family physician, was charged with 14 counts of sexual assault involving seven female patients who had attended at his office for medical treatment and

Compétence — Tribunaux d'appel — Séparation avant le procès des chefs d'accusation d'agression sexuelle — Trois procès devaient être tenus selon que l'agression portait sur les organes génitaux, les seins ou d'autres parties du corps — Refus du juge du procès d'admettre des éléments de preuve touchant les autres chefs d'accusation — Requête en non-lieu accordée — Notre Cour avait-elle compétence pour examiner l'ordonnance de séparation des chefs d'accusation rendue avant le procès? — Dans l'affirmative, y a-t-il lieu d'annuler l'ordonnance de séparation rendue avant le procès? — Y aurait-il eu lieu d'admettre l'un ou l'autre des témoignages écartés au procès? — Le non-lieu aurait-il dû être accordé?

Preuve — Agressions sexuelles perpétrées contre des patientes par un médecin de sexe masculin — Chefs d'accusation séparés et divisés par un juge en chambre avant la présentation de l'acte d'accusation devant le juge du procès — Trois procès devaient être tenus selon que l'agression portait sur les organes génitaux, les seins ou d'autres parties du corps — Refus du juge du procès d'admettre des éléments de preuve touchant les autres chefs d'accusation — Requête en non-lieu accordée — Notre Cour avait-elle compétence pour examiner l'ordonnance de séparation des chefs d'accusation rendue avant le procès? — Dans l'affirmative, y a-t-il lieu d'annuler l'ordonnance de séparation rendue avant le procès? — Y aurait-il eu lieu d'admettre l'un ou l'autre des témoignages écartés au procès? — Le non-lieu aurait-il dû être accordé?

Droit criminel — Agressions sexuelles — Agressions sexuelles perpétrées contre des patientes par un médecin de sexe masculin — Chefs d'accusation séparés et divisés par un juge en chambre avant la présentation de l'acte d'accusation devant le juge du procès — Trois procès devaient être tenus selon que l'agression portait sur les organes génitaux, les seins ou d'autres parties du corps — Refus du juge du procès d'admettre des éléments de preuve touchant les autres chefs d'accusation — Requête en non-lieu accordée — Notre Cour avait-elle compétence pour examiner l'ordonnance de séparation des chefs d'accusation rendue avant le procès? — Dans l'affirmative, y a-t-il lieu d'annuler l'ordonnance de séparation rendue avant le procès? — Y aurait-il eu lieu d'admettre l'un ou l'autre des témoignages écartés au procès? — Le non-lieu aurait-il dû être accordé?

L'intimé, un médecin de famille, a fait l'objet de 14 chefs d'agression sexuelle impliquant sept patientes qui s'étaient présentées à son cabinet pour recevoir un traidiagnosis. Each had consented to being touched for valid medical reasons in intimate areas of her body.

Prior to trial, respondent applied for an order that each count be tried separately or alternatively that the counts be severed by complainant. The judge hearing the motion (not the trial judge) ordered that three different trials be held depending on the part of the complainant's body involved in the assault — genitalia, breasts or other matters. The counts therefore were not only severed but also divided such that separate trials were to be held for events that occurred within one visit to the respondent's office by the same complainant.

In a trial by judge alone, the Crown first proceeded on those counts relating to vaginal examinations. The trial judge refused the Crown's motion to hold a *voir dire* to determine the admissibility of the evidence relating to the severed counts and ruled that the Crown could proceed by calling all of the evidence relating to the severed counts, subject to a subsequent ruling on admissibility. The Crown called all of the evidence relating to the severed counts, as well as the evidence of the complainants in the trial going to the counts before the court and the evidence of two medical experts. The trial judge, on a *voir dire*, refused to admit the evidence of several other women of similar assaults by the respondent. He also refused to admit the testimony of the respondent's ranking medical officer as to counselling the respondent had received from her after complaints were lodged against him while he practised in the military. The trial judge subsequently ruled all the evidence relating to the severed counts inadmissible as irrelevant or, even if relevant, too prejudicial. The respondent successfully brought a motion for a non-suit at the close of the Crown's case and was acquitted. The Court of Appeal dismissed the Crown's appeal. At issue here were: (1) whether this Court had jurisdiction to review a pre-trial severance order, and (2) if so, whether the pre-trial severance order should be set aside; (3) whether any of the evidence excluded at trial should have been admitted; and (4) whether a non-suit should have been granted.

tement médical ou un diagnostic. Chacune des patientes avait consenti à ce qu'on lui touche les parties intimes à des fins médicales valables.

