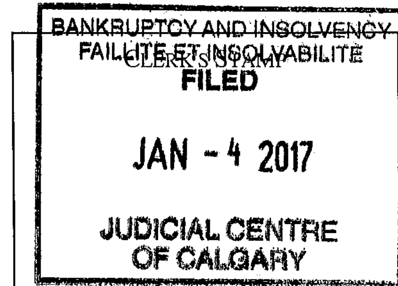

COURT FILE NUMBER	25 – 2172984
ESTATE NUMBER	25 – 2172984
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, C. B-3, AS AMENDED AND IN THE MATTER OF MICROPLANET TECHNOLOGY CORP.
DOCUMENT	**SUPPLEMENTAL BOOK OF AUTHORITIES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4K7 Attention: Alexis Teasdale Telephone No.: (403) 298-3067 Fax No.: (403) 265-7219 Client File No.: 55088.16

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TAB 1

Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of June 13, 2016

Office Consolidation

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Fax: 780-452-0668

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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 *Business Corporations Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Business Corporations Act		
Business Corporations	118/2000	*231/2000, 191/2001, 206/2001, 251/2001, 83/2005, 218/2005, 35/2007, 68/2008, 104/2009, 31/2012, 105/2012, 170/2012, 125/2013, 146/2015*

(f) prepare at least once in every 6-month period after the date of the receiver's or receiver-manager's appointment financial statements of the receiver's or receiver-manager's administration as far as is practicable in the form required by section 155, and, subject to any order of the Court, file a copy of them with the Registrar within 60 days after the end of each 6-month period, and

(g) on completion of the receiver's or receiver-manager's duties,

(i) render a final account of the receiver's or receiver-manager's administration in the form adopted for interim accounts under clause (f),

(ii) send a copy of the final report to the Registrar who shall file it, and

(iii) send a copy of the final report to each director of the corporation.

1981 cB-15 s96

Part 9
Directors and Officers

Directors

101(1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

(2) A corporation shall have one or more directors but a distributing corporation whose shares are held by more than one person shall have not fewer than 3 directors, at least 2 of whom are not officers or employees of the corporation or its affiliates.

RSA 2000 cB-9 s101;2005 c8 s20

Bylaws

102(1) Unless the articles, bylaws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any bylaws that regulate the business or affairs of the corporation.

(2) The directors shall submit a bylaw, or an amendment or a repeal of a bylaw, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the bylaw, amendment or repeal.

Organization meeting

104(1) After issue of the certificate of incorporation, a meeting of the directors of the corporation shall be held at which the directors may

(a) make bylaws,

(b) adopt forms of security certificates and corporate records,

(c) authorize the issue of securities,

(d) appoint officers,

(e) appoint an auditor to hold office until the first annual meeting of shareholders,

(f) make banking arrangements, and

(g) transact any other business.

(2) Subsection (1) does not apply to a body corporate to which a certificate of amalgamation has been issued under section 185 or 187 or to which a certificate of continuance has been issued under section 188.

(3) An incorporator or a director may call the meeting of directors referred to in subsection (1) by giving not less than 5 days' notice of the meeting to each director, stating the date, time and place of the meeting.

(4) A director may waive notice under subsection (3).

1981 cB-15 s99

Qualifications of directors

105(1) The following persons are disqualified from being a director of a corporation:

(a) anyone who is less than 18 years of age;

(b) anyone who

(i) is a represented adult as defined in the *Adult Guardianship and Trusteeship Act* or is the subject of a certificate of incapacity that is in effect under the *Public Trustee Act*,

(ii) is a formal patient as defined in the *Mental Health Act*,

(iii) is the subject of an order under *The Mentally Incapacitated Persons Act*, RSA 1970 c232, appointing a committee of the person or estate, or both, or

(iv) has been found to be a person of unsound mind by a court elsewhere than in Alberta;

(c) a person who is not an individual;

(d) a person who has the status of bankrupt.

(2) Unless the articles otherwise provide, a director of a corporation is not required to hold shares issued by the corporation.

(3) At least 1/4 of the directors of a corporation must be resident Canadians.

(4) Repealed 2005 c8 s21.

(5) A person who is elected or appointed a director is not a director unless

(a) the person was present at the meeting when the person was elected or appointed and did not refuse to act as a director, or

(b) if the person was not present at the meeting when the person was elected or appointed,

(i) the person consented to act as a director in writing before the person's election or appointment or within 10 days after it, or

(ii) the person has acted as a director pursuant to the election or appointment.

(6) For the purpose of subsection (5), a person who is elected or appointed a director and refuses under subsection (5)(a) or fails to consent or act under subsection (5)(b) is deemed not to have been elected or appointed a director.

RSA 2000 cB-9 s105;2005 c8 s21;2008 cA-4.2 s121

Election and appointment of directors

106(1) At the time of sending articles of incorporation, the incorporators shall send to the Registrar a notice of directors in the prescribed form and the Registrar shall file the notice.

(2) Each director named in the notice referred to in subsection (1) holds office from the issue of the certificate of incorporation until the first meeting of shareholders.

(3) Subject to subsection (9)(a) and section 107, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the next annual meeting of shareholders following the election.

(4) If the articles so provide, the directors may, between annual general meetings, appoint one or more additional directors of the corporation to serve until the next annual general meeting, but the number of additional directors shall not at any time exceed 1/3 of the number of directors who held office at the expiration of the last annual meeting of the corporation.

(5) It is not necessary that all directors elected at a meeting of shareholders hold office for the same term.

(6) A director not elected for an expressly stated term ceases to hold office at the close of the first annual meeting of shareholders following the director's election.

(7) Notwithstanding subsections (2), (3) and (6), if directors are not elected at a meeting of shareholders, the incumbent directors continue in office until their successors are elected.

(8) If a meeting of shareholders fails to elect the number or the minimum number of directors required by the articles by reason of the disqualification or death of any candidate, the directors elected at that meeting may exercise all the powers of the directors if the number of directors so elected constitutes a quorum.

(9) The articles or a unanimous shareholder agreement may provide for the election or appointment of a director or directors

(a) for terms expiring not later than the close of the 3rd annual meeting of shareholders following the election, and

(b) by creditors or employees of the corporation or by a class or classes of those creditors or employees.

1981 cB-15 s101;1983 c20 s11

Cumulative voting

107 If the articles provide for cumulative voting,

(a) the articles shall require a fixed number and not a minimum and maximum number of directors,

(b) each shareholder entitled to vote at an election of directors has the right to cast a number of votes equal to the number of votes attached to the shares held by the shareholder

(3) A corporation shall forthwith send a copy of the statement referred to in subsection (2)

(a) to every shareholder entitled to receive notice of any meeting referred to in subsection (1) and,

(b) if the corporation is a distributing corporation, to the director

unless the statement is included in or attached to a management proxy circular required by section 150.

(4) No corporation or person acting on its behalf incurs any liability by reason only of circulating a director's statement in compliance with subsection (3).

1981 cB-15 s105

Filling vacancies

111(1) Notwithstanding section 114(3), a quorum of directors may, subject to subsections (3) and (4), fill a vacancy among the directors, except a vacancy resulting from an increase in the number or minimum number of directors or from a failure to elect the number or minimum number of directors required by the articles.

(2) If there is not a quorum of directors, or if there has been a failure to elect the number or minimum number of directors required by the articles, the directors then in office shall forthwith call a special meeting of shareholders to fill the vacancy and, if they fail to call a meeting or if there are no directors then in office, the meeting may be called by any shareholder.

(3) If the holders of any class or series of shares of a corporation or any other class of persons have an exclusive right to elect one or more directors and a vacancy occurs among those directors,

(a) subject to subsection (4), the remaining directors elected by that class or series may fill the vacancy except a vacancy resulting from an increase in the number or minimum number of directors for that class or series or from a failure to elect the number or minimum number of directors for that class or series, or

(b) if there are no such remaining directors, any holder of shares of that class or series or any member of that other class of persons, as the case may be, may call a meeting of those shareholders or those persons for the purpose of filling the vacancy.

(4) The articles or a unanimous shareholder agreement may provide that a vacancy among the directors shall only be filled by

(a) a vote of the shareholders,

(b) a vote of the holders of any class or series of shares having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class or series, or

(c) the vote of any class of persons having an exclusive right to elect one or more directors if the vacancy occurs among the directors elected by that class of persons.

(5) A director appointed or elected to fill a vacancy holds office for the unexpired term of the director's predecessor.

1981 cB-15 s106

Change in number of directors

112(1) The shareholders of a corporation may amend the articles to increase or, subject to section 107(h), to decrease the number of directors or the minimum or maximum number of directors, but no decrease shall shorten the term of an incumbent director.

(2) If the shareholders adopt an amendment to the articles of a corporation to increase the number or minimum number of directors, the shareholders may, at the meeting at which they adopt the amendment, elect an additional number of directors authorized by the amendment, and for that purpose, notwithstanding sections 179(1) and 267(3), on the issue of a certificate of amendment the articles are deemed to be amended as of the date on which the shareholders adopt the amendment to the articles.

1981 cB-15 s107

Notice of change of directors

113(1) Within 15 days after a change is made among the directors, a corporation shall send to the Registrar a notice in the prescribed form setting out the change and the Registrar shall file the notice.

(1.1) Within 15 days after a director changes his or her address, the director or the corporation shall send to the Registrar a notice in the prescribed form setting out the change, and the Registrar shall file the notice.

(2) Any interested person, or the Registrar, may apply to the Court for an order to require a corporation or a director, as the case may be, to comply with this section, and the Court may so order and make any further order it thinks fit.

RSA 2000 cB-9 s113;2005 c8 s22

Meetings of directors

114(1) Unless the articles otherwise provide, the directors may meet at any place and on any notice the bylaws require.

(2) Subject to the articles or bylaws, a majority of the number of directors appointed constitutes a quorum at any meeting of directors, and, notwithstanding any vacancy among the directors, a quorum of directors may exercise all the powers of the directors.

(3) Directors shall not transact business at a meeting of directors unless at least 1/4 of the directors present are resident Canadians.

(4) Notwithstanding subsection (3), directors may transact business at a meeting of directors when fewer than 1/4 of the directors present are resident Canadians if

(a) a resident Canadian director who is unable to be present approves in writing or by electronic means, telephone or other communication device the business transacted at the meeting, and

(b) the number of resident Canadian directors present at the meeting, together with any resident Canadian director who gives that director's approval under clause (a), totals at least 1/4 of the directors present at the meeting.

(5) A notice of a meeting of directors shall specify any matter referred to in section 115(3) that is to be dealt with at the meeting but, unless the bylaws otherwise provide, need not specify the purpose or the business to be transacted at the meeting.

(6) A director may in any manner waive a notice of a meeting of directors, and attendance of a director at a meeting of directors is a waiver of notice of the meeting, except when a director attends a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called.

(7) Notice of an adjourned meeting of directors is not required to be given if the date, time and place of the adjourned meeting is announced at the original meeting.

(8) If a corporation has only one director, that director may constitute a meeting.

(9) A director may participate in a meeting of directors or of a committee of directors by electronic means, telephone or other communication facilities that permit all persons participating in the meeting to hear each other if

(a) the bylaws so provide, or

(b) subject to the bylaws, all the directors of the corporation consent,

and a director participating in a meeting by those means is deemed for the purposes of this Act to be present at that meeting.

RSA 2000 cB-9 s114;2005 c8 s23;2016 c18 s1

Delegation to managing director or committee

115(1) The directors of a corporation may appoint from their number a managing director, who must be a resident Canadian, or a committee of directors and delegate to the managing director or committee any of the powers of the directors.

(2) If the directors of a corporation appoint a committee of directors, at least 1/4 of the members of the committee must be resident Canadians.

(3) Notwithstanding subsection (1), no managing director and no committee of directors has authority to

(a) submit to the shareholders any question or matter requiring the approval of the shareholders,

(b) fill a vacancy among the directors or in the office of auditor,

(b.1) appoint additional directors,

(c) issue securities except in the manner and on the terms authorized by the directors,

(d) declare dividends,

(e) purchase, redeem or otherwise acquire shares issued by the corporation, except in the manner and on the terms authorized by the directors,

(f) pay a commission referred to in section 42,

(g) approve a management proxy circular referred to in Part 12,

(h) approve any financial statements referred to in section 155, or

(i) adopt, amend or repeal bylaws.

RSA 2000 cB-9 s115;2005 c8 s24;2016 c18 s1

Validity of acts of directors, officers and committees

116(1) An act of a director or officer is valid notwithstanding an irregularity in the director's or officer's election or appointment or a defect in the director's or officer's qualification.

(2) An act of the directors or a committee of directors is valid notwithstanding non-compliance with section 105(3) or (4), 114(3) or 115(2).

1981 cB-15 s111

Resolution instead of meeting

117(1) Subject to the articles, the bylaws or a unanimous shareholder agreement, a resolution in writing, signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors, is as valid as if it had been passed at a meeting of directors or committee of directors.

(2) A resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of directors, and signed by all the directors entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of directors.

(3) A copy of every resolution referred to in subsection (1) must be kept with the minutes of the proceedings of the directors or committee of directors.

1981 cB-15 s112;1987 c15 s13

Liability of directors and others

118(1) Directors of a corporation who vote for or consent to a resolution authorizing the issue of a share under section 27 for a consideration other than money are jointly and severally liable to the corporation to make good any amount by which the consideration received is less than the fair equivalent of the money that the corporation would have received if the share had been issued for money on the date of the resolution.

(2) Subsection (1) does not apply if the shares, on allotment, are held in escrow pursuant to an escrow agreement required by the Executive Director and are surrendered for cancellation pursuant to that agreement.

(3) Directors of a corporation who vote for or consent to a resolution authorizing

(a) a purchase, redemption or other acquisition of shares contrary to section 34, 35 or 36,

(b) a commission on a sale of shares not provided for in section 42,

TAB 2

CANADA

CONSOLIDATION

Bankruptcy and Insolvency Act

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

CODIFICATION

Loi sur la faillite et l’insolvabilité

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

Current to December 8, 2016

Last amended on February 26, 2015

À jour au 8 décembre 2016

Dernière modification le 26 février 2015

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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.

NOTE

This consolidation is current to December 8, 2016. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of December 8, 2016 are set out at the end of this document under the heading “Amendments Not in Force”.

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.

NOTE

Cette codification est à jour au 8 décembre 2016. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 8 décembre 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Creditor may assent or dissent

53 Any creditor who has proved a claim, whether secured or unsecured, may indicate assent to or dissent from the proposal in the prescribed manner to the trustee prior to the meeting, and any assent or dissent, if received by the trustee at or prior to the meeting, has effect as if the creditor had been present and had voted at the meeting.

R.S., 1985, c. B-3, s. 53; 1992, c. 1, s. 20, c. 27, s. 21.

Accord ou désaccord du créancier

53 Tout créancier qui a prouvé une réclamation — garantie ou non — peut, de la manière prescrite, indiquer au syndic, avant l'assemblée, s'il approuve ou désapprouve la proposition; si cette approbation ou désapprobation est reçue par le syndic avant l'assemblée ou lors de celle-ci, elle a le même effet que si le créancier avait été présent et avait voté à l'assemblée.

L.R. (1985), ch. B-3, art. 53; 1992, ch.1, art. 20, ch. 27, art. 21.

Vote on proposal by creditors

54 (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Voting system

(2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Certain Crown claims

(2.1) For greater certainty, subsection 224(1.2) of the *Income Tax Act* shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of

Vote sur la proposition

54 (1) Les créanciers peuvent, conformément aux autres dispositions du présent article, décider d'accepter ou rejeter la proposition ainsi qu'elle a été faite ou modifiée à l'assemblée ou à un ajournement de celle-ci.

Mode de votation

(2) La votation est régie par les règles suivantes :

a) tous les créanciers non garantis, ainsi que les créanciers garantis dont les réclamations garanties ont fait l'objet de la proposition, ont le droit de voter s'ils ont prouvé leurs réclamations;

b) les créanciers votent par catégorie, selon celle des catégories à laquelle appartiennent leurs réclamations respectives; à cette fin, toutes les réclamations non garanties forment une seule catégorie, sauf si la proposition prévoit plusieurs catégories de réclamations non garanties, tandis que les catégories de réclamations garanties sont déterminées conformément au paragraphe 50(1.4);

c) le vote des créanciers garantis n'est pas pris en considération pour l'application du présent article; il ne l'est que pour l'application du paragraphe 62(2);

d) la proposition est réputée acceptée par les créanciers seulement si toutes les catégories de créanciers non garantis — mis à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — votent en faveur de son acceptation par une majorité en nombre et une majorité des deux tiers en valeur des créanciers non garantis de chaque catégorie présents personnellement ou représentés par fondé de pouvoir à l'assemblée et votant sur la résolution.

Certaines réclamations de la Couronne

(2.1) Il demeure entendu que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* n'a pas pour effet d'assimiler, pour l'application du paragraphe (2), aux réclamations garanties les réclamations de Sa Majesté du chef du

Class — creditors having equity claims

54.1 Despite paragraphs 54(2)(a) and (b), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

2007, c. 36, s. 20.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

54.1 Malgré les alinéas 54(2)a) et b), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

2007, ch. 36, art. 20.

Creditors may provide for supervision of debtor's affairs

55 At a meeting to consider a proposal, the creditors, with the consent of the debtor, may include such provisions or terms in the proposal with respect to the supervision of the affairs of the debtor as they may deem advisable.

R.S., c. B-3, s. 37.

Les créanciers peuvent assurer la surveillance des affaires du débiteur

55 À une assemblée convoquée pour étudier une proposition, les créanciers, avec l'approbation du débiteur, peuvent inclure, dans la proposition, les dispositions ou les conditions qui peuvent être jugées convenables relativement à la surveillance des affaires du débiteur.

S.R., ch. B-3, art. 37.

Appointment of inspectors

56 The creditors may appoint one or more, but not exceeding five, inspectors of the estate of the debtor, who shall have the powers of an inspector under this Act, subject to any extension or restriction of those powers by the terms of the proposal.

R.S., c. B-3, s. 38.

Nomination d'inspecteurs

56 Les créanciers peuvent nommer un ou plusieurs, mais au plus cinq, inspecteurs de l'actif du débiteur, qui possèdent les pouvoirs d'un inspecteur aux termes de la présente loi, sous réserve toutefois de l'extension ou de la restriction de ces pouvoirs que prévoit la proposition.

S.R., ch. B-3, art. 38.

Result of refusal of proposal

57 Where the creditors refuse a proposal in respect of an insolvent person,

(a) the insolvent person is deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall either

(i) forthwith call a meeting of creditors present at that time, which meeting shall be deemed to be a meeting called under section 102, or

(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (b) is issued, of the meeting of creditors under section 102,

Effet du rejet d'une proposition

57 Lorsque les créanciers refusent d'accepter une proposition visant une personne insolvable :

a) celle-ci est réputée avoir fait dès lors une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic est tenu :

(i) de convoquer aussitôt une assemblée des créanciers présents à ce moment-là, assemblée qui est réputée convoquée aux termes de l'article 102,

(ii) faute de quorum pour l'application du sous-alinéa (i), de convoquer, dans les cinq jours suivant la délivrance du certificat visé à l'alinéa b), une assemblée des créanciers aux termes de l'article 102.

if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que l'employeur est en mesure d'effectuer, et effectuera, les paiements prévus à l'alinéa a).

Non-application of subsection (1.5)

(1.6) Despite subsection (1.5), the court may approve a proposal that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Non-application du paragraphe (1.5)

(1.6) Par dérogation au paragraphe (1.5), le tribunal peut approuver la proposition qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Payment — equity claims

(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Paiement d'une réclamation relative à des capitaux propres

(1.7) Le tribunal ne peut approuver la proposition qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

Payment to trustee

(2) All moneys payable under the proposal shall be paid to the trustee and, after payment of all proper fees and expenses mentioned in subsection (1), shall be distributed by him to the creditors.

Paiement au syndic

(2) Tout montant payable aux termes de la proposition est payé au syndic et, après le paiement de tous les honoraires et dépenses convenables mentionnés au paragraphe (1), distribué par lui aux créanciers.

Distribution of promissory notes, stock, etc., of debtor

(3) Where the proposal provides for the distribution of property in the nature of promissory notes or other evidence of obligations by or on behalf of the debtor or, when the debtor is a corporation, shares in the capital stock of the corporation, the property shall be dealt with in the manner prescribed in subsection (2) as nearly as may be.

Distribution de billets à ordre, d'actions, etc. du débiteur

(3) Lorsque la proposition prévoit la distribution des biens sous forme de billets à ordre ou d'autres titres d'obligations souscrites par le débiteur ou en son nom ou, si le débiteur est une personne morale, sous forme d'actions du capital social de la personne morale, ces biens sont traités dans la mesure du possible conformément au paragraphe (2).

Section 147 applies

(4) Section 147 applies to all distributions made to the creditors by the trustee pursuant to subsection (2) or (3).

L'art. 147 s'applique

(4) L'article 147 s'applique à toutes les distributions faites aux créanciers par le syndic conformément au paragraphe (2) ou (3).

TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Shermag Inc., Re | 2009 QCCS 537, 2009 CarswellQue 2487, [2009] R.J.Q. 1289, EYB 2009-156550, J.E. 2009-897, 51 C.B.R. (5th) 95 | (C.S. Qué., Mar 26, 2009)

2006 CarswellOnt 406
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2006 CarswellOnt 406, [2006] O.J. No. 276, 14 B.L.R. (4th) 260, 17 C.B.R. (5th) 78

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: January 17, 18, 20, 2006
Judgment: January 20, 2006
Docket: 04-CL-5306

Counsel: Michael Barrack, James D. Gage, Geoff R. Hall for Applicants
Robert Thornton, Kyla Mahar for Monitor
Peter Jervis, George Glezos, Karen Kiang for Equity Holders
John Varley for Salaried Employees
David Jacobs for USW Locals 8782, 5328
Aubrey Kauffman for Tricap Management Ltd.
Kevin Zych, Rick Orzy for 8% and 10.4% Stelco Bondholders
Lawrence Thacker for Directors of Stelco
Sharon White for USW Local 1005
Ken Rosenberg for USW International
Kevin McElcheran for GE
Gale Rubenstein, Fred Myers for Superintendent of Financial Services
Derrick Tay for Mittal
David R. Byers, Sean Dunphy for CIT Business Credit as DIP and ABL Lender
V. Gauthier for BABC Global Finance
L. Edwards for EDS Canada Inc.
Peter Jacobsen for Globe & Mail
Paul Macdonald, Andy Kent for Sunrise, Appalloosa
Murray Gold, Andrew Hatnay for Salaried Retirees
Flaviano Stanc for himself

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

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Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Business associations

VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.a With shareholders
VI.3.a.ii Reorganization

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — With shareholders — Reorganization

Corporation negotiated plan of arrangement and reorganization to present to shareholders for approval — Arrangement acknowledged that subsequent reorganization could result in cancellation of reorganized corporation's shares based on those shares' having no value — Shareholder group claimed that sufficient value in corporation existed to fully satisfy claims of affected and unaffected creditors and to provide some additional value to shareholders — All shareholders and creditors voted on and approved arrangement in excess of statutory two-thirds requirements — Corporation brought application for order sanctioning and approving arrangement — Group brought cross-motion for adjournment of approval of arrangement for 60 days — Motion dismissed — Plan was fair, reasonable and equitable regarding existing equity — Group had not presented credible evidence that existing equity had any value independent of proposed arrangement — Despite very comprehensive capital raising and asset sale process and with market well canvassed, no interested party had come forward to conclude another deal — Significant majority of shareholders had approved of arrangement with large quorum present — No creditor opposition to arrangement existed — Creditors were accounted for and had been involved in negotiations to create arrangement.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Corporation negotiated plan of arrangement and reorganization to present to shareholders for approval — Arrangement acknowledged that subsequent reorganization could result in cancellation of reorganized corporation's shares based on those shares' having no value — Shareholder group claimed that sufficient value in corporation existed to fully satisfy claims of affected and unaffected creditors and to provide some additional value to shareholders — All shareholders and creditors voted on and approved arrangement in excess of statutory two-thirds requirements — Corporation brought application for order sanctioning and approving arrangement — Group brought cross-motion for adjournment of approval of arrangement for 60 days — Motion dismissed — Plan was fair, reasonable and equitable regarding existing equity — Group had not presented credible evidence that existing equity had any value independent of proposed arrangement — Despite very comprehensive capital raising and asset sale process and with market well canvassed, no interested party had come forward to conclude another deal — Significant majority of shareholders had approved of arrangement with large quorum present — No creditor opposition to arrangement existed — Creditors were accounted for and had been involved in negotiations to create arrangement.

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Algoma Steel Inc., Re (2001), 2001 CarswellOnt 4640, 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — considered

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 48 C.B.R. (4th) 205, 2004 CarswellQue 810 (C.S. Que.) — considered

Canadian Airlines Corp., Re (2000), 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Airlines Corp., Re (2000), 2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Laidlaw, Re (2003), 2003 CarswellOnt 787, 39 C.B.R. (4th) 239 (Ont. S.C.J.) — referred to

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1999), 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

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Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 191 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

CROSS-MOTION by shareholder group for adjournment of arrangement implementation for 60 days.

***Farley J.*:**

1 The Applicants (collectively "Stelco") moved for:

(a) a declaration that Stelco has complied with the provisions of the *Companies' Creditors Arrangement Act* ("CCAA") and the orders of this court made in this CCAA proceeding;

(b) a declaration that the Stelco plan of arrangement pursuant to the CCAA and the reorganization of Stelco Inc. ("S") under the *Canada Business Corporations Act* ("CBCA") (collectively the "Plan") as voted on by the affected creditors of Stelco is fair and reasonable;

(c) an order sanctioning and approving the Plan; and

(d) an order extending the Stay Period and Stay Date in the Initial Order until March 31, 2006.

