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COURT FILE NUMBER	B301-052460 25-3052460
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDING	IN THE MATTER OF THE NOTICE OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3, as amended AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KADEN ENERGY LTD.
APPLICANT	KADEN ENERGY LTD.
DOCUMENT	**BENCH BRIEF OF THE PROPOSAL TRUSTEE FOR APPLICATION TO APPROVE PROPOSAL**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Barristers and Solicitors 3400 First Canadian centre 350 – 7th Avenue SW Calgary, AB, T2P 3N9 **Attention: Robyn Gurofsky** Phone: (403) 261-9469 Email: rgurofsky@fasken.com File Number.: 240198.00053

BENCH BRIEF OF THE PROPOSAL TRUSTEE

October 3rd, 2024 at 10:00 am

CONTENTS

I. INTRODUCTION & BACKGROUND FACTS:

1. This Bench Brief is submitted by BDO Canada Limited in its capacity as the proposal trustee (in such capacity, the "**Proposal Trustee**") of Kaden Energy Ltd. ("**Kaden**" or the "**Company**") for an order seeking, among other things:

   (a) approval of the proposal filed August 16, 2024 (the "**Proposal**"), pursuant to section 62 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**");[1]

   (b) continuation of the Administration Charge granted over the assets of the Company until such time as the Proposal Trustee is discharged by the Court;

   (c) dispensing with the requirements to furnish Affected Creditors with a proof of claim form in advance of the Creditors' Meeting (as defined below);

   (d) approval of the releases in favour of the Company, the Proposal Trustee, all of the Company's Directors, and all of their respective affiliates, employees, agents, directors, officers, direct and indirect shareholders, advisors, consultants, and solicitors (collectively the "**Released Parties**") pursuant to the terms of the Proposal (the "**Releases**");

   (e) restricting Court Access to the Confidential Appendices to the Fourth Report (as defined below) dated September 23, 2024 (the "**Confidential Appendices**"); and

   (f) such further and other relief as may be sought by the Proposal Trustee and this Honourable Court may deem appropriate.

2. All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Proposal Trustee's Report to Creditors dated August 26, 2024 (the "**Report to Creditors**"), appended to the Fourth Report of the Proposal Trustee, dated September 23, 2024 (the "**Fourth Report**").

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 at s 62 [BIA] [**TAB 1**].

3. On March 6, 2024 (the "**NOI Filing Date**"), the Company filed a Notice of Intention to Make a Proposal to its creditors (the "**NOI**") pursuant to the BIA. The Proposal Trustee consented to act in such capacity in these Proposal Proceedings.[2]

4. This Court has since granted three extensions of the time in which the Company is required to file a Proposal with the most recent extension being granted on June 28, 2024, to extend the filing time through to August 18, 2024.[3]

5. On April 2, 2024, this Court granted an Order (the "**April 2 Order**"), which, among other things, approved an administration charge to secure the professional fees of the Proposal Trustee and its legal counsel, up to the maximum amount of $250,000 (the "**Administration Charge**").[4] The Administration Charge was given first priority.[5]

6. The April 2 Order also established a claims process (the "**Claims Process**") to be administered by the Proposal Trustee to properly capture and assess the claims of both known and unknown creditors of Kaden.[6] As of June 26, 2024, the Proposal Trustee had taken the necessary steps to substantially complete the claims process.[7]

7. On August 16, 2024, after the Company lodged the Proposal with the Proposal Trustee, the Proposal Trustee filed the same with the Office of the Superintendent of Bankruptcy[8] and subsequently distributed an information package to Affected Creditors on August 26, 2024, which included, among other things, i) notice of the Creditors' Meeting, ii) a condensed statement of the Company's liabilities and assets, iii) a copy of the Proposal Trustee's Report on the Proposal dated August 26, 2024 (the "**Proposal Report**"), iv) a copy of the Proposal, v) a voting letter, vi) an election letter, and vii) a proxy form.[9]

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[2] Proposal Trustee's Report on the Proposal, dated August 26, 2024, at para 1 [Proposal Report].

[3] Proposal Report, at para 2.

[4] Order of the Honourable Justice JS Little, granted April 2, 2024, *In the Matter of the Notice of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended, and In the Notice of Intention to Make a Proposal of Kaden Energy Ltd*, Court of King's Bench of Alberta Court File No 25-3052460, at para 5 [April 2 Order].