Avant le procès, l'intimé a sollicité une ordonnance enjoignant d'instruire séparément chacun des chefs d'accusation ou encore de séparer les chefs par plaignante. Le juge qui a entendu la requête (qui n'était pas le juge du procès) a ordonné la tenue de trois procès distincts selon la partie du corps de la plaignante qui était en cause dans l'agression, les deux premiers portant sur les allégations relatives aux organes génitaux et aux seins respectivement, et le troisième sur les autres questions. Par conséquent, les chefs ont été non seulement séparés mais encore divisés de sorte que des procès distincts devraient être tenus pour les événements survenus à l'égard de la même plaignante dans le cadre d'une seule et même consultation dans le cabinet de l'intimé.

Lors d'un procès devant un juge seul, le ministère public a d'abord procédé relativement aux chefs concernant les examens vaginaux. Le juge du procès a rejeté la requête du ministère public visant la tenue d'un voir-dire pour déterminer l'admissibilité de la preuve concernant les chefs séparés et a décidé que le ministère public pouvait présenter toute la preuve relative aux chefs séparés, sous réserve d'une décision ultérieure sur son admissibilité. Le ministère public a présenté tous les témoignages relatifs aux chefs séparés, le témoignage des plaignantes au cours du procès touchant les chefs dont la cour était saisie, ainsi que celui de deux experts en médecine. À la suite d'un voir-dire, le juge du procès a refusé d'admettre le témoignage de plusieurs autres femmes concernant des agressions de même nature de la part de l'intimé. Il a également refusé d'admettre le témoignage du médecin supérieur hiérarchique de l'intimé quant aux conseils qu'elle lui avait donnés après que des plaintes eurent été déposées contre lui au moment où il exerçait la médecine dans l'armée. Le juge du procès a décidé ensuite que tous les témoignages relatifs aux chefs séparés étaient inadmissibles parce qu'ils n'étaient pas pertinents ou que, même s'ils étaient pertinents, ils étaient trop préjudiciables. À la fin de la présentation de la preuve du ministère public, l'intimé a présenté avec succès une requête en non-lieu et a été acquitté. La Cour d'appel a rejeté l'appel du ministère public. Il s'agit en l'espèce de déterminer (1) si notre Cour avait compétence pour examiner une ordonnance de séparation des chefs d'accusation rendue avant le procès, (2) si, dans l'affirmative, il y a lieu d'annuler l'ordonnance de séparation rendue avant le procès, (3) s'il y avait lieu d'admettre l'un ou l'autre des témoignages écartés par le juge du procès, et (4) si le non-lieu aurait dû être accordé.

Held: The appeal should be allowed.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Sexual assault is a crime of general intent. The Crown need not prove a specific intent with respect to the sexual nature of the assault because it forms part of the *actus reus*. The test is therefore an objective one. All the circumstances surrounding the conduct in question will be relevant to the question of whether the touching was of a sexual nature and violated the complainant's sexual integrity. Courts in individual cases should not create unnecessary barriers to considering all the circumstances surrounding conduct alleged to constitute a sexual assault, particularly where the complainant has consented to some touching but not to touching of a sexual nature. The nature of a complainant's relationship to her alleged assaulter, including the patient's lack of power and knowledge and the doctor's duty to perform medical examinations only for the patient's good, must all figure in a determination of whether the patient in fact consented to the conduct in question.