2 This relief was unopposed by any of the stakeholders except for various existing shareholders of S (who may also be employees or retirees of Stelco). In particular there was organized objection to the Plan, especially as in essence the Plan would eliminate the existing shareholders, by a group of shareholders (AGF Management Ltd., Stephen Stow, Pollitt & Co., Levi Giesbrecht, Joe Falco and Phil Dawson) who have styled themselves as "The Equity Holders" ("EH"). On December 23, 2005 the EH brought in essence a cross motion seeking the following relief:

(a) An order extending the powers of the Monitor, Ernst & Young, in order to conduct a sale of the entire Stelco enterprise as a going concern through a sale of the common shares or assets of Stelco on such terms and conditions as are considered fair;

(b) An order authorizing and directing the Monitor to implement and to take all steps necessary to complete and fulfill all requirements, terms, conditions and steps of such a sale;

(c) An order authorizing and directing the Monitor to conduct the sale process in accordance with a plan for the sale process approved by the court;

(d) An order directing the Monitor to retain such fully independent financial advisors and other advisors as necessary to conduct this sale process;

(e) An order confirming that the powers granted herein to the Monitor supersede any provision of any prior Order of this Court made in the within proceedings to the extent that such provision of any prior order is inconsistent with or contradictory to this order, or would otherwise limit or hinder the power and authority granted to the Monitor;

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(f) An order directing Stelco and its directors, officers, counsel, agents, professional advisors and employees, and its Chief Restructuring Officer, to cooperate fully with the Monitor with regard to this sale process, and to provide the Monitor with such assistance as may be requested by the Monitor or its independent advisors;

(g) In the alternative, an order suspending the sanctioning of the Proposed Plan of Arrangement, approved by the creditors on December 9, 2005, for a period of two months from the date of such order, so that the Monitor may conduct the independent sale process that may result in a more profitable outcome for all stakeholders, including the Equity Holders;

(h) In the further alternative, an order lifting the *Companies' Creditors Arrangement Act* stay of proceedings in respect of Stelco without approving the Plan of Arrangement, as approved by the creditors on December 9, 2005, pursuant to such terms as are just and are directed by court; and

(i) Such further and other relief as counsel may advise and this Honourable Court may permit.

3 In its factum, the EH requested that the court adjourn approval of the Plan for 60 days and direct the Monitor to conduct an independent sale process for the shares of S. In the attendances on January 17 and 18, 2006, the EH then asked that approval of the Plan be adjourned for 30 days in order to see if there were expressions of interest for the shares of S forthcoming in the interim.

4 I indicated that I would defer my consideration of the adjournment request until after I had had submissions on the motions before me as set out above. I also indicated that while there did not appear to be any concern by anyone including the EH as to the first two elements concerning CCAA plan sanctioning as discussed in *Algoma Steel Inc., Re* (2001), 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at p. 3:

> In a sanction hearing under the *Companies' Creditors Arrangement Act* ("CCAA") the general principles to be applied in the exercise of the court's discretion are:
>
> (a) There must be strict compliance with all statutory requirements and adherence to the previous orders of the court;
>
> (b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (c) The Plan must be fair and reasonable.
>
> See *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p. 201; *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p. 109; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at pp. 172-3; *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.), leave to appeal dismissed, [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers]).

it would not be sufficient to only deal in this hearing with the third test of whether the Plan was fair and reasonable (including the aspect of "fair, reasonable and equitable" as discussed in *Sammi Atlas Inc., Re* [1998 CarswellOnt 1145 (Ont. Gen. Div. [Commercial List])]). Rather the court also had to be concerned as to whether the Plan was implementable. In other words, it would be futile and useless for the court to approve a plan which stood no reasonable prospect of being implemented. That concern of the court had been raised by my having been alerted by the Monitor in its 46th Report at paragraphs 8-9:

> 8. The Monitor has had discussions with the proposed ABL lenders, Tricap, the Province and Stelco regarding the status of the ABL Loan and the Bridge Loan. The Monitor has been advised that the parties are continuing to work

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at resolving issues that are outstanding as at the date of this Forty-Sixth Report. However, all of the parties remain optimistic that acceptable solutions to the outstanding issues will be found and implemented.

9. In the Monitor's view, the principal issues to be resolved include:

(a) the corporate structure of Stelco, which could involve the transfer of assets of some of the operations or divisions of the Applicants to new affiliates; and

(b) satisfying the ABL lenders and Tricap as to the priority of the new financing.

These issues need to be resolved primarily among the proposed ABL lenders, Tricap and Stelco and will also involve the Province insofar as they affect pension and related liabilities.

5 I was particularly disquieted by the lack of progress in dealing with these outstanding matters despite the passage of 39 days since the Plan was positively voted on December 9, 2005. I do appreciate that Christmas, Hanukkah and New Year's were celebrated in this interval and that there had been a certain "negotiation fatigue" leading up to the December 9th revisions to the Plan and that I have advocated that counsel, other professionals and litigation participants balance their lives and pay particular attention to family and health. However I find it unfortunate that there would appear to have been such a lengthy hiatus, especially when the workers at Stelco continued (as they have for the past two years while Stelco has been under CCAA protection) to produce steel in record amounts. I therefore demanded that evidence be produced forthwith to demonstrate to my satisfaction that progress was real and substantial so that I could be satisfied about implementability. As a side note I would observe that in the "normal" case, sanction orders are typically sought within two or three days of a positive creditor vote so that it is not unusual for documentation to be sorted out for a month before a plan is implemented with a closing.

6 The EH filed material to support its submission that the Plan is not fair, reasonable and equitable because it is alleged that there is currently sufficient value in Stelco to fully satisfy the claims of affected and unaffected creditors and to provide at least some value to current shareholders. The EH prefers to have a search for some entity to take out the current shareholders for "value". Fabrice Taylor, a chartered financial analyst with Pollit & Co. swore an affidavit on the eve of this hearing which was sent electronically to the service list on January 16, 2006 at approximately 7:30 p.m. In that affidavit, he states:

2. The Dofasco bidding war has highlighted a crucial fact about steel asset valuations, notably that strategic buyers place a much higher value on them than public market investors. Attached as Exhibit "1" is an article entitled "Restructuring of steel industry revives investors' interest", published in the Financial Times on December 14, 2005.

3. I, along with Murray Pollitt and a number of Stelco shareholders, have spent the past three months attempting to attract strategic buyers and/or equity investors in Stelco. These strategic buyers and equity investors are mostly international. Some had already considered buying Stelco or had made bids for the company but had stopped following the story some months ago. Others were not very familiar with Stelco.

4. Three factors hindered our efforts. First, Stelco is under CCAA protection, a complicated situation involving multiple players and interests (unions, politics, pensions) that is difficult to understand, particularly for foreigners. Second, there has not been enough time for these strategic buyers or equity investors to deepen their understanding or to perform due diligence. Finally, the Dofasco bid process, while providing emphatic evidence that steel assets are increasingly valuable, hinders certain strategic buyers and financial institutions interested in participating in Stelco because they are distracted and/or conflicted by the Dofasco sale. I have been advised by some of the participants in the Dofasco negotiations that they would be willing to carefully consider a Stelco transaction once the Dofasco sale has been resolved.

5. The Forty Fifth Report of the Monitor confirmed that Stelco had not received any offers in the last several months. The report does not answer the question of whether the company or its financial advisors have in fact

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attempted to attract any offers. I believe that Stelco would have received expressions of interest had the company made efforts to attract offers, or had the Dofasco sale been resolved earlier. I believe that the Monitor should be authorized, for a period of at least 60 days, to canvas interest in a sale of Stelco before the approval of the proposed plan of restructuring.

7 No satisfactory explanation was forthcoming as to why this affidavit, if it needed to be filed at all, was not served and filed by December 23, 2005, in accordance with the timetable which the EH and the other stakeholders agreed to. Certainly there is nothing in the affidavit which is such late breaking news that this deadline could not have been met, let alone that it was served mere hours before the hearing commenced on January 17, 2006. Aside from the fact that the financing arrangements forming the basis of the Plan contained "no shop" covenants which would make it inappropriate and a breach to try to attract other offers, the foregoing excerpts from the Taylor affidavit clearly illustrate that despite apparently diligent efforts by the EH, no one has shown any real or realistic interest in Stelco. Reading between the lines and without undue speculation, it would appear that the efforts of the EH were merely politely rebuffed.

8 Certainly Stelco is not Dofasco, nor is it truly a comparable (as opposed to a contrastor). Stelco has been a wobbly company for a long time. Further as I indicated in my October 3, 2005 endorsement, in the preceding 20 months under the CCAA protection, Stelco has become "shopped worn". The unusual elevation of steel prices in the past two years has helped Stelco avoid the looming liquidity crisis which it anticipated in its CCAA filing on January 29, 2004. However even this financial transfusion has not allowed it to become a healthy company or truly given it a burgeoning war chest to weather bad times the way that other steel companies (including some in Canada) have so benefited. The redness of the visage of Stelco is not a true indication of health and well being; rather it seems that it is rouge to mask a deep pallor.

9 I am satisfied on the evidence of Hap Stephen, the Chief Restructuring Officer of Stelco and of the Monitor that there has been compliance with all statutory requirements and adherence to previous orders of the court and further that nothing has been done or purported to be done that is not authorized by the CCAA.

10 The next question to be dealt with is whether the Plan is fair, reasonable and equitable. I was advised that creditors of the affected creditor classes representing approximately 90% in value of each class voted on the Plan. The Monitor reported at para. 19 of its 44 th Report as to the results of the vote held December 9 th as follows:

Class of Affected Creditors	Percentage in favour by Number	Percentage in favour by Dollar Value
Stelco	78.4%	87.7%
Stelwire	89.01%	83.47%
Stelpipe	94.38%	86.71%
CHT Steel	100%	100%
Welland Pipe	100%	100%

11 This favourable vote by the affected creditors is substantially in excess of the statutory two-thirds requirement. By itself that type of vote, particularly with such a large quorum present, would ordinarily be very convincing for a court not interfering with the informed decisions of business people. With that guideline, plus the aspect that a plan need not be perfect, together with the lack of any affected creditor opposition to the Plan being sanctioned and the fact that the Plan including its ingredients and nature and amount of compromise compensation to be given to affected creditors having been exhaustively negotiated in hard bargaining by the larger creditor groups who are recognized as generally being sophisticated and experienced in this area, and the consideration of the elements in the next paragraph, it would seem to me that the Plan is fair, reasonable and equitable vis-à-vis the affected creditors and I so find. See *Sammi Atlas Inc., Re*, at p. 173; *T. Eaton Co., Re* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at p. 313; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.

12 I also think it helpful to examine the situation pursuant to the analysis which Paperny J. did in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), leave to appeal refused (2000), 20 C.B.R. (4th) 46 (Alta.

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C.A. [In Chambers]). That proceeding also involved an application pursuant to the corporate legislation, the *Business Corporations Act* (*Alberta*), concerning the shares and shareholders of Canadian Airlines. In that case, Paperny J. found the following factors to be relevant:

> (a) the composition of the vote: claims must have been properly classified, with no secret arrangements to give an advantage to a creditor or creditors; approval of the plan by the requisite majority of creditors is most important (in the case before me of Stelco: the challenge to classification was dismissed; there was no suggestion of secret arrangements; and, as discussed above, the quorum and size of the positive vote were very high);
>
> (b) anticipated receipts in liquidation or bankruptcy: it is helpful if the Monitor or other disinterested person has prepared a liquidation analysis (in Stelco, the Monitor determined that on liquidation, affected creditor recovery would likely range from 13 to 28 cents on the dollar; it should also be observed that Stelco has engaged in extensive testing of the market as to possible capital raising or sale with the aid of established firms and professionals of great experience and had come up dry.);
>
> (c) alternatives to the proposed plan: it is significant if other options have been explored and rejected as unworkable (in Stelco; see comment in (b));
>
> (d) oppression of the rights of certain creditors (in Stelco, this was not a live issue as nothing of this sort was alleged);
>
> (e) unfairness to shareholders (in Stelco, this will be dealt with later in my reasons; however allow me to observe that the interests of shareholders becomes engaged if they are not so far underwater that there is a reasonable prospect in the foreseeable future that the fortunes of a company would otherwise likely be turned around so that they would not continue to be submerged); and
>
> (f) the public interest: the retention of jobs for employees and the support of the plan by the company's unions is important (in Stelco, the Plan does not call for reductions in employment; there is provision for continuation of the capital expenditure program and its funding; an important enterprise for the municipal and provincial levels of government would be preserved with continuing benefits for those communities; an important customer and supplier would continue in the industry and maintain competition; the USW International Union and its locals (except for local 1005) supported the Plan and indeed were instrumental in bringing Tricap Management Limited to the table (local 1005's position was that it did not wish to engage in the CCAA process in any meaningful way as it was content to rely upon its existing collective agreement which now still has several months to go before expiring).

However that is not the end of that issue: what of the shareholders?

13 Is the Plan fair, reasonable and equitable for the existing shareholders of S? They will be wiped out under the Plan and their shares eliminated. New equity will be created in which the existing shareholders will not participate. They have not been allowed to vote on the Plan.

14 It is well established that a reorganization pursuant to s. 191 of the CBCA may be made in conjunction with a sanction order under the CCAA and that such a reorganization may result in the cancellation of existing shares of the reorganized corporation based on those shares/equity having no present value (in the sense of both value "now" and the likelihood of same having value in the reasonably foreseeable future, absent the reorganization including new debt and equity injections and permitted indulgences or other considerations and adjustments). See *Beatrice Foods Inc., Re* (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]) at para. 10-15; *Laidlaw, Re* (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.); *Algoma Steel Inc., Re* at para. 7; *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (C.S. Que.) at p. 217. The Dickenson Report, which articulated the basis for the reform of corporate law that resulted in the enactment of the CBCA, described the object of s. 191 as being:

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> to enable the court to effect any necessary amendment to the articles of the corporation in order to achieve the objective of the reorganization without having to comply with all the formalities of the Draft Act, particularly shareholder approval of the proposed amendment (emphasis added): R.W.V. Dickenson, J.L. Howard, L. Getz, *Proposals for a New Business Corporations Law for Canada*, vol. 1 (Ottawa: Information Canada. 1971) at p. 124.

15 The fairness, reasonableness and equitable aspects of a plan must be assessed in the context of the hierarchy of interests recognized by insolvency legislation and jurisprudence. See *Canadian Airlines Corp., Re* at pp. 36-7 where Paperny J. stated:

> Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd.*, *supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.
>
> To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.
>
> It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

16 The question then is does the equity presently existing in S have true value at the present time independent of the Plan and what the Plan brings to the table? If it does then the interests of the EH and the other existing shareholders must be considered appropriately in the Plan. This is fairly put in K.P. McElcheran, *Commercial Insolvency in Canada* (Toronto, Lexis Nexis Canada Inc.: 2005) at p. 290 as:

> If, at the time of the sanction hearing, the business and assets of the debtor have a value greater than the claims of the creditors, a plan of arrangement would not be fair and reasonable if it did not offer fair consideration to the shareholders.

17 However if the shareholders truly have no economic interest to protect (keeping in mind that insolvency and the depth of that insolvency may vary according to which particular test of insolvency is applied in respect of a CCAA proceeding: as to which, see *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), leave to appeal dismissed [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal dismissed [2004 CarswellOnt 5200 (S.C.C.)] No. 30447). In *Cable Satisfaction*, Chaput J. at p. 218 observed that when shareholders have no economic interest to protect, then they have no claim to a right under the proposed arrangement and the "[m]ore so when, as in the present case, the

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shareholders are not contributing to any of the funding required by the Plan." I do note in the case of the Stelco Plan and the events leading up to it, including the capital raising and sale processes, that despite talk of an equity financing by certain shareholders, including the EH, no concrete offer ever surfaced.

18 If the existing equity has no true value at present, then what is to be gained by putting off to tomorrow (the ever present and continuous problem in these proceedings of manãna — which never comes) what should be done today. The EH speculate, with no concrete basis for foundation as demonstrably illustrated by the eve of hearing Taylor affidavit discussed above, that something good may happen. I am of the view that that approach was accurately described in court by one counsel as a desperation Hail Mary pass and the willingness of someone, without any of his own chips, in the poker game willing to bet the farm of someone else who does have an economic interest in Stelco.

19 I also think it fair to observe that in the determination of whether someone has an economic value, that analysis should be conducted on a reasonable and probable basis. In a somewhat different but applicable context, I observed in *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) at p. 3:

> The "highest price" is not the price which could be derived on the basis of the most optimistic and risky assumptions without any regard as to their likelihood of being realized. It also seems to me that prudence would involve a consideration that there be certain fall back positions. Even in betting on horses, the most savvy and luckiest punter will not continue to stake all his winnings of the previous race on the next (and so on). If he does, he will go home wearing the barrel before the last race is run.

Alternatively there is a saying: "If wishes were horses, then beggars would ride."

20 Unless I were to now dismiss the motion for sanctioning and approving the Plan because I found that it was not implementable and/or that it was not fair, reasonable and equitable to the existing shareholders (based upon the proviso that I did determine that the existing shareholders did have a valid present material equity of value), then I see no reason not to dismiss the motion of the EH concerning its request for an adjournment and its request for a further sale (or other related disposition) process. Allow me to observe that no matter how well intentioned the motion of the EH in that regard, I find that that request to be lacking in any valid substance. Rather, the evidence presented was in essence a chimera. I think it fair to observe that, with all the capital raising and sales processes to date which Stelco has undertaken in conjunction with its experienced and well placed professional advisers together with its Chief Restructuring Officer and the Monitor, the bushes have been exhaustively and well beaten as to any real possible interest. Despite three months of what one must presume to be diligent efforts, the EH have come up with nothing concrete. I do not find that the three factors mentioned by Taylor in his late-blooming affidavit of January 16th to be remotely close to convincing. The first two, if taken at face value, would lead one to the conclusion that no one has the time, interest or ability to take an interest in Stelco in any meaningful timeframe. The third presumes that the losing bidder for Dofasco, be it Arcelor or ThyssenKrupp, will almost automatically want Stelco — and at a price and upon terms which would result in present equity being attributed value. I must say in fairness that this is wishful thinking as neither of these warring bidders pursued any interest in Stelco during the previous processes. It is neither clear nor obvious why mere municipal proximity of Dofasco to Stelco's Hilton Works in Hamilton would now ignite any interest in Stelco.

21 I also think it fair to observe that not proceeding with the sanction hearing now and indeed starting a brand new search for someone who will think Stelco so worthwhile that it will offer such a large amount (with or without onerous conditions) is akin to someone coming into court when a receiver is seeking court approval on a sale — and that someone being allowed to know the price and conditions — and then being able to make an offer for a price somewhat higher. (I reiterate that here we do not even have an offer or a price.) I do not see that such a procedure would be consistent with the principles laid out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.). Given that the affected creditors have rather resoundingly voted in favour of the Plan, all in accordance with the provisions of the CCAA and the Court orders affecting the sanction, I would be of the view that if the existing equity has no value, then the EH's request in this respect would, if granted, be of significant detriment to the integrity of the insolvency system and regime. I would find that inappropriate to attempt to justify proceeding along that line.

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22 Allow me to return to the pivotal point concerning the question of whether the Plan is fair, reasonable and equitable, vis-à-vis the existing equity. The EH retained Navigant Consulting which relied upon the views of Metal Bulletin Research ("MBR") which, *inter alia*, predicted a selling spot price of hot roll steel at $525 U.S. per ton. Navigant's conclusion in its December 8, 2005 report was that the value of residual shareholder equity was between $1.1 to $1.3 billion or a per share value of between $10.76 and $12.71. However, when Stelco pointed out certain deficiencies in this analysis, Navigant took some of these into account and reduced its assessment of value to between $745 million to $945 million for residual shareholder value on per share value of $7.29 to $9.24, using a discounted cash flow ("DCF") approach. Navigant tested the DCF approach against the EBITDA approach. It is interesting to note that on the EBITDA analysis approach Navigant only comes up to a conclusion that the equity is valued at $8 million to $83 million or $0.09 to $0.81 per share. If the Court were to accept that as an accurate valuation, or something at least of positive value even if not in that neighbourhood, then I would have to take into account existing shareholder interests in determining whether the Plan was fair, reasonable and equitable — and not only vis-à-vis the affected creditors but also vis-à-vis the interests of the existing shareholders given that at least some of their equity would be above water. I understand the pain and disappointment of the existing shareholders, particularly those who have worked hard and long with perhaps their life savings tied up in S shares, but regretfully for them I am not able to come to a conclusion that the existing equity has a true positive value.

23 The fight in the Stelco CCAA proceedings has been long and hard. No holds have been barred as major affected creditors have scrapped to maximize their recovery. There were direct protracted negotiations between a number of major affected creditors and the new equity sponsors under the Plan, all of whom had access to the confidential information of Stelco pursuant to Non Disclosure Agreements. These negotiations established a value of $5.50 per share for the *new* common shares of a *restructured* Stelco. That translates into an enterprise value (not an equity value since debt/liabilities must be taken into consideration) of $816.6 million for Stelco, or a recovery of approximately 65% for affected creditors. The parties engaged in these negotiations are sophisticated experienced enterprises. There would be no particular reason to believe that in the competition involved here that realistic values were ignored. Further, the affected creditors generally were rather resoundingly of the view by their vote that an anticipated 65% recovery was as good as they could reasonably expect.

24 The 45th Report of the Monitor had a chart of calculations to determine the level of recovery of affected creditors at various assumed enterprise values up to and including the top end of Navigant's range of enterprise value (as contrasted with residual equity value). At the high end of Navigant's range of revised enterprise value, $1.6 billion, the Monitor calculated that affected creditors would still not receive full recovery of their claims.

25 The EH cited the sale of the EDS Canada claim to Tricap as being at a premium as evidence in support of Navigant's conclusion. However, the fact was that this claim was purchased not at a premium, but rather at a discount. That would be confirmation of the opposite of which the EH has been contending.

26 Despite a very comprehensive capital raising and asset sale process, with the market alerted and well canvassed, and with the ability to conduct due diligence, no interested party came forwarded to conclude a deal. Even since the December 9, 2005 vote when the terms of the Plan were available, no interested party has come forward with any expression of interest which would attribute value to the existing shareholders.

27 Stelco's experts, UBS and BMO Nesbit Burns, both have given opinions that there is no value to the existing equity. Their expert opinions were not challenged by cross-examination. Both these advisors are large sophisticated institutions; both have extensive experience in the steel industry.

28 UBS calculated the enterprise value of Stelco as being in the range of $550 million to $750 million; BMO Nesbitt Burns at $650 million to $850 million. On that basis the unsecured creditors would receive less than full recovery of their claims, which would lead to the conclusion that there is no value for the existing shareholders. The Monitor

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commissioned an independent estimate of the enterprise value from its affiliate, Ernst & Young Orenda Corporate Finance Inc's Valuation Group. That opinion came in at $635 million to $785 million.

29 I would note that Farley Cohen, the principal author of the Navigant report, does not have experience in dealing with integrated steel companies. I find it unusual that he would have customized his approach in calculating equity value by not deducting the Asset Based Lenders loan. Brad Fraser of BMO Nesbitt Burns stated that such customization was contrary to the practice at his firms both present and past and that the Navigant's approach was internally inconsistent with respect thereto as to 2005 to 2009 cash flows as contrasted with terminal value. The Navigant report appears to have forecasted a high selling price for steel combined with low costs for imports such as coal and scrap, which would be contrary to historical complementary movements between steel prices and these inputs.

30 Navigant relies on an average price of $525 US per ton as provided by MBR. This is a single source as to this forecast. While a single analyst may come up with a forecast which is shown by the passage of time to be dead on accurate, it would seem to me to be more realistic and prudent to rely on the consensus approach of considering the views of a greater number of "representative" analysts, especially when prices appear volatile for the foreseeable future. That consensus approach allows for consideration of the way that each analyst looks at the market and the factors and weights to be given. The UBS opinion reviewed the pricing forecast of eight analysts and BMO Nesbitt Burns' ten analysts. Interestingly, MBR's choice of a price at the top of the band would seem at odds as the statements on the MBR website foreseeing downward pressure on steel prices in 2006 because of falling prices in China; although this inconsistency was pointed out, there was no response forthcoming.

31 Navigant estimated Stelco's financial performance for the last quarter of 2005 and made a significant upward adjustment. However, the actual experience would appear to indicate that such an adjustment would overstate Stelco's results by $124 million.

32 Navigant's DCF approach involved a calculation of Stelco's enterprise value by adding the present value of a stream of cash flow from the present to 2009 and the present value of the terminal value determined as at 2009 so that the terminal value represents the majority (60% approximately) of enterprise value as calculated by Navigant. MBR chose a 53-year average steel price despite significant changes over that time in the industry. However, coal and scrap costs were determined as at 2009. This produced the anomalous result that steel prices are rising while costs are falling. This would imply great structural difficulties (economically and functionally) in the steel industry generally and a lack of competition. A terminal value EBITDA margin for Stelco would then be implied at approximately 26% or some 11% higher than the EBITDA margin actually achieved by Stelco in the first quarter of 2005, the most profitable quarter in the history of Stelco.