[5] April 2 Order, *supra* at para 9.

[6] April 2 Order, *supra* at paras 14-26.

[7] Third Report of the Proposal Trustee, dated June 26, 2024, at para 29.

[8] Proposal Report, at para 3.

[9] Kaden Energy Ltd Creditors' Meeting Materials, filed August 27, 2024.

8. The meeting of the Company's creditors (the "**Creditors' Meeting**") to consider the Proposal took place on September 6, 2024, at 11:00 a.m. by virtual teleconference. The creditors voted overwhelmingly in favour of the Proposal, with 98% of Affected Creditors voting (96 creditors), holding 98% in value of claims voting ($11,122,374.09), affirming the Proposal.

9. The key terms of the Proposal are outlined beginning at paragraph 14 of the Proposal Report. Notably, the Proposal provides the Company's Affected Creditors with Proven Claims in excess of $10,000 with four distribution options, including the ability to elect: i) to participate in the Convenience Class and receive $10,000 in full and final satisfaction of their Proven Claim; ii) to receive a distribution payment equal to $0.25 for every $1.00 of Proven Claim immediately on or around the Implementation Date, in full and final satisfaction of their Proven Claim; iii) to receive a distribution payment equal to $0.60 for ever $1.00 of Proven Claim, of which $0.10 for every $1.00 would be payable on or around the Implementation Date and the remaining amount would be distributed equally over the following 12 months commencing on or around October 31, 2024; and iv) to receive a distribution payment equal to $0.80 for ever $1.00 of Proven Claim to be distributed equally over a period of 24 months. Affected Creditors with Proven Claims below $10,000 automatically form part of the Convenience Class and receive payment of their claim in full on or around the Implementation Date.

10. The Proposal will be funded pursuant to a lending agreement as between Apex Opportunities Fund Ltd. ("**Apex**") and Beta Energy Corp (the "**Apex Lending Agreement**"), the details of which are set out beginning at paragraph 12 of the Proposal Report.

II. ISSUES:

11. The issues to be addressed on this Application are:

    (a) *Should the Court approve the Proposal?*

    (b) *Should the Court continue the Administration Charge until such time as the Proposal Trustee is discharged?*

(c) *Should the Court dispense with the requirement to provide a proof of claim form to the Company's creditors as part of the meeting materials for the Creditors' Meeting?*

(d) *Should the Court approve the Release?*

(e) *Should the Court grant a sealing order over the Confidential Appendices?*

III. LAW:

A. The Courts May Approve a Proposal When Reasonable and to the Benefit of Creditors

12. If a proposal is accepted by creditors, then the Proposal Trustee must set a hearing for an application for approval of the proposal by the Courts per section 58 of the BIA.[10] Notwithstanding this statutory requirement and the provision of the Proposal Trustee's report on the proposal to the Courts, the debtor company bears the onus of proving that the Courts should approve the proposal in question.[11]

13. Pursuant to section 59(2) of the BIA, the Court has the authority to refuse to approve a proposal where the Court is of the opinion that the proposal is i) not reasonable, ii) not calculated to benefit the general body of creditors, or iii) where the debtor company has committed an offence under sections 198 to 200 of the BIA.[12]

14. In the Proposal Proceedings of Magnus One Energy Corp., Romaine J. held that to approve a proposal the Court must be satisfied that:

(a) the terms of the proposal are reasonable;

(b) the terms of the proposal are calculated to benefit the general body of creditors; and

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[10] BIA, *supra* at s 58 [**TAB 1**].

[11] *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 5420 at para 28 [*Conforti*] [**TAB 2**].

[12] BIA, *supra* at ss 59(2), 198-200 [**TAB 1**].