At first blush, the pre-trial severance order could not be appealed as part of the respondent's acquittal without violating the rule against collateral attack: a court order, made by a court having jurisdiction to make it, may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or the judgment. Given a strict application of the rule, the trial judge would not have had the power to review the division and severance order because the specific object of the proceedings was not its reversal, variation or nullification. Consequently, there would have been no error of law committed with respect to proceeding on the division and severance order at the trial upon which an appeal of the verdict reached during the trial could be founded. The result would be that neither the Court of Appeal nor this Court would have jurisdiction to review, much less to set aside, the division and severance order.

The rule against collateral attack should not be strictly applied here. The rule was not intended to immunize court orders from review but to maintain the rule of law and to preserve the repute of the administration of justice. The principles based on certainty and on the need for the orderly and functional administration of

Arrêt: Le pourvoi est accueilli.

Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory et Iacobucci: L'agression sexuelle est un crime qui requiert une intention générale. Le ministère public n'a pas à prouver l'existence d'une intention spécifique relativement à la nature sexuelle de l'agression parce qu'elle fait partie de l'*actus reus*. Le critère applicable est donc objectif. Toutes les circonstances entourant la conduite en question seront pertinentes pour déterminer si l'attouchement était de nature sexuelle et s'il a porté atteinte à l'intégrité sexuelle de la plaignante. Dans chaque cas, le tribunal ne devrait pas créer d'obstacle inutile à la prise en compte de toutes les circonstances entourant la conduite qui, allègue-t-on, constitue une agression sexuelle, particulièrement lorsque la plaignante a consenti à un certain attouchement, mais non à un attouchement de nature sexuelle. La nature de la relation qui existait entre la plaignante et son présumé agresseur, y compris l'absence de position de force chez la patiente et son manque de connaissances, ainsi que l'obligation du médecin de ne faire des examens médicaux que pour le bien de la patiente sont tous des éléments dont il faut tenir compte pour déterminer si la patiente a effectivement consenti à la conduite en cause.

À première vue, l'ordonnance de séparation des chefs d'accusation rendue avant le procès ne pouvait faire l'objet d'un appel en tant que partie de l'acquittement de l'intimé sans violer la règle interdisant les attaques indirectes: une ordonnance rendue par une cour compétente ne peut faire l'objet d'une attaque dans le cadre de procédures autres que celles visant précisément à obtenir l'infirmation, la modification ou l'annulation de l'ordonnance ou du jugement. Si on applique strictement la règle, le juge du procès n'aurait pas été habilité à examiner l'ordonnance de division et de séparation des chefs d'accusation parce que les procédures n'avaient pas précisément pour objet d'en obtenir l'infirmation, la modification ou l'annulation. Par conséquent, si l'ordonnance de division et de séparation des chefs d'accusation avait été rendue au procès, on n'aurait pas commis d'erreur de droit susceptible de justifier un appel contre le verdict prononcé à l'issue de ce procès. Il en résulterait que ni la Cour d'appel ni notre Cour n'auraient compétence pour examiner, et encore moins pour annuler, l'ordonnance de division et de séparation des chefs d'accusation.

Il n'y a pas lieu en l'espèce d'appliquer strictement la règle interdisant les attaques indirectes. La règle a été conçue non pas pour soustraire à tout contrôle une ordonnance judiciaire mais pour maintenir la primauté du droit et préserver la considération dont jouit l'administration de la justice. Les principes fondés sur la certijustice which lie behind the rule against collateral attack are not applicable in the case of a pre-trial division and severance order. Such an order does not govern the conduct of the parties but rather regulates the judicial process itself. Allowing a collateral attack at trial on such an order would not jeopardize the rule of law or damage the repute of the administration of justice. Indeed the order would have been subject to review by appellate courts along with the verdict if it had been made by a trial judge. Procedure cannot govern substance — an order so erroneous that it results in a fundamentally flawed trial process cannot be allowed to stand.

The pre-trial division and severance order could be reviewed by the trial judge and set aside if in error. The trial judge's failure to refuse to follow the pre-trial division and severance order, if erroneous, would constitute an error of law reviewable on appeal to this Court.