33 Interestingly, since Navigant's approach in fact would decrease calculated value, UBS and BMO Nesbitt Burns used a weighted average cost of capital ("WACC") for Stelco in the range of 10% to 14%; Navigant used 24%. A higher WACC will result, all other things being equal, in a lower enterprise value. Navigant considered that there should be a 10% to 15% company-specific premium because of the risks associated with Stelco vis-à-vis the higher steel prices forecast by MBR. This would appear to imply that there was recognition that either MBR was aggressive in its forecasting or that price volatility would caution one to use consensus forecasting. Colin Osborne, a senior executive of Stelco, with considerable experience in the steel industry provided direct evidence on the substantial differences between each of Stelco, AK Steel, U.S. Steel and Algoma. Mr. Cohen acknowledged in cross-examination that these differences made Dofasco a more valuable company than Stelco. As set out at para. 74 of the Stelco Factum:

> 74. The specific difference identified by Mr. Osborne which made Dofasco unique include but are not limited to:
>
> > (a) non-union, flexible work environment (vs. Stelco, Algoma, AK Steel and U.S. Steel);
> >
> > (b) legacy costs which are very low due to non-conventional profit sharing, which limits liability (vs. Stelco, AK Steel, Algoma and U.S. Steel);

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(c) high historical cap-ex spend per ton (vs. Stelco, Algoma and U.S. Steel);

(d) a flexible steelmaking stream in terms of a hybrid EAF and blast furnace BOF stream in Hamilton and a mini-mill operation in the U.S. (vs. Stelco, Algoma, U.S. Steel and AK Steel which are all blast furnace based steel makers);

(e) a value added product mix focused on coated products and tubing (vs. Stelco and Algoma which focus on hot roll); and

(f) a strong raw material position with excess iron ore and self-sufficiency in coke (Algoma, Stelco and AK Steel all have dependence to various degrees on either iron ore or coke or both).

Dofasco and Stelco are not in my view fungible. There are incredible differences between these two enterprises, to the disadvantage of Stelco.

34 The reply affidavit of Mr. Fraser of BMO Nesbitt Burns calculated the effect of all of the acknowledged corrections to the initial Navigant report and other adjustments. The result of this exercise was a conclusion by him that there was no value available for existing shareholders. This, along with all the other affidavits provided on the Stelco side, was not cross-examined on.

35 While not referred to in the Factum of EH, there were a number of quite serious allegations raised in material filed by the EH against management of Stelco concerning bias and manipulation. Mr. Osborne responded to each of these allegations; he was not cross-examined. I find it unfortunate that such allegations appear to have been made on an unsubstantiated shotgun approach.

36 The position of the EH is that certain of the features of the Plan should be assumed as transportable directly and without change into a scenario where some insolvency rescuer emerges on the scene as the equivalent of a White Knight, one it would seem which has been awakened from slumber. I am of the view that presumes too much. For example, I take it that the Province would not automatically accept this potential newcomer without question; nor would it likely relish the resumption of weeks of hard bargaining. I would think it unwise, impudent and high stakes poker (with other peoples' money) to speculate as did Taylor in para. 41 of his December 23, 2005 affidavit:

> 41. Were Stelco to emerge from CCAA protection and were the province to carry out its threat to revoke Stelco's entitlement to the benefit of section 5.1 the end result would likely be a liquidation of the company. The Province would be responsible for a substantial portion of Stelco's pension promise. It would clearly not be in the Province's self-interest to force Stelco into liquidation. It was, in other words, an obvious bluff. Yet the notion of calling this bluff does not appear to have crossed management's mind.

This should be contrasted with the views of the Monitor in its 44th Report at para. 61:

> 61. It should also be noted that the Pension Plan Funding Arrangements and the $150 million New Province Note embodied in the Approved Plan were agreed to by the Province only in the context of the terms of the Approved Plan and, in particular, the capital structure, liquidity and other elements contemplated therein. The Province has advised that its proposed financing and the Pension Plan Funding Arrangements should not be assumed to be available if any of the elements of the Approved Plan are changed.

37 The end result is that given the above analysis, I have no hesitation in concluding that it would be preferable to rely upon the analysis of UBS, BMO Nesbitt Burns and Ernst & Young Orenda, both as to their direct views as to the enterprise value of existing Stelco and as to their criticism of the Navigant and MBR reports concerning Stelco. Therefore, I conclude that the existing shareholders cannot lay claim to there being any existing equity value. Given that conclusion, it would be inappropriate to justify cutting in these existing shareholders for any piece of the emergent

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restructured Stelco. If that were to happen, especially given the relative values and the depth of submersion of existing equity, then it would be unfair, unreasonable and inequitable for the affected creditors.

38 That then leaves the remaining question: Does it appear likely that the Plan will be implementable? I have been advised on Wednesday, January 18th that I would receive executed term sheets (which would address the issues raised by the Monitor discussed above) by 5 p.m., Friday, January 20th.

39 The motion and adjournment request of the EH is dismissed.

40 There was a request to extend the stay to March 31, 2006. I am of the view that it would be sufficient and desirable to extend the stay (subject, of course, to further extension) to March 3, 2006.

41 I have received the term sheets together with the Monitor's 48th Report by the 5 p.m. January 20th deadline and find them satisfactory as demonstrating to my analysis and satisfaction that the Plan is implementable as discussed above, subject to a comeback provision if anyone wishes to dispute the implementability issue (the onus remaining on Stelco). My decision today re: implementability should in no way be taken as deciding any corporate reorganization issue or anything of that or related nature. I therefore sanction and approve the Plan.

Motion dismissed.

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TAB 4

2002 CarswellOnt 790
Ontario Superior Court of Justice [Commercial List]

Laidlaw Inc., Re

2002 CarswellOnt 790, 112 A.C.W.S. (3d) 203, 34 C.B.R. (4th) 72

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended

In the Matter of the Business Corporations Act (Ontario), R.S.O. 1990, c. B-16, as Amended

Laidlaw Inc. and Laidlaw Investments Ltd.

Farley J.

Heard: February 28, 2002
Judgment: February 28, 2002
Docket: 01-CL-4178

Counsel: *David Burnham*, *Patrick Alpaugh*, for Moving Parties
B. Zarnett, *J. Carfagnini*, *B. Empey*, for Laidlaw Inc., Laidlaw Investment Ltd.
D. Tay, for Ernst & Young Inc.
R. Orzy, *K. Zych*, for Laidlaw Bondholders Subcommittee
D. Byers, for Laidlaw Banks Subcommittee
R. Jaipargas, for Chubb and Federated Insurance

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Business associations

VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.b Under general corporate legislation

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Companies' Creditors Arrangement Act plan of reorganization was in place — Litigation was pending between company and other business — Individuals brought motion for relief consisting of establishment of shareholders oversight committee and orders appointing committee as inspectors, requiring calling of annual meeting and companies to fund costs of committee — Motion dismissed — Under all foreseeable circumstances, shareholders would not have economic interests to protect — Even if company was entirely successful in pending litigation, it

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would in all probability be "paper judgment" in that there would be no assets available to collect against — If there was radical change in major parts of equation, plan of reorganization would have to be changed to reflect change and would have to come back before court — In interim, monitor was charged with continuing task of looking out for reasonable interests of all stakeholders — Saddling creditors with expense of committee would be inappropriate — Creditors had great and abiding interest in maximizing value of enterprise — Individuals had not met test of s. 229(2) of Canada Business Corporations Act — No material benefit was to be gained from requiring annual meeting — Interjecting committee into negotiations would be inappropriate — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 229(2) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under general corporate legislation

Companies' Creditors Arrangement Act plan of reorganization was in place — Litigation was pending between company and other business — Individuals brought motion for relief consisting of establishment of shareholders oversight committee and orders appointing committee as inspectors, requiring calling of annual meeting and companies to fund costs of committee — Motion dismissed — Under all foreseeable circumstances, shareholders would not have economic interests to protect — Even if company was entirely successful in pending litigation, it would in all probability be "paper judgment" in that there would be no assets available to collect against — If there was radical change in major parts of equation, plan of reorganization would have to be changed to reflect change and would have to come back before court — In interim, monitor was charged with continuing task of looking out for reasonable interests of all stakeholders — Saddling creditors with expense of committee would be inappropriate — Creditors had great and abiding interest in maximizing value of enterprise — Individuals had not met test of s. 229(2) of Canada Business Corporations Act — No material benefit was to be gained from requiring annual meeting — Interjecting committee into negotiations would be inappropriate — Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 229(2) — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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Ferguson v. Imax Systems Corp., 44 C.P.C. 17, 47 O.R. (2d) 225, 52 C.B.R. (N.S.) 255, 11 D.L.R. (4th) 249, 4 O.A.C. 188, 1984 CarswellOnt 155 (Ont. Div. Ct.) — referred to

Loewen Group Inc., Re, 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) — referred to

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Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

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s. 229(2) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

MOTION by individuals for orders establishing shareholders oversight committee, appointment of committee as inspectors, requiring calling of annual meeting and requiring companies to fund costs of committee.

***Farley J.*:**

1 It may be questionable whether the moving parties are technically shareholders of Laidlaw Inc. However it was determined to be appropriate to deal with this motion as if they were shareholders. Mr. Burnham, a non-lawyer, spoke for both Mr. Alpaugh and himself. They wished various relief:

> a) the establishment of a Shareholders Oversight Committee ("SOC") to represent the rights and interests of shareholders with the regard to all business activities of Laidlaw Inc. and Laidlaw Investments Ltd. from 1997 to the present, including through the SOC directly participating in the CCAA Plan of Reorganization, direct participation in the mediation process between Laidlaw and Safety-Kleen ("SK") relating to the pending litigation and review and approval of the proposed litigation settlement between Laidlaw and the bondholders;
>
> b) orders pursuant to the OBCA and the CBCA appointing the SOC as inspectors to investigate the activities of the board, officers, management, auditors and legal counsel of Laidlaw;
>
> c) an order requiring an annual meeting to be called by Laidlaw Inc. upon completion of the inspector's (SOC's) report in (b) above; and
>
> d) an order requiring the Laidlaw companies to fund the costs of the SOC, including the retainer of legal counsel and a forensic accountant.

2 Mr. Burnham quite fairly noted that, if in fact Laidlaw Inc. was so insolvent that the shareholders were so far under water that they had no reasonable expectation that they would come close to having a positive economic interest in the corporation, then the relief which he was seeking would not be appropriate. However, he pointed out that Laidlaw had a $6.5 billion claim against SK and that this was a flicker of hope that, if realized, could result in Laidlaw Inc. having a positive shareholder equity. It is of course important for the objective appreciation of this situation to realize that the $6.5 billion is not a sure thing — in fact far from it. The Monitor Ernst & Young Inc. is a court-appointed officer which must objectively look out for and be concerned for the interests of all stakeholders — including the shareholders in that capacity. However, both the Monitor and the investment-banking firm with extensive experience providing valuation services, Dresdner Kleinwort Wasserstein Inc., have concluded that on any reasonable scenario the shareholders are very significantly underwater. Further, it is realistic to note that creditors (Bondholders and Banks) will take a very severe "haircut" so that they will not come close to being paid out in full. Thus, under all foreseeable circumstances, it appears that the shareholders have no economic interest to protect.

3 What of the $6.5 billion claim against SK? Aside from the fact that SK has a $4.3 billion claim against Laidlaw, Laidlaw's claim against SK is unsecured and therefore junior to SK's secured debt. At the present SK's 2008 Notes, which are junior to the secured bank debt, are trading at less than five cents on the dollar. Thus, even if Laidlaw were entirely successful against SK, it appears that the "market" is confirming that it would in all probability be a "paper judgment" in the sense that there would be no assets available to collect against. However, if there were a radical change in major parts of this equation, then — if, as and when that unexpected good fortune smiles upon Laidlaw — it is possibly conceivable that the shareholders would have a *bona fide* economic interest in Laidlaw Inc. — with the result that the Plan of Reorganization would have to be changed to reflect that. That would have to come back before the courts. In

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the interim the Monitor is of course charged with the continuing task of looking out for the reasonable interests of all stakeholders — but looked at in a realistic way. That is, there must be an air of reality to the analysis.

4 It would be inappropriate to saddle the creditors (who would bear the burden of the costs of the SOC) with the expense of the SOC, at a time when their expected recovery is at a significant discount. See the view of the legal hierarchy of interests (creditors standing before or on top of shareholders) I discussed in *T. Eaton Co., Re* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]). See also Paperny J.'s views in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta Q.B.) at p. 22 concerning not involving shareholders where they do not have a true economic interest. See also *Loewen Group Inc., Re* [2001 CarswellOnt 4910 (Ont. S.C.J. [Commercial List])] released December 13, 2001.

5 I also note that the creditors in the subject case have a great and abiding interest in maximizing the value of the enterprise as in achieving the greatest out of the SK claim. As discussed above, I do not see any reasonable prospect for the shareholders to be on the cusp of economic value, but if they were, then they have the safeguards above discussed.

6 As for an investigation, I would note that the moving parties have not met the test of s. 229 (2) of the CBCA. See *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.) and *Brown v. Maxim Restoration Ltd.* (1998), 42 B.L.R. (2d) 243 (Ont. Gen. Div.). I understand that there is a class proceeding of shareholders in the works; it would not be appropriate to ask the creditors of Laidlaw to fund a shareholder investigation in any event.

7 With respect to an annual meeting, given that Laidlaw Inc. is heavily insolvent and well into the restructuring process, I do not see on the record before me that there is any material benefit to be gained from requiring an annual meeting under the corporate legislation, given the sad financial state of Laidlaw Inc. with the shareholders having no economic interest given their very significant underwater location on the depth gauge.

8 I would also note that it would be inappropriate to interject the SOC into negotiations (either re the Plan of Reorganization or the SK claim mediation or otherwise) as this could have a very disruptive effect on those processes.

9 Motion dismissed.

Motion dismissed.

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TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Adams v. Hutchings (No. 2) | 1893 CarswellNWT 14, 3 Terr. L.R. 206 | (N.W.T. S.C., Oct 30, 1893)

1887 CarswellOnt 19
The Supreme Court of Canada

Hovey v. Whiting

1887 CarswellOnt 19, 14 S.C.R. 515

Albert Henry Hovey and others (Defendants), Appellants and Matthew Whiting and others (Plaintiffs), Respondents

Sir W.J. Ritchie C.J. and Strong, Fournier, Henry and Gwynne JJ.

Judgment: November 13, 1886
Judgment: March 14, 1887

Proceedings: On Appeal from the Court of Appeal for Ontario.

Counsel: Dr. *McMichael Q.C.* and *S.H. Blake Q.C.* (*Wilson Q.C.* with them) for the respondents.

Subject: Corporate and Commercial; Contracts; Evidence; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

II Assignments in bankruptcy
II.2 Types of assignors
II.2.c Corporations
II.2.c.i Power of officers to make assignment

Business associations

III Specific matters of corporate organization
III.1 Directors and officers
III.1.e Duty to manage
III.1.e.ii Power and authority
III.1.e.ii.A Directors
III.1.e.ii.A.3 Miscellaneous

Business associations

IV Powers, rights and liabilities
IV.9 Contracts by corporations
IV.9.d Corporate seal
IV.9.d.ii Miscellaneous

Civil practice and procedure

XVIII Interpleader

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XVIII.1 Nature and scope of proceedings
XVIII.1.a General principles

Contracts

II Parties to contract
II.3 Capacity
II.3.b Corporations

Evidence

XIX Parol evidence rule
XIX.3 Interpretation
XIX.3.c Surrounding circumstances
XIX.3.c.v Miscellaneous

Personal property security

VIII Chattel mortgages and bills of sale
VIII.3 Nature and scope of legislation
VIII.3.d Exclusions

Personal property security

VIII Chattel mortgages and bills of sale
VIII.7 Registration of mortgage or bill
VIII.7.c Form and contents of mortgage or bill
VIII.7.c.i Description of parties and chattels

Headnote

Bankruptcy --- Assignments in bankruptcy — Types of assignors — Corporations — Power of officers to make assignment

Directors.

A board of directors having full power in all things to administer the affairs of the company and to make or cause to be made for the company any description of contract which the company may by law enter into is entitled to make an assignment of all the estate and effects of the company to a trustee for the general benefit of creditors without the formal sanction of the whole body of the shareholders.

Chattel Mortgages and Bills of Sale --- Nature and scope of legislation — Exclusions — Under statute

Assignment for benefit of creditors — Bills of Sale and Chattel Mortgage Act, R.S.O. 1877, c. 119 — Bills of Sale and Chattel Mortgage Act, S.O. 1885, c. 26.

The Court of Appeal held that prior to the amendment of 1885, an assignment for the general benefit of creditors was within the operation of the Bills of Sale and Chattel Mortgage Act. In the Supreme Court of Canada Henry and Gwynne JJ. were of the opinion that an assignment for the general benefit of creditors without preference or priority was not within the Act, and that the earlier Ontario cases were cases of assignments giving a preference to certain creditors.

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Chattel Mortgages and Bills of Sale --- Registration of mortgage or bill — Form and contents of mortgage or bill — Description of chattels

Sufficiency of description of goods in bill of sale -- Bills of Sale and Chattel Mortgage Act, R.S.O. 1877, c. 119.

It is a mistake to hold that the Act is to be construed as meaning that by reading the instrument itself or a schedule annexed thereto, such a description should be obtained as would convey to every reader and to the Court, whenever a question should arise, without the aid of any oral evidence of surrounding circumstances or otherwise, what were the particular articles which constituted `all the stock-in-trade' of the mortgagor. The statute never intended to exclude oral evidence of circumstances surrounding the execution of the mortgage and throw,ing light upon the question of fact to be determined or to cancel the maxim certum est quod certum reddi potest.

Corporations --- Directors and officers — Duty to manage — Power and authority — Directors

Directors and officers — Duty to manage - Power and authority — Directors — General — Assignment by company for benefit of its creditors — Whether directors have authority to execute assignment — Joint Stock Companies Act, S.C. 1877, c. 43..

The directors of a company, incorporated under the Act, which found itself unable to meet its liabilities, held a meeting and passed a resolution that the company should make an assignment of all its property to a trustee for the benefit of all its creditors, and that the president and secretary should execute such assignment; and this was done. The shareholders had not, at a meeting or otherwise, assented to or authorized the assignment. In interpleader proceedings, an execution creditor attacked the validity of the assignment, alleging, inter alia, that the directors had, in the absence of the assent and authority of the shareholders duly evidenced by by-law at a meeting called for that purpose or otherwise, no power or capacity to authorize the execution of an assignment of the company's property for the benefit of the creditors. Held, a sale or transfer by the directors of a company, as in this case, giving everything up to secure the creditors, share and share alike, was an act which the directors had full authority to do, and their affixing the seal of the corporation to the document, which they likewise had authority to do, made it the act of the corporation..

Corporations --- Contracts by corporations — Corporate seal

Contracts by corporations — Corporate seal — General -- Deeds under corporate seal — Authority of directors to affix seal.

Per Gwynne J.: "All deeds executed under the corporate seal of an incorporated company which is regularly affixed are binding on the company unless it appears by the express provisions of some statute creating or affecting the company, or by necessary or reasonable inference from the enactments of such statute that the Legislature meant that such deed should not be executed ... and the directors of the company have authority to affix the seal of the company to all such deeds not so, as above, forbidden by the Legislature to be executed, unless they are by the express provisions of, or by necessary or reasonable inference from, the enactments of such statute forbidden to affix the seal of the company to the particular deed for the time being under consideration without compliance with some condition precedent prescribed as being essential to the validity of such deed, and which condition precedent has not been complied with.".

Evidence --- Parol evidence rule — Interpretation — Surrounding circumstances

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Chattel mortgages -- Description of mortgaged goods -- Admissibility of parol evidence of circumstances surrounding execution of mortgage.

Practice --- Interpleader — Nature and scope of proceedings

Whether interlocutory or final — Sheriff's interpleader — Interpleader to determine issue arising incidentally in action.

The judgment of the Court upon an interpleader issue tried on the application of a sheriff for protection from claims made to property seized in execution, is of a different character from a judgment on an interpleader issue ordered in the progress of a suit for the purpose of determining a point necessary to be determined before judgment should be pronounced on the matters in contestation in the suit. While interpleader proceedings in an action may be properly termed interlocutory with respect to that action, the judgment on the interpleader issue is nevertheless final.

***Sir W.J. Ritchie C.J.*:**

1 In this case I think the appeal to the court below was rightly taken, and with reference to the first proposition, that the directors had no right to assign the property to trustees for the payment of their debts, I am clearly of opinion that they not only had the right to do it, but that, whenever they found the company were unable to meet their engagements and were in an unquestionably insolvent condition, and that individual creditors were seeking to obtain judgments by which they might sweep away from the body of the creditors, for their individual benefit, the assets of the company, they not only had the right, but it was their bounden duty, in honesty and justice, to take such steps in their management of the affairs of the company entrusted to them by law as would preserve the property for the general benefit of all the creditors without priority or distinction, and this without any special statutory provision, upon general principles of justice and equity, and without the formal sanction of the whole body of shareholders. The board of directors, in my opinion, has unlimited powers over the property of the corporation so to deal with it as to pay the just debts of the corporation.

2 As to the question whether the statute applies to an assignment such as this for the general benefit, I do not think it necessary to enter upon a discussion of this question upon which there seems to be some diversity of opinion among the judiciary of the province of Ontario, because it is not necessary, in my opinion, for the determination of this case, for, assuming for the purposes of this case that such an instrument does come within the terms of the Ontario act, I am of opinion that there was a sufficient description of property. I have nothing to add to what I said in the case of *McCall v. Wolff*[1] , and I said nothing in that case which interferes with the judgment of the court below in the present case, there having been, in this case, sufficient material on the face of the mortgage to indicate how the property might be identified after proper inquiries were instituted. I am also of opinion that the statute has been, in other respects, complied with. The instrument appears to have been duly registered, and there was evidence of an actual and continued change of possession before the issuing of the execution in this case. I therefore think this appeal should be dismissed.

***Strong J.*:**

3 I entirely concur in the judgment delivered in the Court of Appeal by the learned Chief Justice of that court so far as the same relates to powers of the directors; and I particularly agree in that passage of his judgment in support of which he cites the observations of Blackburn J. in the case of *Taylor v. Chichester Ry. Co.*[2] Further, I agree in the judgment of Patterson and Osler JJ. as to the evidence being ample to show that there was a taking of possession sufficient to meet the requirements of the statute.

4 For these reasons I am of opinion that the appeal should be dismissed with costs.

***Fournier J.*:**

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5 I am of opinion that the appeal in this case should be dismissed.

***Henry J.*:**

6 I entirely agree with my brother Strong in the opinions which he has expressed on every point in this case, as to the possession, the actual and continued change of possession, and the sufficiency of the description of the property as required by the act, even if it was necessary to comply with its provisions; and I am of opinion that a sale or transfer by the directors of a company, as in this case giving everything up to secure to their creditors, share and share alike, all the property of the company, was an act which the directors had full authority to do, and that their affixing the seal of the corporation to the document, which I am of opinion they likewise had authority to do, made it the act of the corporation.

7 I am also of opinion that such a document as that is not one which requires to be registered, nor do I find that in such a case in Ontario there has been any decision to the contrary. It has been held that where an assignment giving a preference has been made registration is necessary, but not for such a deed as the one in the case before us.

8 So that on all the points in the case I think the judgment of the court below was correct, and am in favor of affirming it and dismissing the appeal with costs.

***Gwynne J.*:**

9 This is an appeal from the judgment of the Court of Appeal for Ontario reversing a judgment of the High Court of Justice of Ontario on an interpleader issue tried by Ferguson J. without a jury. The interpleader issue was between the above respondents as plaintiffs claiming, as assignees in trust for the benefit of all the creditors of a certain company called The Farm and Dairy Utensil Manufacturing Company, limited, certain goods and chattels seized and taken in execution, as the property of the said company, at the respective suits of the above named four appellants, who were made the defendants in the said interpleader issue. The learned judge before whom the issue was tried without a jury rendered judgment upon the issue in favor of the defendants, the execution creditors, finding the assignment to the plaintiffs in trust for creditors to be invalid as against the defendants under ch 119 of the Revised Statutes of Ontario. The grounds of appeal stated are:[3] .

10 As to the first of the above grounds, by the 28th section of the Judicature Act it is enacted that every action and proceeding in the High Court of Justice and all business arising out of the same should, so far as practicable, be heard, determined and disposed of before a single judge, and that a judge sitting elsewhere than in a Divisional Court is to decide all questions coming properly before him, and is not to reserve any case or any point in any case for the consideration of a Divisional Court, and that in all such cases any judge sitting in court should be deemed to constitute a court.

11 The judgment therefore which is appealed from is a judgment pronounced by the High Court of Justice upon the matters in question in the interpleader issue, and in its terms it is a "judgment in favor of the defendants in the issue, the execution creditors, with costs."

12 Now by order 1 in the schedule to the Judicature Act, it is provided that with respect to interpleader the procedure and practice then used by the courts of common law under the Interpleader Act, ch. 54 of the revised statutes of Ontario, should apply to all actions and to all divisions of the High Court of Justice, and that the application by a defendant should be made at any time after being served with a writ or summons and before delivering a defence.

13 The application for an interpleader issue in the present case not being by a defendant, but by the sheriff on account of a claim made by the above respondents to goods and chattels seized by the sheriff as the property of the Farm and Dairy Utensil Manufacturing Company under executions issued upon judgments recovered against them at the suit of divers persons, proceedings were taken under the provisions of the 10th section of the Interpleader Act, for the relief of sheriffs, and a feigned issue was ordered at the suit of the claimants (the above respondents) as plaintiffs against the execution creditors (the above appellants) as defendants to try whether the property seized by the sheriff under the

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executions was in fact the property of the claimants or not as against the rights acquired by the execution creditors in virtue of their judgments and executions. Now the finding and judgment having been in favor of execution creditors that judgment was a judicial determination by the High Court of Justice upon the merits of the matter in contestation, as much as a like judgment upon matters in contestation between plaintiffs and defendants in an action originating in a writ of summons would be; and the judgment might have been entered of record under the provisions of the 19th section of the Interpleader Act, and execution might have been issued thereon for the costs adjudged to the defendants if not paid within the time prescribed in the 20th section. As to the actions at the suit of the defendants against the Farm and Dairy Utensil Manufacturing Company, in which actions the judgment on the interpleader issue is contended to be an interlocutory judgment, they had already been reduced to final judgment and nothing more remained to be done in them except to obtain the fruits of the judgments under the executions; an order it is true might be required to be made, consequential upon the adjudication on the merits of the matter in contestation in the interpleader issue being absolute, for the payment out of court of such monies as may have been, if any had been, realised by the sheriff by sale of the property seized and paid into court to await the determination of the interpleader issue; but such an order could have no effect whatever of the nature of making the adjudication upon the merits of the question tried on the interpleader issue a whit more final than it already was by the judgment of the court rendered in favor of the execution creditors, and if no such monies had been realised and paid into court no such order would be required and nothing would remain to be done but to enter the judgment of record and for the sheriff to proceed to realise the amounts ordered to be levied by the executions in his hands. The judgment of the court upon an interpleader issue tried on the application of a sheriff for protection from claims made to property seized in execution, affirming the validity of the seizure in execution and determining conclusively, until reversed by some court of competent jurisdiction, the rights of the execution creditors to the fruits of the seizure as against the claimants, is, in my opinion, of a different character from a judgment on an interpleader issue ordered in the progress of a suit for the purpose of determining a point necessary, in the opinion of the court, to be determined before judgment should be pronounced on the matters in contestation in the suit, during the progress of which the interpleader had been ordered. Such was the case of *McAndrew v. Barker*[4] ; the order there was purely interlocutory and the subject of it was deemed necessary to be determined preliminary to rendering judgment on the merits in the two cases then pending in the court in the progress of which the interpleader issue had been ordered and tried; and there the question was not whether or not there was an appeal from an interlocutory order, but whether it had been brought in time. The case of *Cummins v. Herron*[5] was a similar case. Now, what the 35th section of the Judicature Act enacts is, that there shall be no appeal to the Court of Appeal from an interlocutory order in case before the passing of that act there would have been no relief from a like order by appeal to the Court of Appeal. The contention is that the judgment of the court presided over by Mr. Justice Ferguson on the trial of the above interpleader issue is an "interlocutory order" within the meaning of the above section, and it is said that before the passing of the Judicature Act there would have been no appeal from a like order to the Court of Appeal for Ontario. Now, as the judgment of Mr Justice Ferguson on this interpleader issue is, by the Ontario Judicature Act, a judgment of the High Court of Justice, and not merely in the nature of a finding of a jury or of a judge sitting alone without a jury under the provisions of the Administration of Justice Act of 1873, to find a like order, on an interpleader issue before the passing of the Judicature Act, to that contained in the judgment of Mr. Justice Ferguson in the present case we must look for a judgment of one of the Superior Courts as formerly constituted upon the matter in contestation on a like interpleader issue. Such a case was *Wilson v. Kerr*[6] . There an interpleader issue ordered at the instance of a sheriff, as in the present case, came on to be tried before a jury, the only tribunal then recognised for trial of issues of fact in the courts of common law. At the trial before the late Sir John Robinson, then Chief Justice of the Court of Queen's Bench for Upper Canada, it was agreed, upon the evidence being taken, that the matter in issue should be left to the court to determine upon the evidence as taken, the court being at liberty to draw such inferences as they might think a jury should. The court rendered their judgment for the defendants the execution creditors just as Mr. Justice Ferguson has in the present case rendered the judgment of the High Court of Justice for Ontario. From that judgment an appeal was taken to the Court of Error and Appeal and the objection was taken that the judgment of the Court of Queen's Bench on the interpleader issue being only interlocutory there was no appeal from such judgment to the Court of Appeal but the court held that there was, and they heard the appeal, upon the authority of *Withers* vs. *Parker*[7] . There the Court of Exchequer held that the English

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Common Law Procedure Act of 1854 gave an appeal to the Court of Appeal from the decisions of the courts of law upon interpleader issues equally as in all other cases, it being considered that the mischief to be remedied being as great in an interpleader issue as in any other the Legislature intended that there should be an appeal in the one case equally as in the other. This was a decision under the provisions of the Common Law Procedure Act of 1854 incorporated into the Upper Canada Common Law Procedure Act of 1856. We find then that under the Common Law Procedure Act of Upper Canada there was an appeal from the judgment of a court of common law upon the matters in contestation on the trial of an interpleader issue. Then in 1877 the Legislature of the Province of Ontario, by sec. 18 of ch. 38 of the Revised Statutes of Ontario, enacted that an appeal should lie to the Court of Appeal from every judgment of any of the Superior Courts, or of a judge sitting alone as and for any of such courts, in a cause or matter depending in any of the said courts or under any of the powers given by the Administration of Justice Act. Now the words in this section — "Judgment in a cause or matter depending, &c.," — are abundantly sufficient to include and must be construed to include an interpleader issue and the matter in contestation therein.

14 It follows, therefore, that the judgment of the High Court of Justice of Ontario pronounced by Mr. Justice Ferguson on the interpleader issue under consideration here, which judgment conclusively determined the rights of the parties to the matter in contestation in such interpleader issue unless and until reversed by some court of competent, that is to say, appellate, jurisdiction, is either not an "interlocutory order" within the meaning of that expression in the 35th section of the Ontario Judicature Act, or if it be that it is such an order as was appealable to the Court of Appeal for Ontario prior to the passing of the Judicature Act, and in either of such cases it is appealable now. It would be singular if it should be otherwise, for the Ontario Interpleader Act gives an appeal expressly to the Court of Appeal from any decision of a county court or a county judge upon any question of law or fact arising on an interpleader issue.

15 The second of the above objections calls in question the validity of the assignment upon the contention that the directors of the company had no power or capacity to affix the corporate seal to the instrument without the assent and authority of the shareholders first obtained at a meeting of the shareholders duly convened for the purpose of authorising the execution of the assignment. If the execution of the assignment was absolutely illegal and void for want of such prior authority of the shareholders it is no doubt competent for the defendants in the interpleader issue to avail themselves of such invalidity, but if the assignment was voidable merely and not absolutely void for want of such prior authority it could only be avoided at the instance of some shareholder who should consider his interest prejudiced by such unauthorized, if it was an unauthorized, act of the directors, and until so avoided it would be valid and binding upon the company and could not be impeached by strangers, "for every shareholder may waive any right which is given to him for his own protection only; and if he has either expressly or tacitly done so, he can no longer object; and neither a stranger nor the body corporate itself can raise such an objection to a contract made by the corporation if no shareholder chooses to raise it for himself." This is the language of Blackburne J. concurred in by Willes J. in *Taylor v. Chichester and Midhurst Railway Company* [8] .

16 In connection with this point it has been urged that the assignment was not executed *bonâ fide* because, at the time of its having been executed, the directors contemplated endeavouring to procure all the creditors of the company to execute a deed of composition upon their being paid 50 cents in the dollar on their claims. I confess that I am unable to appreciate the force of the argument upon which this imputation of *mala fides* is rested; the deed was prepared for execution and was executed at the instance of, and in pursuance of a resolution of a majority of, the creditors of the company convened on the 14th of August, 1884, for the purpose of considering the condition of the affairs of the company; it is, in its terms, an absolute assignment of all the estate real and personal of the company to trustees upon trust to sell and to apply the proceeds in payment of all the creditors of the company without preference or priority, except such as had legal right to priority, ratably and in proportion to the amounts due to them respectively, and after payment in full of all the debts of the company and of the costs and charges attending the execution of the trusts of the deed upon trust to pay over any balance, if there should be any, to the company.

17 This deed executed under the corporate seal of the company was immediately after its execution registered in the registry office of the County of Brant, in which county the lands conveyed by the deed were situate, and in the office of the

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clerk of the county court of the County of Brant, with the affidavits required by ch. 119 of the Revised Statutes of Ontario for the registration of bills of sale of chattels coming within the operation of that statute. The utmost publicity which registration could give was thus given. The instrument was executed not only with the knowledge of, but in pursuance of a resolution of a majority of, the creditors of the company and, as pointed out by the Chief Justice of the Court of Appeal for Ontario in his judgment, with the knowledge and consent also of the holders of shares in the company to the amount of $40,000 out of a total capital of $47,500. On the 18th of August a deed of composition was prepared for execution and was subsequently executed by a large majority of the creditors agreeing to accept in satisfaction 50 cents on the dollar on their claims conditional upon all the creditors accepting the like terms, which deed became inoperative by reason of a few of the creditors refusing to accept the composition. Now how can the fact that, at the time of the execution of the deed of assignment in trust for creditors, the directors may have entertained the hope that all the creditors would accept terms of composition which a majority of them were willing to accept affect with the taint of *mala fides* a deed of trust absolute in its terms providing for all creditors alike and prepared and executed at the instance of a majority of the creditors? The fair and reasonable construction of the whole matter, in my opinion, is that in the interest of the creditors of the company the deed of assignment was executed at the request of the majority of them as an absolute instrument and *bonâ fide* for the trust purposes declared therein, and that a number of the creditors having expressed their willingness to accept a composition of 50 cents on the dollar a deed of composition was prepared with intent of operating only, as it only could operate, in the event of all the creditors giving their consent, which consent when given would operate in the interest of the stockholders. Now who are the persons who, under these circumstances, could with any propriety be heard to say that the trust deed of assignment was tainted with *mala fides* I fail to see; it surely cannot be in the power of a creditor who is provided for by the deed equally with all the other creditors to make such a charge in order that he may sweep away, it may be for his own benefit, all the property appropriated by the deed for the equal benefit of all.

18 Assuming then the trust assignment to be, as I think it is, free from any just imputation of want of *bona fides*, the case in so far as the point now under consideration is concerned is, since the judgment of the Exchequer Chamber in *Taylor v. The Chichester and Midhurst Railway Company* has been overruled by the House of Lords, governed by the dissentient judgment of Blackburn and Wells JJ., in that case in the Exchequer Chamber and the cases relied upon by Blackburn J. [9] ; and the rule to be collected from those cases which is applicable to the present may I think be thus stated — All deeds executed under the corporate seal of an incorporated company which is regularly affixed are binding on the company unless it appear by the express provisions of some statute creating or affecting the company, or by necessary or reasonable inference from the enactments of such statute, that the legislature meant that such deed should not be executed; and the directors of the company have authority to affix the seal of the company to all such deeds not so, as above, forbidden by the legislature to be executed, unless they are by the express provisions of, or by necessary or reasonable inference from, the enactments of such statute forbidden to affix the seal of the company to the particular deed for the time being under consideration without compliance with some condition precedent prescribed as being essential to the validity of such deed, and which condition precedent has not been complied with.

19 It is not contended that the deed in question is illegal in the sense of the company being forbidden by any statute to execute such a deed, but it is contended that it is illegal and void by reason of the directors not having, as is contended, any power or capacity to affix the corporate seal to such a deed without a resolution of the company being first passed at a meeting of shareholders authorising the directors to execute the deed, or in other words, that the deed is illegal and void although the corporate seal has been affixed to it by resolution of the directors having charge of the seal and although the deed is signed by the proper persons to sign deeds which are binding on the company, because, as is contended, a statutory enactment either in express terms or by necessary implication forbids the directors to affix the corporate seal to a deed of the nature of that under consideration without the authority of such a resolution of the shareholders first passed as a condition precedent necessary to be complied with. The only statutory enactments in relation to the matter are contained in the 26th and 32nd sections of the Dominion statute, 40 Vic. ch. 43, respecting the incorporation of joint stock companies by letters patent, the former of which sections enacts that:

> The affairs of the company shall be managed by a board of not less than three nor more than fifteen directors.

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20 And the latter: —

> That the directors of the company shall have full power in all things to administer the affairs of the company and to make or cause to be made for the company any description of contract which the company may by law enter into.

21 Now, it is contended that a deed purporting to transfer all the estate, real and personal, of an incorporated company for the benefit of the creditors of the company, it being in a state of insolvency, is, in effect, terminating the existence of and amounts to a winding up of the company instead of administering its affairs, which words, it is contended, necessarily imply that the power of the directors is confined to the management of the affairs of the company as a going concern and, consequently, to the period during which the company continues to be solvent.

22 Now, not to omit, although it is unnecessary to dwell upon, a plain answer to this contention, it by no means must necessarily follow that a deed conveying all the property of a company in trust for payment of its creditors amounts to a winding up of the affairs of the company and the termination of its existence, for although the creditors of the company have a just claim upon the company to have all the property of the company secured, so that it shall be appropriated in payment of the creditors equally, still it may be found that a sale of part only will prove sufficient and that a balance will remain which would enable the company to renew its operations. But assuming a company to be so insolvent that the whole assets of the company conveyed in trust for the payment of the debts of the company should be insufficient to pay those debts in full, and that nothing should remain to be paid over to the company, and so that the necessary result should be the winding up of the affairs of the company, still the making provision for payment on the debts by the trust deed was no less part of the affairs of the company because of its insolvent condition. It cannot be said that the affairs of a company cease to require the management and administration of those to whom is specially intrusted the management of its affairs when it becomes unable to pay its debts in full. The insolvency, as it appears to me, makes it to be the first duty of those having intrusted to them the management and administration of the whole of the affairs of the company to take prompt measures to secure the assets of the company for distribution among all the creditors proportionably and equally without preference or priority, and the balance, if there be any, after payment of all the debts in full, for the shareholders. When the company is in insolvent circumstances the greatest care, as it appears to me, is necessary and the best management is required to prevent the assets of the company being wasted in litigation or lost by sacrifice at forced sales under execution, in order to preserve equal distribution among the creditors and if possible something out of the wreck for the shareholders of whose affairs the directors are given the management and administration. The statute, in my opinion, warrants no such limitation of the power of the directors, for it is the management of all the affairs of the company and power to make any description of contract which the company may legally make which is vested in the directors. If then the company could legally by a vote and resolution of its shareholders make a contract the effect of which would be to appropriate its assets in payment of its creditors equally and ratably without preference or priority, the statute in express terms declares that the directors may make for the company such a contract, and if such contract in order to be perfect requires the seal of the company to be affixed to it, the directors must have authority to affix it. However, the language of Willes J. in *Wilson v. Miers*[10] is strangely misinterpreted and misapplied for the purpose of supporting the contention that directors have no power to affix the seal of the company to such a deed without special authority by vote of the shareholders first given to them; the language so relied upon, separating it from its context, is as follows[11] : —

> Then I apprehend there is another principle of law which applies and which makes the transaction valid, that the court is not to assume that parties propose to carry their intentions into effect by illegal means if their intention can be carried into effect by legal means. There is no presumption that the directors did in this case intend of their own heads and without consulting the company to effect a winding up. The court ought rather to presume that the directors would have been well advised and would have acted according to their duty; and on obtaining the £60,000 instead of proceeding forthwith to make a winding up of their own authority, they would have held a meeting and taken the opinion of the shareholders as they were bound to do on the subject.

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23 This language has been referred to as if in using it the learned judge was laying down a general principle of law applicable to all cases making it illegal for directors in the management of the affairs of a company to take any steps, however insolvent the company might be, to have the assets of the company appropriated to distribution among the creditors of the company without first calling a meeting of the shareholders and obtaining from them special authority to make such appropriation of the company's assets, whereas the languages is applied to the circumstances of the particular case then in judgment and to the duty imposed upon the directors of the particular company in question there by the articles of association of the company, the 161st clause of which provides: —

> That an absolute dissolution of the company shall be made under the following circumstances, that is to say, if a resolution for that purpose shall be reduced into writing and shall be twice read and put to the vote, and shall be carried each time by a majority of at least two thirds in number of the shareholders present personally or by proxy holding among them at least two-thirds of the shares of the company at an extraordinary general meeting, and if such resolution shall be confirmed by a like majority at a subsequent extraordinary general meeting to be held after the expiration of fourteen days but before the expiration of fourteen days next after the general meeting at which such first resolution shall have been passed, then the company shall be dissolved and it is hereby declared to be dissolved accordingly from the date of such second general meeting, except for the purposes mentioned in the next following article and without prejudice thereto.

24 This subsequent or 162nd article made provision for winding up the affairs of the company upon such dissolution being resolved upon. That it is to these clauses that the language of Willes J. applies is apparent on the face of the judgment itself, for in a previous part speaking of the directors and their powers he says: —

> They have power in terms, by Art. 5, to sell the vessels belonging to the company. They then have in the same clause of the regulations, powers given not affecting that authority; and then they have powers conferred on them in the most sweeping terms to deal with all other matters in which the company are interested. Now there could be no doubt that the sale (which was in effect of all the assets of the company) was *primâ facie* within the authority of the directors; but it is said that that authority is taken away by the effect of the 161st and 162nd clauses of the regulations, which provide for the case of a dissolution of the company; and it is said that those provisions require, as they unquestionably do, the dissolution of the company to take place with the assent of a certain proportion in number and value of the shareholders, and that the assent of that proportion of the shareholders had not been obtained.

25 The whole judgment, in fact, is a strong argument in support of the validity of the deed in question here, in so far as the point now under consideration is concerned, for by statute the directors have been given in most sweeping terms power to manage and administer the affairs of the company in all things and make any description of contract which the company might legally make, and there is no clause in qualification of this power, as there was in *Wilson v. Miers*, to which the language of Willes J. applies. A case of *Donly v. Holmwood*[12] was cited in which the Court of Appeal for Ontario held that a joint stock company incorporated under the joint stock companies letters patent act could not, without being specially authorized by the shareholders, make an assignment in insolvency under the 14th section of the Insolvent Act of 1875. In so far as this judgment is rested upon an implied prohibition to make such an assignment, if any there be, contained in the 15th sub-section of section 147 of the Insolvent Act, we are not called upon in the present case to express any opinion upon that judgment, but in so far as it is rested upon any supposed general principle of law applicable to all cases, or upon the language of Willes J. in *Wilson v. Miers*, in the absence of some statutory prohibition express or implied it cannot, in my opinion, be sustained.

26 Lastly, it was contended that as the Dominion statute 45 Vic. ch. 23 makes provision for the winding up of insolvent incorporated trading companies, such as the company in question here is, the proper procedure to have been taken was that authorized by this act. Well, that act enables a creditor for the sum of $200 to take proceedings under the act to bring a company become insolvent under its operation, and it is still quite competent for any such creditor, who thinks the dilatory and more expensive mode of procedure authorized by the act more beneficial to the creditors than carrying into effect the trust assignment which has been executed at their request, to petition the courts as they may be advised under

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the act. But the fact that it was competent for the creditors to have availed themselves of the provisions of that statute cannot make another proceeding, adopted in their interest and at their request for the purpose of obtaining payment of their claims against the company in a less expensive manner, to be illegal. The deed therefore cannot, in my opinion, be assailed by the respondents upon the objection made as to the power of the directors to affix the seal of the company to it.

27 The 3rd and 4th grounds of appeal are that the trust deed of assignment in question is a deed of sale of goods and chattels within ch. 119 of the revised statutes of Ontario and that it is void under that statute as against the defendants in the interpleader issue, the above named execution creditors of the company executing the assignment, by reason of insufficiency in the description of the chattel property thereby assigned.

28 With respect to this ground of appeal, which brings in review for the first time before a Court of Appeal certain decisions of the Superior courts of common law before the passing of the Judicature Act of Ontario with which the unanimous judgment of the Divisional Court of Queen's Bench of the High Court of Justice in a recent case of *Robertson v. Thomas* [13] is said to be in conflict, before entering upon a consideration of the points involved in those several cases it may be premised that the case before us appears to be defective in this, that there is nothing to show what were the goods and chattels seized by the sheriff under the executions in his hands, the title to which alone was what was in question in the interpleader issue and which is now in question before us, and this is not an immaterial defect for from the language of the deed o assignment it may be that the assignees in trust for creditors have by the terms and operation of the deed, assuming it to be within the provisions of the above statute, perfect title to some of the goods and chattels assigned although not to others, that is to say, that some of the goods and chattels assigned by the deed may be sufficiently described within the provisions of the statute although others may not be, and upon the question to which class, namely, to the sufficiently or to the insufficiently described goods the things seized under the executions belong may depend the question whether our judgment should be for the plaintiffs or the defendants in the interpleader issue. The consideration of this point which comes within the 4th ground of appeal I shall for the present defer until I shall have dealt with the point involved in the third ground of appeal which raises the question — Whether a deed executed *bonâ fide*, assigning all the estate real and personal of a debtor to trustees in trust for sale and an equal distribution of the proceeds amongst the creditors ratably and proportionably to the amounts due to them respectively without any preference or priority save such as the law may have established and given, and without any qualification, condition or provision for the release of the debtor, or for any benefit to him whatever until all his creditors should be paid in full, is a deed of sale within ch. 119 of the revised statutes of Ontario.

29 By a statute of the legislature of Canada, passed in the year 1849, 12 Vic. ch. 74, in its first section it was enacted that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, made in Upper Canada after the passing of the act which should not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged should be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith unless the mortgage or conveyance, or a true copy thereof, together with an affidavit of a witness thereto sworn before a commissioner of the Queen's Bench of the due execution of the mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy to be filed purports to be a copy, shall be filed as directed in the 2nd clause of the act. It is to be observed that this act only related to mortgages, or "conveyances intended to operate as mortgages of goods and chattels." Now an instrument absolute on its face as a sale and conveyance of chattels might be intended to operate as a mortgage, the agreement for defeasance being contained in another instrument or being verbal, and by reason of the difficulty of proving, in the event of a claim being made by the bargainee in the bill of sale to the goods when seized in execution against the bargainor that the conveyance absolute on its face was intended to operate as a mortgage, the beneficial object of the act might be defeated. Whether this was or not the reason for passing the act 13-14 Vic. ch. 62 we cannot tell, but in 1850 that act was passed under the title of

> An act to alter and amend the act requiring mortgages of personal property in Upper Canada to be filed.

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30 And after reciting that the law in force in Upper Canada requiring mortgages of personal property to be filed requires amendment, so as to require that every sale of goods and chattels which should not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, shall be in writing, it was enacted that the first section of

> An act requiring mortgages of personal property in Upper Canada to be filed,

31 Should be amended by adding at the end thereof as follows: —

> And that every sale of goods and chattels which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of the said act.

32 In 1857 these acts were amended by 20 Vic. ch. 3, by which forms of affidavit were prescribed applicable to the cases of a mortgage and of a sale respectively, and providing that mortgages might be executed to secure future advances in certain cases, and enacting that all instruments mentioned in the act, whether for the sale or mortgage of goods and chattels, should contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished. The clause as to the sale of chattels was as follows: —

> Every sale of goods and chattels which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of this act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and the affidavit of the bargainee or his agent duly authorized in writing to take such conveyance, a copy of which authority shall be attached to such conveyance that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and shall be registered as hereinafter provided within five days from the execution thereof, otherwise such sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

33 The act contained other clauses not material to the point under consideration.

34 In 1858 it was enacted by 19th sec. of 22 Vic. ch. 96 that: —

> If any person being at the time in insolvent circumstances or unable to pay his debts in full or knowing himself to be on the eve of insolvency shall make or cause to be made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects or deliver or make over or cause to be delivered or made over any bills, bonds, notes or other securities or property with intent to defeat or delay the creditors of such person or with intent of giving one or more of the creditors of such person a preference over his other creditors or over any one or more of such creditors, every such gift, conveyance, assignment, transfer or delivery shall be deemed and taken to be absolutely null and void as against the creditors of such person. Provided always that nothing herein contained shall be held or construed to invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably and without preference or priority all the creditors of such debtor their just debts.

35 The deeds of assignment made void by this clause are only made so as against the creditors of the debtor. That is to say, they are the only persons who could impeach and invalidate the deeds, and they only because of the deeds having been made either with intent to defeat or delay the creditors of the person executing the deed as a class or with intent of giving one or more of the creditors of such person a preference over his other creditors. Now a deed of assignment of all the property of an insolvent made in good faith and effectually executed so as to be irrevocable in trust for the purpose of paying and satisfying ratably and proportionably all the creditors of such persons their just debts without preference or priority never could, although the proviso never had been inserted in this clause, have been construed to

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be a deed impeachable by the creditors of the insolvent as a deed made either with intent to defeat or delay the creditors of the insolvent or with intent of giving one or more of his creditors a preference over others. The proviso therefore was not necessary for the purpose of protecting and maintaining the validity of a deed which but for the proviso would, by the previous terms of the clause, have been made void as against creditors. It is however a legislative declaration that such a deed made for the benefit of all creditors without preference or priority could not be invalidated by the creditors of the person executing it.

36 The act 20 Vic. ch. 3 was incorporated in the consolidated statutes of Upper Canada, ch. 45, and is now incorporated in the revised statutes of Ontario, ch. 119, and the above 19th sec. of 22 Vic. ch. 96 was incorporated in the 26th chapter of the consolidated statutes of Upper Canada, and is now the 2nd section of ch. 118 of the revised statutes of Ontario.