An indictment is preferred only when it is lodged with the trial judge. An accused need not wait until the actual trial date to bring an application to divide or sever counts. The indictment can be preferred once the trial judge has been assigned and a severance application can be brought after the indictment has been preferred but before the court has been constituted to begin hearing evidence. As a matter of practice and policy, the trial judge should hear applications to divide and sever counts. Such orders are not immunized from review and needless duplication is avoided.

The division or severance of a count requires the exercise of a great deal of discretion given the breadth of the criteria governing division and severance — the court must be satisfied that the ends of justice require the order. An appellate court should not interfere with the exercise of this discretion unless it is shown that the issuing judge acted unjudicially or that the ruling resulted in an injustice. The order at issue here worked an injustice towards the Crown, the complainants and the administration of justice in that it placed an artificial barrier to the trial judge's ability to consider the respondent's conduct in all the circumstances. The order had to

tude et sur le besoin d'une administration ordonnée et pratique de la justice qui sous-tendent la règle interdisant les attaques indirectes ne sont pas applicables à une ordonnance de division et de séparation des chefs d'accusation rendue avant le procès. Une ordonnance de cette nature régit non pas la conduite des parties, mais plutôt le processus judiciaire lui-même. Permettre, au cours du procès, une attaque indirecte contre une telle ordonnance ne compromettrait pas la primauté du droit ou ne déconsidérerait pas l'administration de la justice. En réalité, si l'ordonnance avait été rendue par le juge du procès, elle aurait fait l'objet d'un examen par les tribunaux d'appel en même temps que le verdict. La procédure ne peut l'emporter sur le fond — on ne saurait permettre le maintien d'une ordonnance erronée au point d'entacher le procès d'un vice fondamental.

L'ordonnance de division et de séparation des chefs d'accusation rendue avant le procès pouvait faire l'objet d'un examen par le juge du procès et être annulée si elle était erronée. L'omission erronée du juge du procès de refuser de suivre ladite ordonnance constituerait une erreur de droit pouvant faire l'objet d'un pourvoi devant notre Cour.

L'acte d'accusation est présenté seulement quand il est produit devant le juge du procès. Un accusé n'a pas à attendre à la date du procès pour présenter une requête en division ou séparation des chefs d'accusation. L'acte d'accusation peut être présenté une fois que le juge du procès s'est vu confier l'affaire, et une requête en séparation des chefs d'accusation peut être soumise après que l'acte d'accusation a été présenté mais avant que le tribunal ne soit constitué pour commencer à entendre les témoignages. En pratique et en principe, le juge du procès devrait entendre les requêtes en division et en séparation des chefs d'accusation. Ces ordonnances n'échappent pas à tout contrôle et le dédoublement inutile est évité.

Pour rendre une ordonnance de division ou de séparation des chefs d'accusation, il faut exercer un large pouvoir discrétionnaire étant donné la portée des critères qui régissent la division ou la séparation des chefs d'accusation — le tribunal doit être convaincu que les fins de la justice exigent l'ordonnance en question. Une cour d'appel ne devrait pas s'immiscer dans l'exercice de ce pouvoir discrétionnaire, à moins qu'il ne soit démontré que le juge qui a rendu l'ordonnance n'a pas agi judiciairement ou que sa décision a causé une injustice. L'ordonnance visée en l'espèce a causé une injustice au ministère public, aux plaignantes et à l'administration de la justice, du fait qu'elle a entravé artificiellement la capacité du juge du procès d'examiner la conduite de l'in-be set aside given its jurisdictional and substantive flaws and given the trial judge's errors in applying it.

All the evidence by the complainants going to the severed counts should have been admitted with respect to all the counts before the trial judge. It was relevant to several important issues and its prejudicial effect would not outweigh its probative value. The evidence of other touching, while it might be characterized as similar acts, was not tendered solely to show that the respondent was a person of bad character or of a disposition likely to commit the offences, but rather to provide information highly relevant to understanding the context in which the offences occurred. This evidence was admissible. The trial judge did not weigh the probative value of the evidence or specify its prejudicial effects.