37 In *Taylor v. Whittemore*[14] which came before the Court of Queen's Bench for Upper Canada in 1853, the case was that one Mountjoy being largely indebted to divers persons in the sum of £5,864 made an assignment of his estate and effects upon trust to pay several preferred creditors several specified sums amounting in the whole to £1,750, and after payment of those preferred debts then on trust for the payment ratably and proportionably of the several debts mentioned in a schedule annexed to the deed provided the creditor should execute the deed within two months and thereby release Mountjoy. The deed provided that if the trustees should think it advisable, and the creditors who might sign the deed or a majority of them in value should assent thereto, they might carry on the business for the benefit of the creditors who should come into the assignment, and they might employ Mountjoy in carrying on the business for the trustees and the benefit of the creditors and, from time to time, out of the proceeds realised from the sale of the stock and merchandise assigned, might add to the said stock as the trustees might think it advisable until the same should be exhausted and disposed of, and then to wind up the said business and to collect and get in all the debts due and payable to Mountjoy, so assigned, and all debts which might grow due in the carrying on of the said business as soon as the trustees conveniently could, and at all events within two years from the date of the deed, unless the debts mentioned in the schedule should be sooner paid, satisfied and discharged. The deed contained a release from the creditors of Mountjoy to him in full of their respective demands, also a provision that the trustees might permit Mountjoy to have use and occupy so much and such portions of his then household furniture and for such time and upon such terms as the trustees might think proper. This provision, however, did not in any way vest the property or title in such property or any portion of it in said Mountjoy. This transaction was assailed by creditors who refused to come into the assignment upon the contention that the assignment was fraudulent and void within the statute of 13 Elizabeth ch. 5, on the grounds following: "1st. For providing for the employment of Mountjoy in carrying on the business; 2nd. For providing that he might be allowed to retain possession of the furniture; 3rd. Because it contained provisions for carrying on the business; and 4th. As providing for the payment of certain debts in full instead of putting all on an equal footing." It was held that the deed was not impeachable within the statute of Elizabeth. The only point which was raised under 12 Vic. ch. 74, as amended by 13-14 Vic. ch. 62, was that inasmuch as it appeared that Mountjoy's household furniture was never delivered to the trustees it was contended that the deed was void as to those things which had been delivered, the deed not having been filed as required by those statutes; but it was held that the non-delivery could only affect the goods not delivered, leaving the deed good as to those which had been received into the actual possession of the trustees, and as the goods taken in execution were some of those which had been taken into their actual possession the trustees were held entitled to recover on the interpleader issue, it being held that the effect of the acts was to avoid the deed *quoad* the subject matter of the suit, and as the household furniture had not been taken in execution the title as to it was not before the court, so that the objection as to the non-delivery of the household furniture into the actual possession of the trustees had no effect upon the matter in issue in the interpleader; it was assumed and not disputed that the deed in question there came within the operation of the act, 12 Vic. ch. 74, as amended by 13-14 Vic. ch. 62, but it must be observed that the deed before the court there was not a deed in trust for the payment of all the creditors of the debtor equally without preference or priority; on the contrary it was only for the benefit of such as should be content to take what should remain after payment of the preferred creditors the amounts to be first paid to them in full satisfaction of their debts, and this should release the debtor from all further claim.

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38 In *Heward v. Mitchell et al.* [15] decided in the same term as was *Taylor v. Whittemore*, the point appears to have been taken that the trust deed there did not come within the statute, 12 Vic. ch. 74, as amended by 13-14 Vic. ch. 62, and the court held that it did. The deed of assignment there provided for the payment, in the first place, of certain notes which the trustees had endorsed for the benefit of the debtors who made the assignment, and then for the payment in full of the debts owing by the debtors to such creditors as should sign the deed; and although the deed contained no clause of release of the debrors by the creditors signing the deed it did contain a covenant by the signing creditors not to sue the debtors during a period of three years during which the trustees were to be at liberty in their discretion to add to the stock and carry on the business. The assignment, therefore, was for the benefit only of the preferred creditors and such others as should be willing to take the benefit of the assignment subject to the condition of executing such a covenant. That was not an assignment for the benefit of all creditors alike without preference or priority, and subject to no conditions imposed in the interest of the debtor.

39 In *Olmstead v. Smith* [16] which was before the same court in 1857 the terms of the trust assignment are not set out and it does not appear whether or not it made provision for payment first of preferred creditors, or whether its benefits were or not limited to such creditors only as should signify their assent to the terms of the deed by signing it within any prescribed time, nor whether it was clogged with a condition releasing the debtor from all further claim whether the property assigned should or not pay all debts in full. It was assumed there, no doubt upon the authority of *Taylor v. Whittemore* and *Heward v. Mitchell*, that the deed came within the provisions of the statute 13-14 Vic. ch. 62, and the affidavit was held to be defective within the provisions of that statute; however, McLean J. though feeling bound by the prior decisions makes use of the following language showing grave doubt to exist in his mind as to the application of the statute to trust deeds executed for the benefit of creditors.

> I do not see (he says) how the affidavit required by the statute can be taken by assignees in the position of the plaintiffs who take a conveyance of goods in trust for the benefit of creditors, the very object of the conveyance being to hold them against all creditors though with a view of distributing the proceeds ultimately among them or such as may choose to become parties to an assignment. It can scarcely be said that the plaintiffs are not to hold the goods of Trevor against his creditors because they were authorised to sell them and make specific payments. The creditors could not touch the goods if the assignment is legal. The plaintiffs now are holding Trevor's goods against the defendants, his creditors, and how could they swear that they did not receive them for that express purpose.

40 The defect in the affidavit was that instead of saying in the words of the statute that the assignment was not made for the purpose of holding or enabling the assignees to hold the goods therein mentioned against the creditors of Trevor, the assignor, it said that the assignment was not made for the purpose of holding or of enabling Trevor to hold the goods therein mentioned against his creditors. The language of McLean J., (although susceptible of an answer when applied to cases of trust assignments such as were those in *Taylor v. Whittemore* and *Heward v. Mitchell* upon the assumed application of the authority of which cases, by which the learned judge and the court of which he was a member were bound, to *Olmstead v. Smith*, the latter case proceeded,) seems to me to be unanswerable when applied to the case of a trust assignment for the equal benefit of all creditors alike without preference or priority save such as the law has given; for if the affidavit which is required by the statute in the case of every deed to which the statute applies cannot with truth be made in the case of such a deed, it must of necessity follow that such a deed cannot be within the intent and operation of the statute, a point which was decided by the same court in *Baldwin v. Benjamin* [17] in which it was held, however, that the affidavit could be made in the particular circumstances of that case which have no application to the point now under consideration.

41 *Harris v. the Commercial Bank* [18] was a case no doubt of the same description as *Taylor v. Whitlemore* and *Heward v. Mitchell*, that is to say, that the trust deed made provision for the payment first of certain preferred creditors and that only such as should become parties to the deed should participate in its benefits, and that it contained a clause providing for the carrying on of the business by the trustees in their discretion and for release of the debtor from all further claims, for while the report does set forth a clause providing that such creditors only as should become parties to the deed within

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90 days from notice of its execution, given to them or sent to them by mail, should participate in the benefits of the deed to the conclusion of all others, the non-insertion of the terms and conditions of the deed in the report is thus excused:

> As the objections to its provisions independently of the statute were not pressed on the argument, only the description of the goods assigned is material to be given here.

42 And moreover Robinson C.J. in giving judgment says: —

> I see nothing in the arrangements made by the deed which would warrant us in holding it void. They are such I think as MacDonell (the debtor) was then at liberty to make.

43 indicating by this language that the trust provisions were not simply for the benefit of all creditors alike without preference or priority, but that the assignment contained provisions which were objected to but not pressed as making the deed void under the statute of Elizabeth, as had been contended in *Taylor v. Whittemore*. He also says: —

> I have doubts, which I believe, however, are not entertained by my brother judges generally, whether assignments of this description, namely, to trustees for the benefit of creditors, come within the provisions of our statute, 20 Vic. ch. 3.

44 Then referring to the language of the statute which speaks of "the sale of goods," as distinguished from mortgages, and speaks also of the "bargainor and bargainee," and of the sale being made *bonâ fide* and for "good consideration as set forth in the conveyance," he says: —

> It is true that in respect to real property trusts are created by deeds of bargain and sale — I mean by a description of conveyance technically so called — although the grantor is not selling the estate nor the trustee buying it, and though no bargain in the common sense of the term is made between the parties; and it is true also that in the language of the courts all persons acquiring lands by deed or will or otherwise than by inheritance are said to hold as purchasers; but we have to deal here with goods and chattels, and it has not seemed to me that the Legislature has used the words "every sale of goods and chattels" in these statutes in any other sense than their common acceptation as applied to goods, that is, when the absolute beneficial interest passes from a seller to a buyer.
>
> A more comprehensive construction, however, has been given to them by our courts, and they are held to comprehend assignments to trustees for the benefit of creditors like that before us.

45 It is clear, to my mind, that the case in which this language is used was one similar to that in *Taylor v. Whittemore* and in *Heward v. Mitchell*, where the application of the statute to deeds like that before the court in *Harris v. Commercial Bank* was decided by the court, and by which judgments the Chief Justice, although differing from them, deemed himself to be bound. Assuming then the deed in question there to be within the statute 20 Vic. ch. 3, the point decided by the judgment was that a description of the goods assigned as "all the goods, &c.," of the assignor being in and about his warehouse on T. street and all his furniture in and about his dwelling house on W. street, and all bonds bills and securities for money loans, stock, notes, &c., &c.. whatsoever and wheresoever belonging, due or owing to him was sufficient to satisfy the statute.

46 In *Wilson v. Kerr*[19] the assignment was of

> All and singular the stock in trade of the assignor situate on Ontario street in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years leases and securities for money,

47 in trust for such creditors as should execute the deed within forty days. The deed contained a clause of release, by creditors executing, of all claim beyond what the dividends might produce, and the surplus, after paying out the proceeds ratably to the creditors who should execute, was by the terms of the trust to be paid over to the assignor. The deed also

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contained a clause empowering the assignee to return to the assignor the household furniture not exceeding £100 in value if he should see fit, which was done.

48 Robinson C.J. held the deed to be fraudulent and void against creditors, upon the ground: —

49 1st. That it was fraudulent for the assignor to assign only on the understanding that he should be allowed to keep possession of his household furniture which he did keep and enjoy as before.

50 2nd. That it was fraudulent by reason of the stipulation contained in the assignment that no creditor should share in the proceeds except such as should execute the assignment within forty days which assignment contained a release by the creditors who should execute of all the debts in full, on condition of their getting the dividend out of what the effects might produce, and a provision that after the executing creditors should be paid their dividend any surplus that there might be should go to the assignor; "it is" he said "an attempt to coerce the creditors to come under a disadvantageous condition on the peril of getting nothing," and he held

51 3rd. Assuming the deed to be within the intent of 20 Vic. ch. 3, the description of the goods intended to be assigned was insufficient.

52 Burns J. saying that the only point he had considered was this last, also held the description to be insufficient; the report says that McLean J. concurred, but whether or not with the whole of the judgment of the Chief Justice or only with that part which Burns J. had considered and in which he concurred is not stated. The report of what took place in appeal in this case [20] is still more unsatisfactory for, notwithstanding the doubts which had been expressed by the Chief Justice and by McLean J. as to trust deeds for the benefit of creditors being within the statute, and as to the deed in *Wilson v. Kerr* being fraudulent and void for the reasons given by the Chief Justice, neither of these points appears to have been mooted or referred to in the case in appeal, the Court of Appeal resting their judgment affirming the judgment of the Court of Queen's Bench upon the point merely of the insufficiency of the description of the goods, assuming the deed to be within the operation of the statute, and this is the more remarkable because the Court of Queen's Bench, in the same term in which it had given judgment in *Wilson v. Kerr*, gave judgment in *Maulson v. Topping* [21] wherein it was held by the unanimous judgment of the court that a deed in trust for the benefit of such creditors as should execute the deed within a stated time, and which enacted a release in full from those who should execute it, was fraudulent and void against non-executing creditors, notwithstanding that the requirements of 20 Vic. ch 3 should be complied with.

53 In *Maulson et al v. Peck et al* [22] the deed in trust for creditors contained a provision: —

> For payment in full of certain preferred creditors, and to pay, distribute and divide all the balance of monies arising from the property assigned ratably among the other creditors, according to the several amounts of their respective debts, in full satisfaction and discharge thereof, subject, however, to this proviso: that if any of the creditors of the assignors should refuse to come in and become parties to the deed of assignment or to accede thereto within two months after the date thereof, or such further time not exceeding four months as the trustees might extend to them, then that the dividends on such debts respectively should be paid to the assignors as part of their personal estate, and in order that the goods might be disposed of to the best advantage power is given to the assignees to purchase from time to time other stock to assort and sell with the assigned goods for the benefit of the estate.

54 It seems to raise a nice question to determine wherein a deed like this, which contained a clause that only the parties executing it, other than the preferred creditors, should participate in the balance remaining after payment of the preferred creditors, and which contained also a clause that those executing should accept whatever dividends the assigned property would give to each ratably to the respective amounts due to every creditor of the debtors after such payment in full satisfaction and discharge of their debts, and that the dividends attributable to the debts due to those who should not execute the deed should be paid over to the debtors, differs from the deed in *Maulson v. Topping*, which was declared to be fraudulent and void for exacting a release of the debtors by those who should execute the deed; however, no such point was taken in the case, and the only point which was taken and decided was upon a question whether or not, as was

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contended, the power given to the assignees to purchase additional stock from time to time made the executing creditors partners in the business, and whether the insertion of that clause did or not make the deed void, which questions were decided in the negative.

55 In *Hutchinson v. Roberts*[23] , the only point decided was that the statute 20 Vic. ch. 3 did not apply to that case, because the trust deed for creditors was accompanied by an immediate and actual and continued change of possession.

56 In *Maulson et al. v. Joseph*[24] the terms of the deed which was an assignment for the benefit of creditors do not appear in the report. They probably were the same as those contained in the deed in *Maulson v. Peck* which was before the Court of Queen's Bench at the same time. The report does say that after the deed was executed the assignees carried on the business which was continued for some months. The case cannot, I think, be regarded in any stronger light than a confirmation of the judgment of the Queen's Bench in *Taylor v. Whittemore* and *Heward v. Mitchell* notwithstanding the doubts of Sir John Robinson as to the statute 20 Vic. ch. 3 having any application to trust deeds in favor of creditors.

57 In *Arnold v. Robertson*[25] the trusts of the deed were declared in an instrument referred to in the deed of assignment, and they were, to sell the goods, chattels and effects specified in the bill of sale and to apply the proceeds in payment of all necessary and incidental expenses and then in payment of certain preferred claims in full, and to apply the residue towards the payment of the debts in schedule A. due to such of the creditors as should execute the assignment ratably, and to pay the surplus to the debtor, who was to be discharged from all further liability to the creditors who should execute the assignment. This case was expressly rested upon the authority of *Heward v. Mitchell*. Draper C.J. in giving the judgment of the Court of Common Pleas then says —

> Since the case of *Heward v. Mitchell* which has been followed in this court it is not a question open to argument that sales or a ssignments of goods for the benefit of creditors in trust to dispose of the proceeds thereof in payment of the creditors of the assignor are not within the statute.

58 This judgment simply affirms the anthority of *Heward v. Mitchell*, saying that it has been followed, so that this case does not nor, indeed, do any of the reported cases go further than to recognise the judgments in the early cases of *Taylor v. Whittemore*, *Heward v. Mitchell* and *Harris v. The Commercial Bank* as binding authorities unless and until reversed in a court of appeal.

59 It was contended that as the decisions in *Taylor v. Whittemore* and *Heward v. Mitchell* have been followed for a period of thirty years, a court of appeal even should not now reverse those judgments. That would be, I confess, in my opinion, a very strong argument if the decisions so followed for such a length of time had involved the construction of a statute in relation to real estate so as to maintain in their integrity the rights belonging to a fee simple estate, or if upon the faith of the decisions so followed large sums of money had been expended by the owners of land in fee in the improvement of their property, and if the reversal of the decisions would deprive such owners in fee, without giving them any compensation whatever, of the full enjoyment of their property, and of all benefit from the large sums of money so expended by them on its improvements; but even in such a case as I have described the judicial committee of Her Majesty's Privy Council of England, in the recent case of *Maclaren v. Caldwell*[26] , seems to have felt no difficulty in reversing the unanimous judgment of this court which upheld the judgment of the Court of Common Pleas for Upper Canada, pronounced about twenty years previously and upon different occasions followed, putting a construction upon an act of the Provincial Legislature in a matter having relation to the condition of the province, with which the judges of the courts of the province at the time of the passing of the act, having had intimate knowledge, may be said to have had peculiar qualifications eminently fitting them to put a sound construction upon the act, and the effect of whose construction was to maintain the fee simple proprietors of land in the full enjoyment of their property and of the benefit of all such sums as should be expended by them on its improvement, and the effect of the reversal of such their construction being to deprive such owners without any compensation whatever of the benefit of the outlay of immense sums of money expended by them upon the faith of the judgment pronounced shortly after the passing of the act, and followed without any doubt having been expressed as to its soundness during a period of about twenty years. But a judgment now putting upon

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the statute under consideration a different construction from that which was put upon it by the judgments in *Taylor v. Whittemore*, *Heward v. Mitchell*, and the other cases decided upon their authority would have no such effect; in fact no rights or interests whatever, whether acquired upon the strength of the former decisions or otherwise, would be effected injuriously or at all by their reversal. However, in none of the cases to which we have been referred, and in none of the reported cases that I have seen prior to *Robertson v. Thomas*[27] , does any question appear to have arisen as to the application of the statutes under consideration to the case of a trust deed for the payment of all the creditors of the assignor ratably and proportionably to the amounts due to them respectively without any preference or priority and without any release of the debtor or any other benefit whatever reserved in the interest of the assignor. The deed in *Dolan v. Donelly*[28] may possibly have been such a deed, but if it was it is not made to appear so in the report; the only question there was as the sufficiency of the description of the goods, upon the assumption that upon the authority of *Taylor v. Whittemore* and *Heward v. Mitchell*, and the other cases following them the deed was one to which the statute applied. In *Robertson v. Thomas* the question does appear to have arisen and for the first time, so far as I have been able to find. There the divisional Court of Queen's Bench unanimously decided that an assignment in trust made for the *bonâ fide* purpose of paying and satisfying ratably and proportionably without preference or priority all the creditors of a debtor their just debts was not within the statute ch. 119 R.S.O.

60 This decision can, in my judgment, well stand without its being necessary to question the application of the statute to trust assignments drawn in such terms as were those in *Taylor v. Whittemore*, *Heward v. Mitchell* and *Harris v. The Commercial Bank*, and such like cases, for there is a vast distinction between a trust assignment made for the benefit of all creditors alike without preference or priority, not requiring the creditors to execute any release of the debtor, and an assignment in trust first for the payment in full of certain preferred creditors, and then for such only as should within a limited time prescribed by the debtor signify their acceptance of the terms of the trust assignment by signing it containing a release of the debtor, whether the property assigned should or not realize sufficient for payment of such creditors in full.

61 Although preference of one creditor over another be not in itself unlawful, unless the debtor making such preference be in insolvent circumstances and unable to pay all his debts in full, still the preferring one to another is an act injurious to all other creditors; and as the object of the statute under consideration was, in my opinion, to prevent the committal of fraud upon creditors by a debtor and to guard against pretended sales or secret incumbrances made and executed to the prejudice of the creditors of the assignor as a class, every creditor has an interest in knowing and a right to know what disposition, if any, a debtor has made of property originally his own and still remaining in his actual possession and to all appearance his own, whether such disposition be made to a stranger or to, or in trust for, a preferred creditor. In such deeds of assignment therefore the statute may well be held to apply for the benefit of all non-preferred creditors who, as persons prejudiced by the trust assignment, refuse to accept the terms inserted in it in relation to their claims. But where a debtor makes an irrevocable assignment of property in trust for the benefit of all his creditors alike, without preference or priority, no creditor has any just right to complain of his being prejudiced by the terms of such a trust assignment. The statute does not avoid all conveyances by way of mortgage or sale of chattels as to which the terms of the statute are not complied with, but only avoids them in the interest of and at the suit of the creditors of the debtor making the assignment. But an individual creditor who, repudiating a trust assignment made in his favor equally with all the other creditors of the debtor, proceeds to judgment and execution, as he can not be said to have been prejudiced by the terms of the trust assignment he cannot in justice invoke the terms of the statute to aid him in obtaining a preference over all the other creditors who by the trust assignment were placed on precisely the same footing with himself. If the statute should be construed so as to aid an individual creditor in such an attempt it would be made to operate to the prejudice of the creditors whom, as a class, the statute was passed to protect. To hold that a trust assignment, such as that before us, made by an insolvent debtor at the request of the body of the creditors of the insolvent, for the benefit of all such creditors alike without preference or priority, and which therefore makes the precise disposition, not only which the body of creditors desired but which in the case of insolvency was the disposition made by the Insolvent Act when in force, could be defeated by an individual creditor hurrying to judgment and execution upon the suggestion that in some particular the terms of chapter 119 of the R.S.O. had not been fully complied with in relation to the deed in question, and so upon such suggestion to aid an individual creditor to obtain a preference over all the other creditors whom, as

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a class, the statute was passed to protect, would be, in my opinion, at variance with the intent and object of the statute, as converting an act intended to protect creditors from acts of their debtor into an instrument by which one creditor placed honestly by his debtor upon an equal footing with all his other creditors, might perpetrate a fraud upon all such others; and by which one of several *cestuis que trustent* under the same deed might defraud the others. In my opinion the statute does not apply to such a trust assignment.

62 There is in the fourth of the above grounds of appeal a question involved upon which, as there seems to be some variety of opinion on a point of importance and as the question has been raised in a court of appeal, it should, I think, be disposed of. The question is as to the sufficiency of the description in the trust assignment before us, assuming it to be an instrument within the operation of the statute, of the goods seized. The question turns upon the construction of the 23 sec. of ch. 119 R.S.O. That section enacts that "all instruments mentioned in the act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily known and distinguished."

63 By the deed of assignment, read in connection with the schedule annexed thereto and made part thereof, the debtors, describing themselves as "The Farm and Dairy Utensil Manufacturing Company," carrying on their business as manufacturers at the city of Brantford and declaring themselves to be in insolvent circumstances, granted, bargained, sold, assigned, &c., to trustees named: —

> All and singular these certain parcels or tracts of land and premises situate lying and being in the city of Brantford in the county of Brant, being composed of town lots numbers 14, 15 and 16 on the east side of Waterloo street, and lots numbers two and three on the west side of Duke street running half-way through to Wadsworth street, in the said city of Brantford, with the appurtenances to the said lands belonging or in any wise appertaining and used or enjoyed therewith, and the foundry erections and buildings thereon erected and being, including all articles such as engine, boiler, cupola, machinery, and shaftings in and upon said premises. And all and singular the personal estate and effects, stock in trade, goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever and whether upon the premises where said debtors business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever, on trust for sale and distribution of the proceeds among all the creditors of the debtors without preference or priority.

64 Now, from this deed it is, I think, abundantly apparent that the place where the debtors carried on their business as farm and dairy utensil manufacturers was on the lands described in the deed, which with the erections and buildings thereon and all articles such as engine, boiler, cupola, machinery and shafting in and upon the premises were conveyed by the deed. These latter articles, although conveyed with the land and buildings thereon, either passed to the trustees as part of the realty upon the authority of *Holland v. Hodgson*[29], or if they be regarded as pure chattels it cannot be doubted that they are sufficiently described so as to be readily and easily known and distinguished. In so far then as these articles are concerned, if they were seized by the sheriff under the executions in his hands, the execution creditors could have no claim to them founded upon any insufficiency in their description. Then again as to all and singular the stock in trade, goods, chattels, &c, upon the premises where the said debtors' business is carried on, or which the said debtors are possessed of or entitled to in any way whatever, there can, I think, be no doubt that the locality of that place of business is sufficiently designated, assuming a statement of locality to be in such case necessary, whatever uncertainty of insufficiency the introduction of the words "wheresoever" or "elsewhere," in the connection in which they are used in the clause enumerating the several particulars of the personal estate and effects intended to be conveyed, may create in distinguishing what goods and chattels, personal estate and effects, are intended under the description of being situated elsewhere than on the premises where the debtors' business is carried on. There is no uncertainty as to the locality of those described as being on the premises where that business is carried on, these premises being plainly enough designated in the deed.

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65 The question, therefore, as to the goods, &c., is, as it appears to me — Whether or not a conveyance by a debtor in the terms following, namely, all and singular the stock in trade, goods, chattels, fixtures, &c., upon the premises where the debtors' business is carried on, and which the debtors are possessed of or entitled to (such premises being plainly enough design ated in the deed so as to remove all doubt as to their locality) is an insufficient description within the 23rd section of the statute to cover all or any "stock in trade," goods, chattels, fixtures, &c., situate on their premises and belonging to the debtors at the time of execution of the conveyance.

66 In *Ross v. Conger* [30] , A.D. 1857, it was held that: —

> All the stock of dry goods, hardware, crockery, groceries, and other goods, wares and merchandise in the store and premises occupied by the mortgagor, etc.

67 was a sufficient description within the statute to cover all such articles as were in the store at the time of the execution of the mortgage.

68 In *Harris v. The Commercial Bank* [31] it was held that a description of the goods assigned as: —

> All the goods, &c., of the assignor being in and about his warehouse on T. Street, and all his furniture in and about his dwelling house on W. Street, and all bonds, bills and securities for money loans, stocks, notes, &c., whatsoever and wheresoever belonging, due or owing to him.

69 was sufficient within 20 Vic. ch. 3 s. 4.

70 In *Rose v. Scott* [32] the goods in a chattel mortgage were described as: —

> Seven horses, three lumber wagons, one carriage, one pleasure sleigh, all the household furniture in possession of the assignor and being in his dwelling house, all the lumber and logs in and about the sawmill and premises of said assignor, and all the blacksmith's tools of said party of the first part, six cows and four stoves.

71 And it was held that the description was sufficient to cover the household furniture, lumber and logs, but that it was insufficient as to the other goods.

72 In *Fraser v. Bank of Toronto* [33] the goods were referred to in a chattel mortgage as set forth in schedules annexed; two schedules were annexed, designated C. and D. The former was headed "Household furniture in J.E.W's. residence" and then followed an enumeration of articles, but no locality was stated for the residence of J.E.W. Schedule D was headed: "Household furniture and property of J.R.McD," one of the assignors, and then followed an enumeration of articles; it was held that the headings on both schedules sufficiently described the locality of the goods, for as to schedule C., J.E.W's. residence was readily ascertainable, and as to schedule D that the terms "Household furniture and property of J.R.McD," sufficiently showed that J.R. McD's. dwelling house was their locality, which was readily ascertainable.

73 In *Powell v. the Bank of Upper Canada* [34] , the property covered by a chattel mortgage was described as: —

> The goods, chattels, furniture and household stuff expressed in the schedule hereunto annexed.

74 Which schedule was headed: —

> An inventory of goods and chattels in the possession of J.R.

75 on a certain day, the locality of the house in which the goods were not being mentioned, and it was held a sufficient description of the goods intended to be covered by the mortgage in compliance with the statute.

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76 In *Mills v. King* [35] the description of goods mortgaged was given in the mortgage as follows: —

> All and singular the goods and chattels, furniture and household stuff, and articles particularly mentioned and expressed in the schedule hereunto annexed, and which are now in the warehouse of James Reid, in the City of Hamilton, and are about to be placed in the building known as the Burlington Hotel.

77 The schedule mentioned then a long list of articles as situate in several rooms of the hotel, designating the rooms as parlor "C," parlor "H," &c. In some of the rooms there were goods as described in the schedule, in others there were no goods, and some of the goods described in the schedule were still in possession of Reid, who was the manufacturer of them; and it was held that all the goods in the schedule which were said to be in certain rooms in the hotel in which rooms there were such goods were sufficiently described, but that goods described in the schedule as being in certain rooms which were not in these rooms did not pass; and that all goods of the mortgagor that were in Reid's warehouse did pass as sufficiently described.

78 In *Sutherland v. Nixon* [36] the goods mortgaged were specified as —

> The goods, chattels, furniture and household stuffs particularly mentioned and described in the schedule thereunto annexed marked A.

79 In this schedule the chattels were put down without any other description than

> One buggy, one cutter, one cart, one bread sleigh, two sets of harness, one horse, one chaff cutter, and the following household furniture, namely, in the small parlor, one stove, &c.,

80 and then the various articles of furniture were enumerated in the several rooms in the mortgagor's dwelling house, but where the dwelling house was situate did not appear. This description was held sufficient as to the furniture, but insufficient as to the other articles.

81 In *Mathers v. Lynch* [37] goods in a chattel mortgage were described as —

> The following goods and articles being in the store of the party of the first part, on the corner of Queen and Main Streets, in the said town of Brampton, that is to say, 85 gallons of vinegar, &c., giving a long list, and also the following goods, being of the stock in trade of the party of the first part, taken in the month of April last, that is to say, 16 pieces of tweed, &c.

82 In this case the court had no difficulty in holding that the goods described as "being of the stock in trade, &c,," of the mortgagor were situate in the store previously mentioned, and that the goods enumerated as "the stock in trade" of the mortgagor were therefore sufficiently described.

83 Now as to the correctness of all those judgments, as to the sufficiency of the several descriptions which were held to be sufficient, there can not in my opinion be entertained a doubt; but the reasoning upon which the description in *Wilson v. Kerr* [38] , was held to be insufficient appears to me to be hypercritical and to proceed upon what I think was a misconception of the object and intent of the statute.

84 The trust assignment in question there was executed by a trader who had become insolvent, and the person assailing it was an execution creditor of such trader. Now a creditor of the assignor was the only person who could assail the mortgage and there can be little doubt that he well knew in what building on Ontario Street, in Stratford, the person who had become his debtor carried on his business, and if he knew the place where his debtor carried on his business and where his stock in trade was he could not have been prejudiced by reason of the mortgage not having more precisely stated a fact which may have been well known to him and all the creditors of the assignor and they were the persons,

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and not the court, for whose information the statute required the description of the goods assigned to be inserted in the assignment. In that case the goods were described as —

> All and singular the stock in trade of the said R.D.W. (the assignor) situate on Ontario street in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses, cattle and also all bonds, bills, notes, debts, choses in action, &c., &c.

85 Now the enactment in question was not based upon the assumption that persons dealing with a trader and becoming his creditors might be ignorant of the nature of the trade in which he was engaged, or the place where such trade was carried on, and that to protect them from any prejudice arising from such ignorance it was necessary that any mortgage made by a debtor of goods and chattels under the designation of "all the stock in trade" of the mortgagor should be void as against creditors unless the nature of the debtor's trade should be stated in the mortgage and the place where such stock in trade was situate should be stated with greater preciseness than naming the street and town where it was.

86 It is, in my opinion, quite a mistake to hold that the statute is to be construed as meaning that by reading the instrument itself or a schedule annexed thereto such a description should be obtained as would convey to every reader and to the court, whenever a question should arise, without the aid of any oral evidence of surrounding circumstances or otherwise, what were the particular articles which constituted "all the stock in trade" of the mortgagor, or that in a mortgage of goods and chattels under such designation it is indispensable that an inventory should be made or stock taken and that the nature, quantity, quality and value of the several items constituting the stock in trade should be set out in the mortgage or in a schedule annexed thereto.

87 Such an inventory, perfect though it should be, would be of no use whatever in many cases; if, for example, the debtor, after executing a mortgage of all his stock in trade in his shop at a named place designating every item of such stock in an inventory annexed by its quantity, quality and value, and after selling one-third of such stock in the course of his trade should replenish his shop with other goods of the like description, quality and value but in much greater quantities so that the goods remaining of the stock in trade mortgaged should, when a question should arise, constitute but a part of the mortgagor's stock in trade in his shop of the like articles as those mortaged consisted of, in such a case it would be impossible by reading the mortgage alone without any oral evidence to distinguish the mortgaged goods from those of the like description which had been subsequently purchased, but with oral evidence the goods mortaged could be readily and easily known and distinguished from the others.

88 So again, if the mortgage should be of a part only of the mortgagor's stock in trade in his shop and there should be an inventory annexed specifying the goods intended to be conveyed by their quantity, quality and value as for example: —

> 5 pieces of black silk for ladies dresses of the value of $2 per yard, ten pieces of black satin for ladies dresses at $2.25 per yard, twenty pieces of grey cotton goods at twenty cents per yard, ten bales of Brussels carpet, containing each 100 yards, of the value of $2 per yard, twenty bales of tapestry carpet, containing each 100 yards, of the value of $1 per yard, and five bales of Kidderminster carpet of 100 yards, each of the value of $1.25 per yard,

all of which goods were described as being in the mortgagor's shop, the precise site of which is stated — such a description would be utterly insufficient to enable a person who knew no more than the inventory annexed to the mortgage stated to distinguish the goods intended to be mortgaged from others of the like description, quantities, quality and value in the mortgagor's shop at the time of the execution of the mortgage. This is what I understand the judgment of this court in *McCall v. Wolff*[39] , in substance to decide. I was not a party to that judgment, but the majority of the court appear to have been of opinion that the goods as described in the mortgage constituted part only of the goods in the mortgagor's shop at the time of the execution of the mortgage, and it is plain I think, from the language of His Lordship the Chief Justice who delivered the judgment of the majority, that if the goods had been stated in the mortgage to have been all the goods in the mortgagor's shop, or even if oral evidence had established that the goods were, in point of fact, all the goods that were in the mortgagor's shop when the mortgage was executed, it would have been sufficient.

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89 The naming a locality where the goods intended to be covered by the mortgage or bill of sale are at the time of its execution seems to me to be the least efficient mode possible of describing the goods intended to be assigned and in many cases utterly useless, for when the question arises whether the goods intended to be covered by the assignment can be readily and easily known so as to be distinguished from other goods of the assignor the locality in which the goods were at the time of the mortgage may be wholly changed. Thus if the mortgagor described the property intended to be mortgaged as

> One black gelding, one bay mare, one Alderney cow, one Jersey heifer, one Durham bull, and five South Down ewes, the property of the mortgagor, all of which cattle are now in the care of A.B. and grazing upon his farm, situate upon lot No. 1, in the 2nd Concession of the Township of Nepean,

90 of what use would the statement of locality be if A.B. should himself have property of his own or of some other person of like description on the farm named when the question as to the sufficiency of the description should arise? And yet, independently of the locality stated, the interested parties, namely, the mortgagor's creditors, might have no difficulty whatever in distinguishing which were the property of the mortgagor, and so which were covered by the mortgage. When the execution creditors who assailed the mortgage in *Wilson v. Kerr*, in order to obtain satisfaction of their execution seized a portion of the stock in trade of the mortgagor they had no difficulty in finding the goods seized where they were on Ontario Street, in the town of Stratford, so that they could not have been prejudiced by any supposed insufficiency of the statement in the mortgage of a building on Ontario Street in which the mortgagor's stock in trade was. Whether or not a description is sufficient to enable the goods mortgaged to be distinguished within the meaning of the statute, is always a question of fact and not of law. In the above case the question was limited to the sufficiency of the statement of the locality where the mortgaged stock in trade was and was whether the description given conveyed such information to the parties interested, namely, the creditors of the mortgagor, as to have enabled them to find the goods; and the tribunal to determine such fact could not reasonably exclude from consideration any evidence of knowledge bearing upon such fact which the creditors possessed through their dealings with their debtors.

91 Again, if a mortgage should describe the property mortgaged as

> One Alderney cow, one Jersey cow, one bay mare, one Durham bull, one plough, one threshing machine, two harrows, all of which cattle, goods and chattels are now upon the farm of the mortgagor, being the S. $^1/_2$ of lot No. 2, in the 2nd Concession of the Township of Gloucester,

92 of what use would this statement of locality of the cattle, goods and chattels mortgaged be if, when the question should arise, the mortgagor had already removed to another farm in another township to which the cattle and chattels mortgaged had been removed? And yet oral testimony of the most undoubted veracity might without difficulty shew — and perhaps out of the lips of the creditors assailing the mortgage — that at the time of the execution of the mortgage the mortgagor owned and had in his possession no cattle, goods or chattels of the description stated in the mortgage other than the precise number there stated, and that they were, at the time of the question arising, on the farm to which he had removed. Innumerable instances might be given of the insufficiency of a statement of the locality of the goods intended to be covered by a mortgage as a mode of distinguishing the goods intended to be covered by the mortgage from other goods of the mortgagor. But when all a man's stock in trade is assigned no occasion for distinguishing assigned from non-assigned goods can arise unless it be to distinguish what a man had at the time of the execution of the mortgage from articles of a like description, if any there be, in his possession which he had subsequently acquired, and that is a thing which no description in the mortgage might be able to effect but which could readily and easily be done by parol evidence.

93 So where a man assigns all his bonds, bills, notes and securities for money, there can be no doubt that such a description was intended to cover every bond, bill, note and security for money of which the mortgagor was, at the time of the execution of the mortgage, the owner and entitled to receive the proceeds, whatever might be the names of the obligors of the bonds or of the makers of the notes or of the acceptors of the bills, and whether the mortgagee was obligee or assignee of the bonds or payee or endorser of the notes, and whatever might be the amount secured by each

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respectively, and whether they were in the possession of the mortgagor's bankers for safe keeping, or in a strong box or safe in his own custody, which places of safe keeping might, if stated in the mortgage, be changed after its execution and before the occasion for distinguishing what was intended to pass should arise; and as that occasion never could arise except at the suit of some creditor assailing the mortgage, and in respect of some particular bond, bill, note, or security for money claimed to be the property of the mortgagor, and as such applicable to payment of the debt due to the creditor or creditors assailing the mortgage, and as the mortgage plainly shows that all the bonds, bills, notes and securities for money which the mortgagor possessed at the time of the execution of the mortgage were covered by it, the only question would be, whether the particular security or securities which the assailing creditor or creditors claimed to be applicable to satisfaction of their debts was or were the property of the mortgagor at the time of the execution of the mortgage or had been acquired by him since; and for this purpose I cannot see upon what principle oral evidence should be excluded. The statute never intended, in my opinion, to exclude oral evidence of circumstances surrounding the execution of the mortgage and throwing light upon the question of fact to be determined or to cancel the maxim *certum est quod certum reddi potest*.

94 The object and intent of the statute, in my opinion, was to prevent creditors being defrauded by means of secret mortgages or bills of sale being executed by the debtor of property still remaining in his possession and to all appearance his own property, and to afford facilities for unsecured creditors to distinguish between the goods of their debtor which are encumbered from those which are as yet unencumbered, and to protect persons dealing with him and giving him credit upon the faith of the property of which he was in open possession being, as it appeared to be, his own property. The clause in the statute which requires such a description of the goods intended to be covered by the instrument that the same may be thereby readily and easily known and distinguished was not, in my opinion, enacted either for the purpose of enabling the mortgagee or assignee to know and distinguish the goods upon which he had agreed to accept the security taken, nor to enable a stranger to the transaction or the court upon a question arising by merely looking at the description in the mortgage to distinguish what goods were covered by the mortgage from other goods of the mortgagors, but to enable unsecured creditors of a debtor and persons having dealings with him or contemplating becoming his creditors to ascertain what part if any of the goods and chattels being in his possession and apparently his own is to any, and if to any to what, extent encumbered by assignment to a stranger or to a preferred creditor so as to be removed wholly or in part from liability to unsecured creditors; in short, to distinguish the encumbered from the unencumbered goods so as to enable them to determine how they shall govern themselves in their dealings with him, namely, whether to continue dealing with him, and trusting him, and giving him credit, or to call in question the assignment, if any, as not being executed in good faith. When all the goods and chattels of a debtor are assigned the occasion for distinguishing that which is assigned from that which is not assigned does not arise, and when such assignment is put on registry in the manner and with the affidavits required by the statute the object and intent of the statute is attained, and the only question open to the unsecured creditors, as it appears to me, is as to the *bona fides* of the instrument.

95 In the case before us, assuming the deed to be within the operation of the statute and to be open to attack at the suit of the particular creditors assailing it to the prejudice of all other creditors, who equally with the assailing creditors are all alike *cestui que trustent* of the trust assignment, and as the only objection taken to the sufficiency of the description is as to its sufficiency to protect from seizure the goods taken in execution, none of which are suggested not to have been on the premises where the debtors' business was carried on at the time of the execution of the trust assignment, all that is necessary to determine is that as to all such goods the description given in the trust assignment is abundantly sufficient upon a true construction of the statute, and I am of opinion that it is. And assuming locality of the assigned goods to be necessary to have been stated in the trust assignment, that locality does sufficiently appear by the deed to have been in the particular lots of land conveyed by the deed, where the debtor's business was carried on and where the goods were when seized and taken out of the possession of the trustees of the deed, and, therefore, upon the authority of the great weight of the decisions in the Ontario courts, and of what was said in this court when holding the description in *McCall v. Wolff*[40] to have been insufficient, the statute has been sufficiently complied with in the present case, and the plaintiffs in the interpleader issue were upon this point also entitled to judgment, as well as upon the ground that the statute does not apply to such a trust deed for the benefit of all creditors of the as signor alike ratably to the amount due to each without preference or priority.

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96 The appeal must for the above reasons, in my judgment, be dismissed with costs.

Appeal dismissed with costs.

Solicitors of record:
Solicitor for appellants: *William M. Hall.*
Solicitor for respondents: *Hugh McKenzie Wilson.*

Footnotes

1 13 Can. S.C.R. 130.

2 L.R. 2 Ex. 356.

3 See p. 518.

4 7 Ch. D. 701.

5 4 Ch. D. 787.

6 17 U.C.R. 168 and in appeal 18 U.C.R. 470.

7 4 H. & N. 810; 6 Jur. N.S. 22.

8 L.R. 2 Ex. 379.

9 *The South Western Ry. Co. v. Gt. N. Ry. Co.*, 9 Ex. 84; *Cham bers v. M. & M. Ry. Co.*, 5 B. and S. 588; *Wilson v. Miers*, 10 C.B.N.S. 364; *S.W. Ry. Co. v. Redmond*, 10 C.B.N.S. 675; *Bateman v. Ashton-Under-Lyne*, 3 H. & N. 323; The judgment of Erle J. in *Mayor of Norwich v. Norfolk Ry.*, 4 E. & B. 412; and of Lord Chancellor Cranworth in the *Shrewsbury & Birmingham Ry. Co. v. N.W.R. Co.*, 6 H.L. Cas. at p. 136 and 3 Jur. N.S. at p. 781.

10 10 C.B.N.S. 364.

11 At p. 366.

12 4 Ont. App. R. 555.

13 8 O.R. 20.

14 10 U.C.R. 440.

15 10 U.C.R. 535.

16 15 U.C.R. 421.

17 16 U.C.R. 52.

18 16 U.C.R. 437.

19 17 U.C.R. 168 and 18 U.C.R. 470.

20 18 U.C.R. 470.

21 17 U.C.R. 183.

22 18 U.C.R. 113.

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23 7 U.C.C.P. 471.

24 8 U.C.C.P. 15.

25 8 U.C.C.P. 147.

26 9 App. Cas. 392.

27 8 O.R. 20.

28 4 O.R. 440.

29 L.R. 7 C.P. 328.

30 14 U.C.R. 525.

31 16 U.C.R. 437.

32 17 U.C.R. 385.

33 19 U.C.R. 381.

34 11 U.C.C.P. 303.

35 14 U.C.C.P. 228.

36 21 U.C.R. 629,

37 28 U.C.R. 354.

38 17 U.C.R. 168; 18 U.C.R. 470.

39 13 Can. S.C.R. 130.

40 13 Can. S.C.R. 130.

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TAB 6

1962 CarswellQue 28
Quebec Superior Court, In Bankruptcy

Deziel, Re

1962 CarswellQue 28, 4 C.B.R. (N.S.) 215

In re Deziel; Miller v. McKechnie

Batshaw J.

Judgment: March 6, 1962

Counsel: *A. J. Rosenstein, Q.C.*, for petitioner.
Redmond Quain, Q.C., for respondent.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

II Assignments in bankruptcy
II.3 Annulment of assignment
II.3.a By creditor

Headnote
Bankruptcy --- Assignments in bankruptcy — Annulment of assignment — By creditor

Assignments — Filed in locality of debtor — Application to set aside in another province not appropriate procedure — Power of de facto directors to make assignment in bankruptcy — Irregularities in qualifications of directors cannot be raised by a third party.

An assignment was made in Ontario by the debtor company. An application was brought to set aside the assignment in the Quebec Superior Court on the grounds that there were irregularities in the qualifications of the directors who had made the assignment.

Held, the application should be dismissed on two grounds:

1. Ontario was the locality of the debtor and it would not be appropriate for the court of another province to set aside an assignment filed in that jurisdiction.

2. Irregularities in the qualifications of directors cannot be raised by a third party such as the creditor of a shareholder in bankruptcy. Directors who are *de facto* directors have power to make an assignment in bankruptcy.

***Batshaw J.* (orally):**

1 Miller had (before the present petition) made a petition before the Supreme Court of Ontario to set aside the assignment but had discontinued it when McKechnie pleaded *lis pendens* on the present petition.

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2 Ontario was the "locality of the debtor", and the place where the authorized assignment was filed. It would not be appropriate for the court of another province, in these circumstances, to set aside the authorized assignment.

3 Apart from this and on the merits of the application, the application to set aside the authorized assignment was based upon alleged irregularities in the qualification of the directors of the bankrupt company who authorized the assignment. These irregularities, if they indeed existed, were not something that can be raised by a third party, such as for instance, the creditors of a shareholder in bankruptcy or their representative, the trustee. This was not one of the cases where the Court should interfere in the interior management of the bankrupt company: *In re Pacific Coast Coal Mines and Hodges*, 8 C.B.R. 102, [1926] 3 W.W.R. 378, 37 B.C.R. 550, [1926] 4 D.L.R. 759, 3 Can. Abr. 252.

4 The directors whose qualifications were questioned were *de facto* directors (*Mahony v. East Holyford Mining Co.* (1875), L.R. 7 H.L. 869), and such directors have power to make an assignment (*Hovey v. Whiting* (1887), 14 S.C.R. 515, 3 Can. Abr. 252) and to bind the company toward third parties dealing with it in good faith.

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TAB 7

1990 CarswellAlta 207
Alberta Court of Queen's Bench

Clareview Rental Project (Edmonton) Ltd. v. Dockery

1990 CarswellAlta 207, [1991] A.W.L.D. 041, 78 Alta. L.R. (2d) 106

CLAREVIEW RENTAL PROJECT (EDMONTON) LTD. v. DOCKERY

O'Leary J.

Judgment: October 11, 1990
Docket: Calgary No. 8801-14212

Counsel: *A. Robertson*, for plaintiff.
L. Plotkins, for defendant.

Subject: Contracts

Claim for cash calls authorized by special resolution pursuant to investors' agreement; Counterclaim for return of payments.

***O'Leary J.* (Excerpt from the transcript):**

1 The defendant is an investor in a project located in Edmonton called the Clareview Gardens Apartment Project. It is a MURB which was built in the late 1970s. The defendant signed an investors' agreement when he became an investor. That agreement is with the plaintiff company. The plaintiff company is the agent of the investors in respect of the project.

2 This action is a claim for advances or cash calls which were allegedly authorized by the investors by special resolution and in respect of which the defendant has defaulted in payment.

3 The project involved 268 investment units. As I said, it is a multiple unit residential property with the tax advantages that go with it. The investors' agreement states the objectives of the project to be capital appreciation, income and tax deferral.

4 The project ran into financial difficulty early in its life and by 1984 was in serious financial trouble with at least the first mortgage being foreclosed. At that time, and in fact for some time prior to 1984, the project had a negative cash flow and was going deeper and deeper into the hole.

5 The investors' agreement contains a number of relevant clauses. The agent, that is, the plaintiff in this action, is given certain powers by the agreement. In addition to that, it is provided that the investors may by resolution, ordinary or special, authorize the agent to take certain steps. Among those steps is the power to request advances or what has been referred to in the trial as "cash calls," from time to time as needed. The investors' agreement also contains a provision for its amendment by special resolution of the investors.

6 The claim is for three cash calls plus interest thereon to date. The first cash call was made on 19th November 1985 in the amount of $1,090 per unit. The defendant has two units and was therefore called upon to pay at that time $2,180. The second cash call was made 4th May 1987 and was for $1,000 per unit, or $2,000 as far as the defendant was concerned. The third was made on 1st March 1988 and was for $1,200 per unit for a total of $2,400 as far as the defendant is concerned. The plaintiff also claims interest on those amounts from the dates upon which they were notified to the defendant and other investors.

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7 The defences raised by the defendant are basically two. Firstly, the defendant questions the status of the plaintiff to bring this action in its own name. This defence arises out of the fact that the investors' agreement was amended in December 1987 to provide a mechanism for recovery of delinquent cash calls which is more efficient than that contained in the original investors' agreement signed by the defendant and other investors.

8 The second defence is that the cash calls in question were not properly authorized in accordance with the provisions of the investors' agreement.

9 There is a counterclaim by the defendant raising issues under the Securities Act and the Unconscionable Transactions Act and seeking relief by way of a return of payments made to date.

10 I want to refer to several parts of the investors' agreement because they are relevant to the issues raised here. First of all, art. 3.05(*b*) grants power to the agent, or the plaintiff in this action, to carry out and give effect to any special resolution passed by the investors.

11 The powers of the investors to carry on business in respect of the project is contained largely in arts. 6.11 and 6.12. These two articles set out the steps which the investors may take by way of special resolution. Article 6.11 provides that a special resolution passed at a meeting of the investors shall be binding on all the investors and upon each and every investor and his heirs, executors, administrators, successors and assigns.

12 Among the powers which the investors may exercise by special resolution are included the following: First, to sanction any scheme for additional financing of the project, or the refinancing, sale or leasing of the project. Two, to require the agent to exercise or refrain from exercising any of the powers conferred upon it by the agreement from time to time.

13 Article 6.12 is very broad and in effect gives the investors the power to do everything and anything in respect of the project, including to sell the project. The investors may, by special resolution, sanction any amendments to the agreement. The same article gives the investors the power by special resolution to agree to any modification, change, addition or other alteration in or to the investors' agreement or any instrument supplemental thereto which shall be agreed to by the agent.

14 The investors' agreement in effect provides a constitution for the relationships inter se of the investors as well as the relationship between them and the agent, and between the agent acting on behalf of the investors and third parties.

15 Article 7 of the investors' agreement provides for the requirement of investors to make additional advances towards the project from time to time.

16 Article 7.01 provides that if the investors so decide by special resolution, each investor shall make advances to fund any cash loss in order to protect the interest of the investors in the project "in the same manner as would a prudent owner." Article 7.02 is one that was amended, and that amendment has reference to the status to sue the plaintiff in this action.