The evidence of the respondent's superior officer from his time of military practice was relevant to the nature and quality of the acts which respondent performed on the complainants and specifically to whether he was carrying out proper medical procedures. The hearsay rule was wrongly applied here to exclude the evidence. This evidence was not hearsay.

The admissibility of other evidence excluded by the trial judge should be left to the discretion of the trial judge in the new trial.

The motion for non-suit should not have been granted because there was admissible evidence which, if believed by a properly charged jury acting reasonably, would justify conviction. Here, the trial judge made the determination on the application for a non-suit in his capacity as trial judge and not as trier of fact because he made no determinations of weight and credibility prior to reaching his decision. Other errors made over the course of the trial judge's ruling also made it impossible for the order to stand. Even with the trial judge's rulings on the admissibility of evidence, there was some evidence, both direct and circumstantial, which, if believed by a properly instructed jury acting reasonably, could have resulted in convictions. Under a correct approach

timé à la lumière de toutes les circonstances qui l'ont entourée. L'ordonnance devait être annulée en raison des vices de compétence et de fond qu'elle comportait, ainsi que des erreurs que le juge du procès a commises en l'appliquant.

Tous les témoignages des plaignantes relatifs aux chefs séparés auraient dû être admis à l'égard de tous les chefs soumis au juge du procès. Ils étaient pertinents en ce qui concernait plusieurs questions importantes et leur effet préjudiciable ne l'emporterait pas sur leur valeur probante. Même s'ils pourraient être qualifiés de preuve d'actes similaires, les témoignages relatifs à d'autres attouchements ont été produits non pas seulement pour démontrer que l'intimé était une personne de mauvaise moralité ou qu'il était prédisposé à commettre les infractions alléguées, mais plutôt pour fournir des renseignements très pertinents pour saisir le contexte dans lequel les infractions ont été perpétrées. Cette preuve était admissible. Le juge du procès n'a pas déterminé la valeur probante des témoignages ni précisé leur effet préjudiciable.

Le témoignage du médecin supérieur hiérarchique de l'intimé pendant qu'il exerçait la médecine dans l'armée était pertinent quant à la nature et à la qualité des actes que l'intimé a accomplis sur les plaignantes et, plus précisément, quant à la question de savoir si ses actes médicaux étaient appropriés. La règle du ouï-dire a été appliquée de façon erronée en l'espèce pour exclure le témoignage. Ce témoignage n'était pas du ouï-dire.

Il y a lieu de laisser à la discrétion du juge qui présidera le nouveau procès le soin de déterminer l'admissibilité d'autres éléments de preuve écartés par le juge du procès.

La requête en non-lieu n'aurait pas dû être accordée parce qu'il y avait des éléments de preuve admissibles qui, s'ils étaient acceptés par un jury ayant reçu des directives appropriées et agissant de manière raisonnable, justifieraient une déclaration de culpabilité. En l'espèce, le juge du procès a statué sur la requête en non-lieu en sa qualité de juge du procès, et non de juge des faits, car il ne s'est pas prononcé sur le poids de la preuve ni sur la crédibilité des témoins avant de rendre sa décision. L'ordonnance ne peut être maintenue en raison d'autres erreurs que le juge du procès a commises en statuant sur la requête. Même avec les décisions du juge du procès sur l'admissibilité de la preuve, il y avait des éléments de preuve, à la fois directs et circonstanciels, qui, s'ils avaient été acceptés par un jury ayant reçu des directives appropriées et agissant de manière to the admissibility of the evidence, there would have been all the more evidence to satisfy the standard.