17 When the investors' agreement was executed by the defendant and prior to its amendment in December 1987 it provided that if an investor defaulted in paying any advance sanctioned by a special resolution, any other investor or investors could pay that advance and could thereafter claim against the defaulting investor.

18 Other portions of that article, and other parts of the investors' agreement, gave additional remedies to an investor or investors who made up an advance for a defaulting investor. Specifically, art. 7.01 provided that an investor or investors who made up such default could recover on demand from a defaulting investor the amount paid on behalf of that defaulting investor. There is a provision, or was a provision, I should say, in the agreement before it was amended for the payment of interest according to a formula involving the prime rate of the Toronto Dominion Bank at Calgary.

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19 At a meeting on 17th December 1987 the investors' agreement was amended, purportedly pursuant to the provisions of art. 10 which I will refer to in a moment. Article 7.02 was amended. The result of that amendment is to provide that an advance which is in default becomes a debt to the other investors who have made their advances and gives the agent the power to take action to recover against the defaulting investor for and on behalf of the remaining investors. In addition to that, it provides for interest to accrue on outstanding advances at the rate of 16 per cent per annum calculated and compounded monthly from the date of the mailing of the notice of the cash call until the same is paid.

20 At the same meeting art. 7.07 was replaced by a new provision, and it is that provision which gives the agent, or the plaintiff in this case, the direct right to sue a defaulting investor for delinquent advances. In the new article it is provided that the right of the agent to bring an action against a defaulting investor on behalf of the remaining investors is to apply with respect to cash calls which had been made prior to the date of the amendment, as well as to cash calls made thereafter.

21 There is one more provision of the agreement which I wish to refer to, and that is art. 10 which provides for amendment. That article provides as follows, and I quote:

> This Agreement may be amended at any time and from time to time provided that each such amendment has been
>
> (i) authorized by a Special Resolution of the Investors, and,
>
> (ii) where such amendment affects the rights or obligations of the Agent, approved in writing by the Agent.

22 The issues which I have to decide are, first, whether the agent, or the plaintiff in this case, has the right to bring action as it has against the defendant. That involves the propriety of the amendment passed in December 1987 and whether its provisions are retroactive. Two of the cash calls involved here were made prior to that amendment.

23 The second issue is whether the cash calls were properly authorized by appropriate resolutions of the investors and were properly put into effect thereafter by the directors of the plaintiff company as agent for the investors.

24 With respect to the first issue, I am satisfied that the plaintiff in this case has the status to bring this action against the defendant to recover the amounts of the cash calls in question, together with any interest which the plaintiff may be entitled to. The amendment to the investors' agreement is, in my view, in the nature of a procedural one and does not substantially affect the rights of the defendant or any of the other investors who may not have voted for it.

25 The amendment was made pursuant to a special resolution of the investors, and the notice of the meeting at which that resolution was passed and the quorum requirements and other formalities have not been questioned.

26 The amendment to art. 7, pursuant to which the plaintiff brings this action, is expressed to be in respect of both prior cash calls and subsequent cash calls. The obligation of the defendant would exist in any event. There has been no substantive change to that as far as the status of the plaintiff to sue is concerned.

27 The defendant, according to the provisions of art. 7 prior to their amendment, would have been subject to suit by the investor or investors who made up his cash call, if any. In the circumstances which prevail here, it is unlikely that any investor would be inclined to make up the defendant's cash calls. The defendant maintains that he relied on that prospect and on the remedial provisions of art. 7 when he declined to pay the cash calls. In my view, that is not an answer to the plaintiff's claim and does not affect the status of the plaintiff to sue. The procedural difficulty that existed prior to the amendment was cured by the amendment, and in my view, the defendant cannot legitimately complain about that.

28 In summary, I am satisfied that the plaintiff has the right to bring this action in its own name pursuant to the amended provisions of art. 7. Those amendments were, in my view, procedural in nature and did not affect the substantive rights or obligations of the defendant.

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29 The second issue raises the question of whether the cash calls, that is the three cash calls in question, were properly made in accordance with the terms of the investors' agreement which controls and governs the relationships inter se of the investors and their individual and joint relationships with the agent.

30 The first matter raised by the defendant relates to the cash call made 19th November 1985. The resolution authorizing that cash call expressed it to be conditional upon a scheme of refinancing then contemplated being put into effect as contemplated by the refinancing proposal which was before the meeting which authorized the cash call. At that time an elaborate scheme of refinancing was proposed. It was not completed. It was obvious, in any event, that a cash call would be necessary.

31 That cash call was made the day following the meeting. At the meeting it was obvious to everyone that the refinancing scheme was not fully in place. A refinancing scheme was contemplated but it was not finalized. The defendant did not make an advance pursuant to that cash call. Many of the other — in fact, the majority of the other investors did so.

32 The condition was attached primarily to insulate the money (the proceeds of the cash call) in the hands of the agent from attachment by the mortgagee or mortgagees, in particular C.M.H.C. as its mortgage was at the time seriously in default. The mortgagee at that time also held personal guarantees from the individual investors. That was the reason for making the cash call conditional rather than an outright cash advance.

33 Subsequently, at a meeting on 27th October 1986 a scheme of refinancing was approved. That scheme was similar to the one contemplated at the 1985 meeting. At the 1986 meeting the accumulated funds representing the 1985 cash call plus interest thereon was called the "trust fund." It had been invested and was being held pending completion of the refinancing arrangements.

34 At the 27th October 1986 meeting a scheme of refinancing was approved. It was different from that contemplated in November 1985. Although the then president of the plaintiff company categorized those changes as significant, it appears to me from the evidence that they were not that significant. One thing is clear, they were much more favourable to the investors than were the particulars of the scheme contemplated in November 1985. At the October 1986 meeting no special resolution was passed removing the condition imposed on the cash call authorized in November 1985. Neither was the special resolution re-enacted at the October 1986 meeting.

35 The argument of the defendant is that there was, therefore, no resolution or special resolution authorizing that cash call, the first being conditional and the condition not having been satisfied and no further resolution having been passed. I do not accept that proposition. In my view, the proceedings which took place at the 27th October 1986 meeting, although the cash call made 19th November 1985 was not discussed as such, did in fact deal with the 1985 cash call.

36 Part of the resolution concerning refinancing made at the 1986 meeting dealt with the disposition of the trust fund which, as I have said, represented the proceeds of the 1985 cash call. In my view, the proceedings of the October 1986 meeting were either a fulfilment of the condition imposed on the cash call in November 1985 or were sufficient — although not referred to in the minutes — to amount to in effect a confirmation of the special resolution passed at the 18th November 1985 meeting. In any event, I do not concur with the defence suggestion that the cash call was conditional and that the condition was never removed and therefore that no special resolution authorizing that cash call exists. In my view, the cash call made on 19th November 1985 was a legitimate and valid cash call and should stand.

37 The cash call made 4th May 1987, which is the second one claimed here, was made by the directors of the plaintiff company pursuant to authority purported to have been given to them at the October 1986 meeting. The argument of the defendant is that although the directors were given some authority to make a cash call if, as and when needed, they were not given the power to fix the amount of that cash call. The submission is in effect that the power of the plaintiff, acting through its directors, to make the cash call was deficient and that the directors exceeded the power given to them.

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38 In my view, my interpretation of the resolution passed at the October 1986 meeting justifies an assumption or an inference that the directors had the power to fix not only the date and timing of the cash call but also the amount. In any event, the directors' acts were ratified at a later date by resolution of the investors, and any deficiency which existed at that time, that is, in October 1986 and 4th May 1987, was cured by the ratification.

39 The last cash call was made on 10th March 1988. The defence concedes that the directors were properly authorized to fix the amount and prescribe the time of that cash call. The argument that this cash call was improper is more broad. The defence states that the project itself has no viability, even now, and certainly had none in March 1988. It is argued that the cash call was not such that a prudent investor would make and that the investors were not acting in accordance with the objectives of the investors' agreement, nor in accordance with the terms of that agreement, when that cash call was authorized.

40 I am not prepared to accept that argument. The prudence or otherwise of the cash call is not altogether apparent. The vast majority of the investors voted in favour of the cash call. The evidence which I heard indicates that the cash call was justified although that justification may vary on an individual basis. As a group, however, the investors overwhelmingly supported that cash call. Only the defendant and a few other dissenters refused to make that payment.

41 With respect to all of the cash calls, there was an argument that the directors who exercised the power conferred upon them by the investors to make the cash calls were not properly authorized. The plaintiff company did not follow proper procedure in electing directors for quite a number of years. Many of the directors who purported to act from time to time were not in fact properly elected. The acts of all of the directors were ratified by the investors at a later date. In addition to that, it is my opinion that s. 111 of the Alberta Business Corporations Act applies and that all actions taken by the de facto directors from time to time in good faith are binding and effective for all purposes, including their effect upon so called insiders and other people close to the company.

42 In summary, with respect to the submission dealing with the propriety of the cash calls, it is my conclusion that they were all properly authorized in one way or another by the investors and were properly dealt with by the directors of the plaintiff company in accordance with the power given to them by the investors. The cash calls were, in my view, legitimate, and the defendant is liable for them.

43 The general situation is that the defendant and other investors in effect made themselves a constitution by executing the investors' agreement. The investors collectively, and each one individually, bound themselves to the terms of that agreement. The defendant has been and continues to be in the hands of all of his fellow investors and subject to any special resolutions passed by them.

44 That has an appearance of unfairness, especially when looked at through the eyes of someone who fails to see the advantages of putting up further money for what is conceived to be a losing proposition. Nevertheless, the agreement says that special resolutions of the investors may authorize further cash calls. While I concede that there are some parameters to that, I do not believe that the circumstances here fall outside the objectives or, indeed, the precise terms of the investors' agreement. In my view, then, the defendant is responsible for the cash calls to which I have referred.

45 Before I deal with interest, I will deal with the counterclaim. The counterclaim was not pressed, and I do not find that it has merit. The counterclaim will be dismissed.

46 The plaintiff is entitled to judgment for the principal amounts of the cash calls plus interest. I have had some difficulty with the interest. The claim is for interest dating from the dates of the respective cash calls calculated in accordance with the interest provisions of the amended art. 7 of the investors' agreement. I have no difficulty in awarding the plaintiff interest at 16 per cent per annum calculated and compounded monthly on each of the three delinquent cash calls running from 17th December 1987 when the agreement was amended to provide for that interest.

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47 Prior to that time, however, the situation is not quite so clear. I am not convinced that the plaintiff should be awarded interest at the amended rate for any period before 17th December 1987. It seems to me that that is a change in the substantive rights and obligations of the parties to the investors' agreement, and as a matter of principal, I do not believe that it should be applied retrospectively unless that is clear from the terms of the amendment.

48 I do not find that the amendment is that clear. It certainly is clear in respect of the power of the plaintiff to sue in its own name. However, it is not clear to me that it is retroactive with respect to the interest.

49 Having said that, then, I find that the plaintiff is not entitled to recover interest at the rate prescribed in the amended art. 7 on any of the cash calls for any period prior to 17th December 1987.

50 The next question is: Does the plaintiff have any claim to interest prior to that point in time and, if so, on what basis? The agreement which was in effect prior to the amendment in December 1987 speaks of interest payable to investors who have paid the amendment of any advances for and on behalf of a defaulting investor.

51 In looking at that clause, which in my view is the one that applies, it and other provisions of art. 7, I am left in considerable doubt as to whether the plaintiff is entitled to any interest prior to 17th December 1987.

52 I have read and reread the provisions of the agreement several times, and, in my view, the plaintiff simply has not made out a case on a balance of probabilities for the recovery of any interest prior to 17th December 1987 other than on the basis of the Judgment Interest Act, or, perhaps, for any period before 1st April 1984 on the basis of the Judicature Act. Therefore, I am going to award interest on the cash calls, the two of them made prior to 17th December 1987, on the basis of the Judgment Interest Act, and not on the basis of the contractual interest rate mentioned in the investors' agreement, either before or after its amendment.

53 The plaintiff will recover interest at 12 per cent on the cash calls made prior to 17th December 1987, the interest to run from the dates of the mailing of the notices of the cash calls. I should say that I have picked 12 per cent basically as an arbitrary figure. I make that direction notwithstanding the Judgment Interest Act but, rather, pursuant to the discretionary provisions given in that Act.

54 With respect to costs, I would award costs to the plaintiff on the appropriate column with no limiting rule to apply and with the costs to include all necessary disbursements. There will be no costs in respect of the counterclaim.

***Mr. Plotkins*:**

55 My Lord, I had intended to and hoped to have made a submission regarding the costs.

***O'Leary J.*:**

56 I can change it.

***Mr. PLotkins*:**

57 All right, I wonder if I could.

***O'Leary J.*:**

58 Have I finished everything else? Have I covered everything else?

***Mr. Robertson*:**

59 I think you have.

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***O'Leary J.*:**

60 That is fine. I am prepared to hear submissions on costs.

***Mr. Plotkins*:**

61 My Lord, I have two case authorities that I would like to submit to you, and I would like to cite The Law of Costs by Orkin. It is the 1968 edition, issued by the Canada Law Book Limited and I refer Your Lordship to p. 25.

***O'Leary J.*:**

62 Have you given me that?

***Mr. PLotkins*:**

63 No, I have not, My Lord, but the two cases that are referred to are in effect the cases I have given you, but the statement of Orkin on this point reads as follows: Other cases — and they are talking about costs of course. "An action or application may be disposed of without costs when the question involves a new one not previously decided by the courts" — which apply here — "or where it involves interpretation of a new or ambiguous statute" — which also might be appropriate — "or a new or uncertain or unsettled point of practice or where the practice is altered by recent English decision or where the action is a test action." An then it goes on to add a further paragraph: "A successful plaintiff has been denied costs where this would have worked an unjust hardship on the defendant." I primarily rely on the position that my learned friend admitted that this was in the nature of a test case, and he said there was no particular animosity to the defendant and costs of this action will be shared by approximately 260 investors, including my client, obviously, will be required to share on a pro rata basis. I would submit that in view of the fact that there are many other defendants that are — as the record has indicated that are in the process of being pursued — one of them was 13 units — I would think this would be a case where the courts — the courts should consider waiving costs against the defendant, and the authorities for this position is supported — the authority of the statements by Mr. Orkin are supported by the case of *Poizer v. Ward*, 55 Man. R. 214, [1947] 2 W.W.R. 193, [1947] 4 D.L.R. 316 (C.A.). The essence of the case simply was the right of the registrar to refuse approval in regard to an application, but the judges in this case, the three or four Court of Appeal Judges, McPherson, Chief Justice of Manitoba, and there was Justice of Appeal Richards, Justice of Appeal Bergman, and finally, Justice of Appeal — I do not find the other judge, but in any event, I would like to read the judgment of the justice of appeal who stated the principle that I am relying on, at page — on p. 325, the second last paragraph prior to the judgment of Justice of Appeal Coyne. Coyne was the judge I was looking for.

64 Now, this paragraph reads as follows:

> This being in the nature of a test case and the language of the statute here in question being far from clear, and as the appellant really represents the Crown, I think that no costs should be awarded against the respondents.

So there is a Court of Appeal which unanimously supported that finding.

65 Then I refer Your Lordship to a judgment in British Columbia by the Supreme Court reported at [1950] 1 W.W.R. 1041, the case of *Re Bothwell Estate*. This was a matter of a taxation of an estate and the question of costs arose again, and the court again did not award costs to the plaintiff, and I quote on p. 1044, the last paragraph of the case where it states:

> Inasmuch as this has been a matter in the nature of a test case at the instance of the profession in the city of Victoria to determine the right of the registrar in this case to make the reduction, there will be no costs to either party.

66 I would submit, My Lord, that this is a similar situation. We have 260 investors who will share the cost of this litigation, and in view of the nature of the case and my learned friend's admission it was in the nature of a test case, I would ask that no costs be awarded.

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***O'Leary J.*:**

67 This is — is a test case. Is it a test case from your point of view or just the individual —

***Mr. Plotkins*:**

68 We did not want to proceed at this time. We had hoped that they would proceed against other defendants who had larger interests in the project, and unfortunately they chose to proceed against us. I guess we looked like easier targets. It turned out, they were right.

***O'Leary J.*:**

69 I kind of doubt that.

***Mr. Robertson*:**

70 There are test cases and there are test cases, My Lord. The cases that my friend has referred to are situations where there is a matter of public interest involved, and one poor member of the public is forced to appear before the courts and argue a case that is of interest to many. This is not a test case in that context. This is a private contract amongst businessmen, and when I said it was a test case, I meant that there were a few other dissenting investors, as you were aware through out the trial, and obviously the decision in this case, which is the first one that happened to get to court, would be of some value in dealing with the other ones, so in that sense it is a test case. But ultimately, there is a private contract amongst businessmen, and Mr. Dockery, unfortunately from his perspective, is the one that got to court first, and I do not think it is a test case in the context of the cases my friend has referred to. First one that he referred to, I point out that — the court said the appellant really represents the Crown, and therefore it was an individual dealing with the statutory provision that was far from clear where really the Crown was on the other side and the court exercised its discretion not to order costs. In the second one, the *Bothwell Estate* case in British Columbia, the case dealt with the registrar's rights of taxation, and in the last paragraph, the court points out that the application was brought at the instance of the profession in the city of Victoria, and I gather that it was — the lawyers in Victoria trying to determine what the registrar's — so I do not think those cases are applicable to these facts. This is simply a private contract and no doubt the precedent will be used, but it is not a test case in that sense.

***O'Leary J.*:**

71 Mr. Plotkins, do you have a reply to that?

***Mr. Plotkins*:**

72 No, My Lord.

***O'Leary J.*:**

73 I am afraid that I agree with Mr. Robertson. It is a private contract. In one sense, every case is a test case, especially if there happen to be other cases that are similar or involve the same contract. Nevertheless, it is a private deal and a private contract, and I think it is proper to follow the usual rule in this case. I think the order I made is one that I will stay with. I certainly do not see any reason to increase the scale of costs. There are some calculations to be made, and the exact scale, I suppose, will be unknown, but the scale will be in accordance with the amount of the recovery, and no limiting rule will apply and it will include all reasonable disbursements. That is the usual rule.

Judgment for plaintiff; counterclaim dismissed.

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End of Document

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TAB 8

Most Negative Treatment: Reversed
Most Recent Reversed: TLC The Land Conservancy of British Columbia Inc. No. S36826, Re | 2014 BCCA 473, 2014 CarswellBC 3568, 379 D.L.R. (4th) 101, 65 B.C.L.R. (5th) 284, 2 E.T.R. (4th) 52, [2015] 6 W.W.R. 69, 247 A.C.W.S. (3d) 735, 364 B.C.A.C. 82, 625 W.A.C. 82, [2015] B.C.W.L.D. 9, [2015] B.C.W.L.D. 91, [2015] B.C.W.L.D. 92, [2015] B.C.W.L.D. 94, [2015] B.C.W.L.D. 95, [2015] B.C.W.L.D. 96 | (B.C. C.A., Dec 3, 2014)

2014 BCSC 97
British Columbia Supreme Court

TLC The Land Conservancy of British Columbia Inc. No. S36826, Re

2014 CarswellBC 160, 2014 BCSC 97, [2014] 7 W.W.R. 122, [2014] B.C.W.L.D. 2137, [2014] B.C.W.L.D. 2203, [2014] B.C.W.L.D. 2204, [2014] B.C.W.L.D. 2205, [2014] B.C.W.L.D. 2208, [2014] B.C.W.L.D. 2209, [2014] B.C.W.L.D. 2210, 242 A.C.W.S. (3d) 1002, 58 B.C.L.R. (5th) 321, 96 E.T.R. (3d) 17

In the Matter of the Companies' Creditors Arrangement Act R.S.C. 1985, c. C-36, As Amended

In the Matter of TLC The Land Conservancy of British Columbia, Inc. No. S36826, and The TLC The Land Conservancy (Enterprises) Ltd., Petitioners

Fitzpatrick J.

Heard: December 11-13, 19, 2013
Judgment: January 22, 2014
Docket: Vancouver S137436

Counsel: John R. Sandrelli, Steven D. Dvorak, Tevia R.M. Jeffries, for Petitioners
Amy D. Francis, Claire Wilson, for University of British Columbia
Shirley P. Kay, Richard D. Butler, for Attorney General of British Columbia
Jonathan L. Williams, Zachary J. Ansley, for Monitor
Francesca V. Marzari, Elizabeth A. Anderson, for District of West Vancouver
Stephanie Redding (A/S) (Agent), for 0980469 B.C. Ltd. and Frances Margaret Sloan Sainas, Carlyon Holdings Ltd.
Gregory J. Gehlen, Allan J. Perry, for Habitat Conservation Trust Foundation
Stephen R. Schachter, Q.C., for Trustees / Executors
William G. MacLeod, E. Jane Milton, Q.C., for Bull Housser Tupper LLP
Sharon I. Walls, for Ross Bay Villa Society
Robert A. Millar, Daniel A. Byma, for Proposed Purchaser

Subject: Estates and Trusts; Insolvency; Contracts; Corporate and Commercial; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.iii Miscellaneous

Estates and trusts

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I Estates
I.5 Construction of wills
I.5.a Fundamental issues
I.5.a.ii Testator's intentions given effect
I.5.a.ii.A Determination of intent
I.5.a.ii.A.2 Extrinsic evidence of intent

Estates and trusts

I Estates
I.11 Powers and duties of personal representatives
I.11.i Administrator's power to sell real property
I.11.i.iv Miscellaneous

Estates and trusts

II Trusts
II.2 Express trust
II.2.a Creation
II.2.a.ii Three certainties
II.2.a.ii.D Object

Estates and trusts

II Trusts
II.5 Purpose trust
II.5.a Charitable purpose

Estates and trusts

II Trusts
II.5 Purpose trust
II.5.c Miscellaneous

Headnote

Estates and trusts --- Estates — Construction of wills — Fundamental issues — Testator's intentions given effect — Determination of intent — Extrinsic evidence of intent

Executors of JB's estate, which included historically and culturally significant residence, sought to ensure preservation of residence — Heritage property society (BHPS) was set up, and residence was transferred from estate to BHPS, which immediately transferred residence to petitioner TLC, which operated as land trust — TLC had financial difficulty and obtained creditor protection — TLC received offer to purchase property — There was dispute whether TLC properly obtained title or was entitled to property or its proceeds, or was otherwise restricted from selling full title by Charitable Purposes Preservation Act or common law trust obligations — University, beneficiary under will, brought application for declaration that transfer of residence by executors was void and that residence be returned to estate — TLC brought application for approval of sale — University's application dismissed; TLC's application adjourned generally — Regarding evidence of intention, final version of will, and not prior unsigned draft wills, was document that had to be considered — Argument that draft wills were admissible as evidence of intention was akin to looking at instructions given to solicitor, which was impermissible to determine intention — Intention may change over time and what was relevant was intention evident at time of signing of last will — Other evidence concerning JB's intention was inadmissible; it was not evidence of "surrounding circumstances" relating to execution of will, and was hearsay — Only relevant and admissible evidence advanced by university was three prior signed wills.

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Estates and trusts --- Estates — Construction of wills — Fundamental issues — Testator's intentions given effect — Determination of intent — Miscellaneous

Executors of JB's estate, which included historically and culturally significant residence, sought to ensure preservation of residence — Heritage property society (BHPS) was set up, and residence was transferred from estate to BHPS, which immediately transferred residence to petitioner TLC, which operated as land trust — TLC had financial difficulty and obtained creditor protection — TLC received offer to purchase property — There was dispute whether TLC properly obtained title or was entitled to property or its proceeds, or was otherwise restricted from selling full title by Charitable Purposes Preservation Act or common law trust obligations — University, beneficiary under will, brought application for declaration that transfer of residence by executors was void and that residence be returned to estate — TLC brought application for approval of sale — University's application dismissed; TLC's application adjourned generally — Based on interpretation of will itself, JB's intention was to preserve residence into future — JB knew that residence was of great cultural significance — JB gave executors significant discretion towards achieving purpose of preserving property in relation to establishing entity in accordance with will — Discretion was not fettered in sense of requiring that executors determine, as precondition to exercise of discretion, that estate would have sufficient resources to fund entity's operations in perpetuity and that executors were prepared to maintain control over entity for that purpose — Even if there was ambiguity in will in that respect, further evidence of surrounding circumstances, being prior wills, did not detract from that interpretation and in fact supported it.

Estates and trusts --- Estates — Powers and duties of personal representatives — Administrator's power to sell real property — Miscellaneous

Executors of JB's estate, which included historically and culturally significant residence, sought to ensure preservation of residence — Heritage property society (BHPS) was set up, and residence was transferred from estate to BHPS, which immediately transferred residence to TLC, which operated as land trust — TLC had financial difficulty and obtained creditor protection — TLC received offer to purchase property — There was dispute whether TLC properly obtained title or was entitled to property or its proceeds, or was otherwise restricted from selling full title by Charitable Purposes Preservation Act or common law trust obligations — University, beneficiary under will, brought application for declaration that transfer of residence by executors was void and that residence be returned to estate — TLC brought application for approval of sale — University's application dismissed; TLC's application adjourned generally; TLC was at liberty to reset application with further evidence or to file amended application in respect of other relief — Use of BHPS to accomplish purpose under will did not fall outside of scope of powers granted to executors — There was no indication that executors had any purpose or intent to transfer residence other than to protect and preserve property — There was no evidence of any agreement between executors, society, and TLC to subvert terms of will — Executors acted in good faith, had significant discretion, properly established and transferred residence to BHPS, did not exercise powers for ulterior motive, and acted with purpose of complying with intentions under will — Fact that executors and TLC worked together to find solution that fit within terms of will did not mean that there had been fraud on power — There was no fraud on executors' powers as contained in will.