Per McLachlin J.: In Alberta, it appears to be standard practice to arraign an accused before the trial for the purposes of taking pleas and pre-trial orders. This procedure allows severance motions to be heard prior to trial without seizing the chambers judge of the matter. The indictment is preferred and trial proceedings begin upon arraignment even though that may be months before a judge and jury are empanelled. The suggestion in *R. v. Chabot* that the indictment is not preferred until it is presented in the presence of the accused before a trial court constituted to dispose of the case, does not apply to pre-trial arraignments in Alberta. The rule against collateral attack would present no difficulty in cases like this one because the severance order is part of the trial proceedings. As such, it was appealable. In the alternative, if the order were taken to have preceded the preferment of the indictment and not to be part of the trial, there should be an exception to the rule against collateral attack where the Alberta procedure has been followed.

Cases Cited

By Iacobucci J.

Considered: *R. v. Chase*, [1987] 2 S.C.R. 293; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *R. v. Chabot*, [1980] 2 S.C.R. 985; **referred to:** *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *B.C. (A.G.) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 129; *R. v. Pastro* (1988), 42 C.C.C. (3d) 485; *R. v. Meltzer*, [1989] 1 S.C.R. 1764; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Deol, Gill and Randev* (1979), 20 A.R. 595; *R. v. Martel* (1986), 63 Nfld. & P.E.I.R. 39; *R. v. Barbeau*, [1992] 2 S.C.R. 845; *R. v. Watson* (1979), 12 C.R. (3d) 259; *R. v. Auld* (1957), 26 C.R. 266; *R. v. Kestenberg and McPherson* (1959), 126 C.C.C. 387; *R. v. Christie*, [1914] A.C. 545; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763; *R. v. Monteleone*, [1987] 2 S.C.R. 154; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067; *Deyong v. Weeks* (1983), 43 A.R. 342.

raisonnable, auraient entraîné des déclarations de culpabilité. Si la question de l'admissibilité de la preuve avait été abordée correctement, il y aurait eu d'autant plus d'éléments de preuve pour satisfaire à la norme.

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Le juge McLachlin: En Alberta, il paraît qu'il est normal que l'accusé soit interpellé avant le procès aux fins d'enregistrer un plaidoyer et de rendre les ordonnances préalables au procès. Cette procédure permet d'entendre
b des requêtes en séparation des chefs d'accusation avant le procès sans que le juge en chambre ne soit saisi de l'affaire. L'acte d'accusation est présenté et le procès commence au moment de l'interpellation, même si celle-ci peut être faite des mois avant qu'un juge soit
c désigné et un jury constitué. La proposition, dans l'arrêt *R. c. Chabot*, selon laquelle l'acte d'accusation n'est pas présenté tant que cela n'est pas fait en présence de l'accusé devant un tribunal de première instance constitué pour connaître de l'accusation, ne s'applique pas aux
d interpellations préalables au procès en Alberta. La règle interdisant les attaques indirectes ne poserait aucun problème dans des cas comme celui-ci, puisque l'ordonnance de séparation des chefs d'accusation fait partie du procès. À ce titre, elle pouvait faire l'objet d'un appel. Subsidiairement, si on considérait que l'ordonnance a
e précédé la présentation de l'acte d'accusation et ne faisait pas partie du procès, il devrait y avoir une exception à la règle interdisant les attaques indirectes lorsque la procédure albertaine a été suivie.

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Jurisprudence

Citée par le juge Iacobucci

g **Arrêts examinés:** *R. c. Chase*, [1987] 2 R.C.S. 293; *Norberg c. Wynrib*, [1992] 2 R.C.S. 226; *R. c. Chabot*, [1980] 2 R.C.S. 985; **arrêts mentionnés:** *Mills c. La Reine*, [1986] 1 R.C.S. 863; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *B.C. (A.G.) c. Mount Currie Indian Band*
h (1991), 54 B.C.L.R. (2d) 129; *R. c. Pastro* (1988), 42 C.C.C. (3d) 485; *R. c. Meltzer*, [1989] 1 R.C.S. 1764; *R. c. Garofoli*, [1990] 2 R.C.S. 1421; *Canada (Commission des droits de la personne) c. Taylor*, [1990] 3 R.C.S. 892; *R. c. Deol, Gill and Randev* (1979), 20 A.R. 595;
i *R. c. Martel* (1986), 63 Nfld. & P.E.I.R. 39; *R. c. Barbeau*, [1992] 2 R.C.S. 845; *R. c. Watson* (1979), 12 C.R. (3d) 259; *R. c. Auld* (1957), 26 C.R. 266; *R. c. Kestenberg and McPherson* (1959), 126 C.C.C. 387; *R. c. Christie*, [1914] A.C. 545; *R. c. C. (M.H.)*, [1991] 1
j R.C.S. 763; *R. c. Monteleone*, [1987] 2 R.C.S. 154; *États-Unis d'Amérique c. Shephard*, [1977] 2 R.C.S. 1067; *Deyong c. Weeks* (1983), 43 A.R. 342.

and severance order. Therefore, under a strict application of the rule against collateral attack, the trial judge would have had no power to review the division and severance order. Consequently, there would have been no error of law committed with respect to proceeding on the division and severance order at the trial upon which an appeal of the verdict reached during the trial could be founded. The result would be that neither the Court of Appeal nor this Court would have jurisdiction to review, much less to set aside, the division and severance order.

In my opinion, however, this is not the case for a strict application of the rule against collateral attack which was not intended to immunize court orders from review. The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty. Further, "the orderly and functional administration of justice" requires that court orders be considered final and binding unless they are reversed on appeal (*R. v. Pastro*, *supra*, at p. 497). However, these principles behind the rule against collateral attack are not applicable in the case of a pre-trial division and severance order.

A pre-trial division and severance order does not govern the conduct of the parties but rather regulates the judicial process itself. Such an order is purely related to the procedure of an accused's trial. Another way of stating the matter is that a pre-trial division and severance order is only concerned with a court's controlling its own process within the confines of the same litigation. Therefore, to allow a collateral attack at trial before a superior court on a pre-trial division and severance order made by a superior court would not jeopardize the rule of law or damage the repute of the administration of justice. Further, if the order had

division et de séparation des chefs d'accusation. C'est pourquoi, si on applique strictement la règle interdisant les attaques indirectes, le juge du procès n'aurait pas été habilité à examiner cette ordonnance. Par conséquent, si l'ordonnance de division et de séparation des chefs d'accusation avait été rendue au procès, on n'aurait pas commis d'erreur de droit susceptible de justifier un appel contre le verdict prononcé à l'issue de ce procès. Il en résulterait que ni la Cour d'appel ni notre Cour n'auraient compétence pour examiner, et encore moins pour annuler, l'ordonnance de division et de séparation des chefs d'accusation.

À mon avis, cependant, il ne convient pas en l'espèce d'appliquer strictement la règle interdisant les attaques indirectes qui n'a pas été conçue pour soustraire à tout contrôle les ordonnances judiciaires. La règle repose sur un solide raisonnement: elle vise à maintenir la primauté du droit et à préserver la considération dont jouit l'administration de la justice. L'incertitude résulterait si on permettait aux parties de gérer leurs affaires suivant la perception qu'ils ont de questions comme la compétence du tribunal qui rend l'ordonnance. De plus, [TRADUCTION] «l'administration ordonnée et pratique de la justice» exige que les ordonnances judiciaires soient considérées comme définitives et ayant force exécutoire à moins d'être annulées en appel (*R. c. Pastro*, précité, à la p. 497). Toutefois, ces principes qui sous-tendent la règle interdisant les attaques indirectes ne sont pas applicables à une ordonnance de division et de séparation des chefs d'accusation rendue avant le procès.

Une ordonnance de division et de séparation des chefs d'accusation rendue avant le procès régit non pas la conduite des parties, mais plutôt le processus judiciaire lui-même. Une telle ordonnance ne se rapporte qu'à la procédure suivie au procès d'un accusé. Autrement dit, une ordonnance de division et de séparation des chefs d'accusation rendue avant le procès ne concerne que le contrôle, par un tribunal, de sa propre procédure dans le cadre d'un même litige. Par conséquent, permettre, au cours du procès devant une cour supérieure, une attaque indirecte contre une ordonnance de division et de séparation des chefs d'accusation rendue par une