Estates and trusts --- Trusts — Purpose trust — Charitable purpose

Executors of JB's estate, which included historically and culturally significant residence, sought to ensure preservation of residence — Heritage property society (BHPS) was set up, and residence was transferred from estate to BHPS, which immediately transferred residence to TLC, which operated as land trust — TLC had financial difficulty and obtained creditor protection — TLC received offer to purchase property — There was dispute whether TLC properly obtained title or was entitled to property or its proceeds, or was otherwise restricted from selling full title by Charitable Purposes Preservation Act (CPPA) or common law trust obligations — University, beneficiary under will, brought application for declaration that transfer of residence by executors was void and that residence be returned to estate — TLC brought application for approval of sale — University's application dismissed; TLC's

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application adjourned generally; TLC was at liberty to reset application with further evidence or to file amended application in respect of other relief — BHPS intended to transfer residence to TLC not for TLC's general charitable purposes but pursuant to specific purpose trust so as to preserve it for generations to come — Requirement under s. 2(1)(c) of CPPA was met — It was shown by necessary implication that BHPS intended that residence be kept and administered separately and used by TLC to advance specified charitable purpose with respect to determining that it was discrete purpose charitable property — Nothing in TLC's post-Deed of Gift conduct was indicative of any contrary intent, nor was it indicative of any "sham" — Intention of BHPS and TLC in executing Deed of Gift was to reflect exactly what was stated in that document: that TLC was to receive residence for purpose of restoring, developing and preserving residence as stated.

Estates and trusts --- Trusts — Express trust — Creation — Three certainties — Object

Executors of JB's estate, which included historically and culturally significant residence, sought to ensure preservation of residence — Heritage property society (BHPS) was set up, and residence was transferred from estate to BHPS, which immediately transferred residence to TLC, which operated as land trust — TLC had financial difficulty and obtained creditor protection — TLC received offer to purchase property — There was dispute whether TLC properly obtained title or was entitled to property or its proceeds, or was otherwise restricted from selling full title by Charitable Purposes Preservation Act (CPPA) or common law trust obligations — University, beneficiary under will, brought application for declaration that transfer of residence by executors was void and that residence be returned to estate — TLC brought application for approval of sale — University's application dismissed; TLC's application adjourned generally; TLC was at liberty to reset application with further evidence or to file amended application in respect of other relief — In terms of satisfying requirement of certainty of objects, both common law and CPPA (s. 1, definition of "charitable purpose") required that there be purpose recognized at law as being charitable — Preservation of residence set out in Deed of Gift came within purview of "charitable purpose" relating to advancement of education — Residence was significant from architectural point of view in terms of design elements — Art of late husband of JB was integral part of property.

Estates and trusts --- Trusts — Purpose trust — Miscellaneous

Executors of JB's estate, which included historically and culturally significant residence, sought to ensure preservation of residence — Heritage property society (BHPS) was set up, and residence was transferred from estate to BHPS, which immediately transferred residence to TLC, which operated as land trust — TLC had financial difficulty and obtained creditor protection — TLC received offer to purchase property — There was dispute whether TLC properly obtained title or was entitled to property or its proceeds, or was otherwise restricted from selling full title by Charitable Purposes Preservation Act (CPPA) or common law trust obligations — University, beneficiary under will, brought application for declaration that transfer of residence by executors was void and that residence be returned to estate — TLC brought application for approval of sale — University's application dismissed; TLC's application adjourned generally; TLC was at liberty to reset application with further evidence or to file amended application in respect of other relief — Proposed sale did not come "as close as possible" to achieving specific intention (to preserve residence for purposes of educating public) that BHPS had in transferring residence to TLC — It could not be concluded to that no other reasonable solution could be found to problem — It was not clear that another trustee could not be found if some efforts were made beyond relying on notoriety of case in press — There was question of whether order sought by TLC was appropriate under s. 3(4) of CPPA — It was not possible to decide at this time on basis of current evidence whether order was appropriate — Further evidence was required as to efforts by TLC to find another trustee to take on residence, if possible.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Miscellaneous

Executors of JB's estate, which included historically and culturally significant residence, sought to ensure preservation of residence — Heritage property society (BHPS) was set up, and residence was transferred from estate to BHPS, which immediately transferred residence to TLC, which operated as land trust — TLC had financial

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difficulty and obtained creditor protection pursuant to Companies' Creditors Arrangement Act (CCAA) — TLC received offer to purchase property — There was dispute whether TLC properly obtained title or was entitled to property or its proceeds, or was otherwise restricted from selling full title by Charitable Purposes Preservation Act (CPPA) or common law trust obligations — University, beneficiary under will, brought application for declaration that transfer of residence by executors was void and that residence be returned to estate — TLC brought application for approval of sale — University's application dismissed; TLC's application adjourned generally; TLC was at liberty to reset application with further evidence or to file amended application in respect of other relief — Court rejected TLC's contention that even if it had no beneficial interest in residence because of trust law and CPPA, it was within court's jurisdiction, whether under Land Title Act, CCAA or otherwise, to allow DIP lenders to seek payment from sale of residence — This was so whether or not residence had, at least notionally, been made subject to DIP Lenders' Charge under Initial Order — It was well known by DIP Lenders that trust issues had arisen in relation to TLC's assets generally and would be, if necessary, decided in course of restructuring proceedings — DIP Lenders were not in position to argue that they were bona fide lenders without notice.

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Carevest Capital Inc. v. 1262459 Alberta Ltd. (2011), 75 C.B.R. (5th) 259, 45 Alta. L.R. (5th) 79, [2011] 7 W.W.R. 125, 2011 CarswellAlta 391, 2011 ABQB 148 (Alta. Master) — referred to

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Christian Brothers of Ireland in Canada, Re (1998), 37 O.R. (3d) 367, 21 E.T.R. (2d) 93, 1998 CarswellOnt 815, 38 B.L.R. (2d) 286 (Ont. Gen. Div. [Commercial List]) — referred to

Christian Brothers of Ireland in Canada, Re (2000), 17 C.B.R. (4th) 168, 33 E.T.R. (2d) 32, 6 B.L.R. (3d) 151, 47 O.R. (3d) 674, 2000 CarswellOnt 1143, 132 O.A.C. 271, 184 D.L.R. (4th) 445 (Ont. C.A.) — referred to

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Vatcher v. Paull (1914), [1915] A.C. 372, [1914-15] All E.R. Rep. 609, 112 L.T. 737, 84 L.J.P.C. 86 (U.K. H.L.) — considered

Wong v. Burt (2004), [2005] 1 N.Z.L.R. 91, [2004] NZCA 174 (New Zealand C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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s. 67(1)(a) — considered

s. 81 — considered

Charitable Purposes Preservation Act, S.B.C. 2004, c. 59
Generally — referred to

s. 1 "charitable purpose" — considered

s. 1 "discrete purpose" (b) — considered

s. 1 "discrete purpose charitable property" — referred to

s. 1 "returns" — considered

s. 2(1) — considered

s. 2(1)(b) — considered

s. 2(1)(c) — considered

s. 2(1)(c)(i) — considered

s. 2(3) — considered

s. 2(4) — considered

s. 3(1) — considered

s. 3(3) — considered

s. 3(4) — considered

s. 3(5)(a) — considered

s. 4(2)(c) — considered

s. 5 — considered

Charities Act, 1993, c. 10
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 2(1) "company" — considered

s. 3 — considered

s. 11 — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

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s. 36(1) — considered

s. 36(3) — considered

Land Title Act, R.S.B.C. 1996, c. 250
Generally — referred to

s. 23 — considered

s. 23(2) — considered

s. 25.1(1) [en. 2005, c. 35, s. 14] — considered

s. 26 — considered

Law and Equity Act, R.S.B.C. 1996, c. 253
s. 47 — referred to

Society Act, R.S.B.C. 1996, c. 433
Generally — referred to

s. 4(1) — considered

APPLICATION by beneficiary for declaration that transfer of property by executors was void; APPLICATION by petitioner for approval of sale of property.

***Fitzpatrick J.*:**

Introduction

1 The petitioner, TLC The Land Conservancy of British Columbia Inc. No. S36826 ("TLC"), is a society which operates as a land trust. Its mandate is a laudable one: firstly, to secure at-risk environmentally sensitive properties themselves or to transfer those properties to other parties who will hold them; and secondly, to secure conservation covenants on other properties, all for the benefit of society and for generations to come.

2 Unfortunately, TLC's ambitions have outpaced its ability to fund the fulfillment of those ambitions, both in the short and long term. To put it bluntly, TLC does not have the financial resources to maintain and administer the various property interests that it has secured. As such, TLC sought and obtained creditor protection in October 2013 pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

3 One of the properties which TLC holds is a historically and culturally significant residence in West Vancouver, known as the Binning House. TLC has received an offer to purchase that property and it now seeks court approval of that sale to address its urgent financing needs. To some extent, TLC's fate in these proceedings and its ability to continue with its restructuring efforts depends on its ability to sell the Binning House and use the proceeds towards that end.

4 What stands in the way are various issues raised by other persons: namely, that TLC did not properly obtain title to the Binning House and that TLC is not entitled to either the property or its proceeds; and that if TLC did properly obtain title, TLC is restricted from selling full title to the Binning House by reason of certain provincial legislation, being the *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59 (the "*CPPA*"), or common law trust obligations.

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5 The stakeholders say that this decision may potentially have implications for other properties held by TLC. Even if that is so (and I make no comment on that), the more specific issue here is the fate of the Binning House. Binning House is not a revenue generating property and like many older homes, requires substantial maintenance and repairs. Someone will have to expend substantial sums of money for its upkeep.

6 All the stakeholders, including TLC, have expressed an interest in ensuring that the Binning House is preserved into the future. The sad fact though is that TLC is no longer financially able or willing to do so. More importantly, up to this point in time, no person, government (provincial or municipal), educational institution or charity has come forward to take on such an undertaking, other than the purchaser now proposed by TLC.

TLC's Background

7 In 1996, TLC was registered as a society pursuant to the *Society Act*, R.S.B.C. 1996, c. 433. Its stated goal was to act as a land trust in order to protect certain lands with ecological, agricultural or cultural importance.

8 Article 2 of TLC's Constitution sets out its purposes:

> (a) to contribute to and improve the education, health and welfare of the general public and to benefit the community as a whole by the promotion and encouragement of the protection, preservation, restoration, beneficial use and management of primarily;
>
> > (1) plants, animals and natural communities that represent diversity of life on Earth by protecting the lands and waters they need to survive, and secondarily:
> >
> > (2) areas of scientific, historical, cultural, scenic and compatible outdoor recreational value;
>
> (b) to promote such charitable activities or endeavors, including the acquisition, management and disposal of land and interests in land, as may in the opinion of the Society board of directors appear to contribute to the above objectives;
>
> (c) To encourage co-operation in, support for and research into, and education regarding all matters pertaining to the fulfillment of the above objectives;
>
> (d) to do all such other things as are incidental or ancillary to the attainment of the purposes and the exercise of the powers of [TLC].

9 Since 1996, TLC has protected over 250 properties by securing those properties and transferring them to other land trusts or government park departments or agencies. By 2013, TLC had also secured and was holding 50 other properties in addition to having secured approximately 250 conservations covenants on various properties which it monitors in terms of ensuring compliance with those covenants.

10 Historically, TLC obtained funding from a variety of sources, including: private or community foundations, individual donations, membership dues, other land trusts, corporate donations, gaming commission money, government grants, community collectives and event and direct product sales. In some instances, TLC obtained mortgage funding in order to obtain certain properties quickly where there was urgent need for protection or in anticipation of later funding which unfortunately never materialized. Funding from the usual sources, including government agencies, has dropped significantly over the last few years.

11 The financial difficulties that arose were first formally addressed by TLC beginning in 2009 and various restructuring options were explored. However, these efforts did not garner any significant success. By early 2012, some of the mortgages were in default and foreclosure proceedings were commenced. Remittances to Canada Revenue Agency were also in arrears. TLC was also, by this time, unable to fund the management of its portfolio of covenants.

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12 TLC's problems were compounded by various restrictions as to how they could deal with the various properties. TLC's Bylaws set out certain powers and actions the TLC Board of directors may exercise in respect of property owned by TLC. In particular, the Bylaws contemplated that properties could be designated as "inalienable" and that once designated, TLC was prohibited from mortgaging or selling that property save in certain limited circumstances. Over half of the 50 properties were so designated. These provisions were designed to enhance the permanence of these conservation efforts but they have also largely hamstrung TLC in finding a solution to its financial woes.

13 As of October 2013, TLC owed in excess of $7.5 million to its secured and unsecured creditors. The value of TLC's properties exceeds $43.7 million.

The CCAA Proceedings

14 On October 7, 2013, TLC sought creditor protection pursuant to the *CCAA*.

15 One of the first issues addressed was whether TLC could, as a society, seek protection under the *CCAA*. The *CCAA* applies to a "debtor company" (s. 3). Section 2 defines debtor company as a "company" and "company" is defined as meaning and including:

> ... any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated ...

16 The *Society Act*, s. 2 provides that a society may be "incorporated" under that *Act*. Further, s. 4 of that *Act* provides:

> **Effect of incorporation**
>
> 4 (1) From the date of the certificate of incorporation, the members of a society are members of a corporation
>
> (a) with the name contained in the certificate,
>
> (b) having perpetual succession,
>
> (c) with the right to a seal, and
>
> (d) with the powers and capacity of a natural person of full capacity as may be required to pursue its purposes.

17 In similar circumstances, the Ontario courts have granted protection to a society under the *CCAA*: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306 (Ont. Gen. Div. [Commercial List])), leave to appeal to ONCA refused *CCAA*: [1998] O.J. No. 6562 (Ont. C.A.). Although in a different context, this court has recognized the status of a society as that of a corporation: *International Taoist Church of Canada v. Ching Chung Taoist Assn. of Hong Kong Ltd.*, 2010 BCSC 1164 (B.C. S.C.) at para. 23, rev'd on other grounds 2011 BCCA 149 (B.C. C.A.).

18 On the basis of these authorities and a plain reading of the legislation, I was satisfied that as a society, TLC was able to seek creditor protection under the *CCAA* and on October 7, 2013, this Court granted an Initial Order (the "Initial Order"). At that time, TLC's stated intention was to restructure its operations, assets and affairs to enable it to continue its conservation efforts and fulfill TLC's general purposes as a land trust in British Columbia. The restructuring was intended to be accomplished through a reduction in operating costs, retirement or restructuring its debt, growing its membership and funding and perhaps most importantly, adopting a more entrepreneurial model that would see a more secure basis for funding of its properties. Critical to this plan was the sale or transfer of its land holdings to the extent possible in order to eliminate debt and fund its ongoing operating and restructuring efforts. The Initial Order requires that this Court approve any sale of TLC's properties, including the Binning House.

19 The Initial Order provided for the appointment of Wolrige Mahon Limited as Monitor. An Administration Charge of $500,000 and a Directors' Charge of $500,000 were approved at that time. In addition, interim financing in the amount

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of $1.85 million was approved in order to fund TLC during the restructuring proceedings and these funds were secured by a DIP Lenders' Charge. All of these charges were secured against eight separate properties of TLC which mostly include those identified by the Monitor as "heritage properties which have varying degrees of marketability and have special interest group support that is dedicated to ensure each property's special character is maintained and preserved". One of the properties which was made subject to the charges under the Initial Order is the Binning House.

20 On November 4, 2013, this Court extended the Initial Order and at the time of the hearing, the stay of proceedings was to expire on January 20, 2014. Since then, the stay has been further extended to the end of April 2014.

21 At least two other properties are for sale, although both are subject to mortgages and any equity realized is not expected to be sufficient to materially advance TLC's efforts to restructure. As such, TLC urgently requires funding in order to move forward with its restructuring efforts. While opponents of the sale have decried the "monetization" of the Binning House to satisfy TLC's creditors, this is a simplistic and to some extent inaccurate description of what is intended. TLC has been using credit to support its conservancy efforts, which include those relating to Binning House.

22 In addition, if TLC is to survive its financial difficulties and continue with its conservation efforts, it must have the ability to fund the continuation of this proceeding under the *CCAA*. In that sense, obtaining these sale proceeds represents a key part of ensuring the attainment of these laudable goals. Accordingly, the fate of TLC is somewhat linked to the Binning House and the reverse is also true; the fate of the Binning House is somewhat linked to the fate of TLC.

The Binning House

23 The Binning House is located in West Vancouver. It was designed and constructed in 1941 by Bertram Charles (B.C.) Binning, a well-known Canadian artist. Since its construction and continuing to this day, it has been recognized as one of the first and finest examples of the West Coast modern architectural movement. For that reason, since its construction, the Binning House was seen as having significant cultural and heritage value, both nationally and locally and it remains so to this day.

24 On the death of B.C. Binning in 1976, the Binning House passed to his widow, Jessie Binning.

25 The Binning House was designated a national historic site of Canada on March 12, 1998.

26 In 1999, the District of West Vancouver (the "District") passed certain bylaws (the "Bylaws") at the request of Jessie Binning, being Heritage Designation Bylaw No. 4157, 1999, designating the Binning House as a Municipal Heritage site and Heritage Maintenance Bylaw No. 4187, 1999, establishing maintenance standards for Heritage Designated Buildings and Sites. Title to the Binning House references a notation as to the Notice of Heritage Status.

27 The Designation Bylaw sets out the components and features of the Binning House designated for heritage protection, the requirement that the Binning House be "maintained in good order" in accordance with the Maintenance Bylaw, and the requirement to seek authorization of the District's Director of Planning and Development in order to make any changes to the interior or exterior finishes not otherwise permitted by the Bylaws.

28 In 2007, Jessie Binning passed away without any direct heirs. Details of her last will are in issue on this application, as discussed below.

29 Through a series of transactions in 2008, which will be discussed in more detail below, the executors of Jessie Binning's estate (the "Estate") began working with TLC to ensure that the Binning House would be preserved into the future. The process that was agreed upon involved the setting up of a separate society called the Binning Heritage Property Society ("BHPS").

30 On October 16, 2008, title to the Binning House was transferred from the Estate to this new society and immediately thereafter, BHPS transferred the Binning House to TLC. A Deed of Gift was also executed by both BHPS and TLC at the same time.

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31 Since that time, the Binning House has been administered by TLC as one of the many properties under its control and it has been dealt with in accordance with its general purposes. In particular, all revenue relating to the Binning House has been deposited into its general operating account and all disbursements have been paid from this same account although TLC maintained operating budgets specifically relating to the property. Unlike some of its properties, TLC never designated the Binning House as "inalienable".

32 In the period of approximately five years since TLC took title to the Binning House, the Binning House has been available for public viewing and public use from time to time, either through guided tours, open houses or special events.

33 The only charges against Binning House are the charges granted in the Initial Order, as noted above.

34 In October 2011, TLC arranged for a tenant or warden to reside in the Binning House to provide security and assist in minor maintenance and facilitate any tours, events and workshops there. The warden has been paying $700 per month in rent to TLC which has been deposited into TLC's general revenue.

35 TLC has completed only minor maintenance and no capital improvements to the Binning House since it was acquired in 2008.

The Sale Agreement

36 On October 28, 2013, TLC received an unsolicited offer from BJW Real Estate Holdings Ltd. ("BJW") to purchase the Binning House for $1.6 million, subject only to the Bylaws. The offer included all personal property on the premises, including: artwork, drawings and furniture associated with B.C. and Jessie Binning. The offer initially contemplated a closing at the end of November 2013.

37 It was later revealed that the person behind the BJW offer was in fact Bruno Wall, a Vancouver businessman. Mr. Wall has been collecting the works of B.C. Binning for over ten years and has accumulated a significant collection to date. As such, he clearly has an interest in acquiring this large "work" of B.C. Binning. Mr. Wall's offer requires that title to the Binning House be transferred to him free of any trust or other requirements.

38 After inspecting the Binning House, BJW obtained the services of an engineer to determine the condition of it. The engineering report obtained by BJW indicates that Binning House is in a "structurally satisfactory condition" but it requires some repairs and a "regular building maintenance program". The engineer estimated that $150,000 to $200,000 would be required for those repairs, to prevent further structural deterioration and to ensure compliance with the Bylaws. BJW or Mr. Wall has the financial resources to have this work performed.

39 Mr. Wall has indicated that he will review all reasonable proposals for public access and educational purposes once the property is restored.

40 The offer exceeds the 2013 assessed value of Binning House in the amount of $1,519,900. In December 2012, TLC had received another unsolicited offer in the amount of $700,000. In addition, based on the valuation information gathered by TLC indicating a range of $1,775,000-$1,825,000, TLC is satisfied that the offer represents fair market value.

41 On the basis of the above, TLC decided that the offer was a provident one and the offer was accepted, subject to court approval. In particular and in light of its stated purpose under its Constitution, TLC was of the view that BJW/Mr. Wall was a suitable and appropriate purchaser for the Binning House since Mr. Wall was expected to preserve and protect the Binning House in accordance with the Bylaws.

42 Further, TLC is of the view that the sale of the Binning House would further the goals of its restructuring efforts by divesting it and freeing up necessary funds to facilitate these *CCAA* proceedings. Retaining the Binning House is not essential to TLC's restructuring goals.

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43 In anticipation of the sale, TLC has now given the warden notice to vacate the premises by the end of January 2014.

44 At the November 4, 2013 hearing, counsel for TLC referred to the conditionally accepted offer to purchase and that an application would be brought on quickly to obtain the necessary court approval. By that time, however, opposition to the sale was beginning to mount. At the return of the application on November 18, 2013, BHPS was not present; however, substantial others interests, including the District, were aligned against TLC's sale of the Binning House. Alternatively, if the sale was approved, the University of British Columbia ("UBC"), a beneficiary under the will in question, asserted that it was entitled to the proceeds of the sale. The Attorney General of British Columbia (the "AG") indicated her intention to provide the court with assistance on the trust issues raised and generally speaking, the AG submitted that TLC did not hold beneficial interest in the Binning House that could be sold.

45 The arguments against the sale raise substantial issues relating to TLC's right to deal with the Binning House in light of the potential application of the *CPPA* and general trust law and issues relating to the interpretation of Jessie Binning's will. Before I address those issues, I will briefly address the issue in relation to this sale under the *CCAA*.

46 Section 36 of the *CCAA* provides:

> **Restriction on disposition of business assets**
>
> **36.** (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> . . .
>
> **Factors to be considered**
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

47 There are obviously some factors set out in s. 36(3) which make this proposed sale somewhat unusual. First and foremost, this offer was unsolicited and therefore, there was no "process" by which it was obtained in order to test the market for its value. This point is somewhat muted by the fact that this proposed sale has now been covered extensively in the press since November 2013, although I will return to this matter in relation to the trust issues. Despite some suggestion during the hearing that another offer might materialize, I am advised that no other offeror has come forward.

48 In any event, the offer exceeds the assessed price and TLC's efforts to determine value has confirmed the reasonableness of the amount, particularly in light of the repairs that need to be done to the Binning House.

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49 Secondly, general creditors have not been consulted. No secured creditors have mortgages against title. The DIP Lenders support the sale. Assuming that the offer represents fair market value, there is obvious benefit to the general creditors in shedding an asset which results in a cash drain and which results in the monetization of the Binning House for TLC's urgent financing needs.

50 Finally and importantly, the Monitor has fully reviewed the situation and fully supports the sale in accordance with its Second Report to Court on November 14, 2013. The Monitor supports the assertion of TLC that the offer is at fair market value and that its sale is provident at this time in terms of freeing up badly needed operating funds for not only the restructuring process but its continuing mandate to protect its various property interests. Indeed, since the fall of 2013, TLC's funding needs have become more acute and it appears that ongoing operations are only possible because professional fees are not being paid when incurred.

51 The Monitor notes that TLC has been funding the management of the Binning House from its general operating funds since, despite its initial intentions, it did not obtain any funding specifically for the purpose of maintaining and preserving the Binning House. Despite having been granted some property tax relief from the District and having received various specific grants over the years, the Monitor also notes that TLC does not have the financial capability to manage, maintain and preserve the Binning House into the future.

52 No person has asserted that the statutory test in s. 36 of the *CCAA* has not been met on the evidence.

53 Accordingly, at the outset and in these unusual circumstances, I am satisfied that, assuming that the Binning House is TLC's "asset" available for disposition by it (i.e. subject to the will and *CPPA*/trust issues discussed below), a sale of the Binning House is appropriate at this time.

The Issues

54 The issues are:

a) *The Will Issue*: did Jessie Binning's will allow the transfer of the Binning House to BHPS and then to TLC?

b) *The Trust Issues*:

i. does the *CPPA* or general trust law apply so as to prevent the sale of the Binning House by TLC on the proposed terms?

ii. if the Binning House is subject to a statutory or common law trust in the hands of TLC, should the trust be modified?

iii. in any event, is the Binning House exigible by TLC's creditors?

Summary of the Evidence

55 As stated above, Jessie Binning died in May 2007 leaving her last will and testament dated February 15, 2007 (the "Will"). The executors and trustees under her Will were Geoffrey Massey, Ronald Patrick Walsh and Everhard Van Lidth de Jeude (the "Executors").

56 The Will at para. 4(g)(i) stated at the outset that the Binning House had been designated a National Heritage Site and was listed on the heritage inventory of the District. Paragraph 4(g) continued:

> (ii) it is my hope that the [Binning House] and historic household furnishings will be preserved for historical purposes;

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