(c) the proposal is made in good faith.[13]

15. In its analysis, the Court should consider generally the interests of all stakeholders and the weight of the effects of approving the proposal against those of a bankruptcy, as well as the interests of the following groups:[14]

(a) the debtor company, in particular the restructuring of its debt and staying in business;

(b) the creditors and their ability to resolve claims in a reasonable fashion; and

(c) the public interest in maintaining the integrity of the bankruptcy process and preservation of commercial morality. In this regard, the Courts should consider the payment terms and intended distributions of the proposal.[15]

16. While not bound by their views, substantial deference must be afforded to the recommendations of the Proposal Trustee and the majority support of creditors for a proposal, if received.[16] Where a large majority of creditors, i.e. substantially in excess of the statutory majority, have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of the creditors.[17]

17. In the context of a proposal that gave creditors an estimated 6% in value over the span of five years while the debtor company's financial situation remained almost unchanged, the Quebec Superior Court acknowledged that while the trustee could not predict with certainty how much money would be realized in a hypothetical bankruptcy, it was not satisfied that the proposal was substantially better than a bankruptcy liquidation.[18]

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[13] *Magnus One Energy Corp (Re)*, 2009 ABQB 200 at para 10 [*Magnus One*] [**TAB 3**]; see also *Conforti*, *supra* at para 25 [**TAB 2**]; *Kitchener Frame Limited (Re)*, 2012 ONSC 234 at para 19 [*Kitchener Frame*] [**TAB 4**].

[14] *Magnus One*, *supra* at para 11 [**TAB 3**]; *Conforti*, *supra* at para 26 [**TAB 2**]; *Kitchener Frame*, *supra* at para 20 [**TAB 4**].

[15] *Kitchener Frame*, *supra* at para 22 [**TAB 4**].

[16] *Magnus One*, *supra* at para 11 [**TAB 3**]; *Conforti*, *supra* at para 27 [**TAB 2**]; *Kitchener Frame*, *supra* at para 21 [**TAB 4**].

[17] *Gustafson Pontiac Buick Cadillac GMC Ltd (Re)*, 1995 CanLII 5775 (SK KB) at 3 [**TAB 5**].

[18] *Campagna (Proposition de)*, 2014 QCCS 5786 at para 89 [**TAB 6**].

18. Similarly, the Ontario Superior Court of Justice refused to approve a proposal where the analysis demonstrated that realizations available to creditors in bankruptcy would be almost double those offered in the proposal.[19]

19. The B.C. Supreme Court approved a proposal where the trustee could not estimate with certainty the realization of creditors in a bankruptcy as it was unclear what assets would be available, but was of the position that the proposal offered creditors certain recovery.[20] The proposal was approved by creditors and was found to be made in the interest of creditors in part because recovery under the proposal would likely be greater than that in bankruptcy.[21]

20. In *Magnus One*, this Court approved a proposal that was approved by a significant portion of creditors, specifically 91.7% and 92.3% of the creditors of the respective debtor corporations, and over the objections of the disapproving creditors.[22] A substantial majority of creditors also voted in favour of the proposal in *Conforti* with 26 of 27 unsecured creditors affirming the proposal, representing all but $1 in value of claims.[23] Ultimately, the Ontario Superior Court approved the proposal.[24]

B. The Court May Continue the Administration Charge Until the Proposal Trustee is Discharged

21. Courts have previously espoused the importance of professional advisors and their involvement as critical to a successful restructuring.[25]

22. In the BIA proposal proceedings of Petrolama Energy Canada Inc., this Court continued the administration charge until the completion of the proposal trustee's duties pursuant to

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[19] *In the Matter of the Proposal of Grant Holden Rennie of the City of Toronto, in the Province of Ontario*, 2010 CanLII 8454 (ON SC) at paras 18 [**TAB 7**].

[20] *Abou-Rached (In Bankruptcy)*, 2002 BCSC 1022 at paras 30, 136 [*Abou-Rached*] [**TAB 8**].

[21] *Abou-Rached*, *supra* at paras 31, 79, 84 [**TAB 8**].

[22] *Magnus One*, *supra* at paras 5, 27 [**TAB 3**].

[23] *Conforti*, *supra* at para 30 [**TAB 2**].

[24] *Conforti*, *supra* at para 67 [**TAB 2**].

[25] See e.g. *Mustang GP Ltd (Re)*, 2015 ONSC 6562 at para 33 [**TAB 9**].

the proposal.[26] Further, such charge was ordered terminated and released only upon the filing of the final certificate by the proposal trustee.[27]

23. Given the within Proposal Trustee's contemplated involvement in administering the Proposal over a two year period, it is reasonable and appropriate to protect the Proposal Trustee for its fees and disbursements by continuing the Administration Charge until such time as the Proposal Trustee is discharged by the Court.

C. The Court May Dispense with the Requirement for a Proof of Claim Form

24. Section 51(1) of the BIA requires the Proposal Trustee to call a meeting of creditors by sending every known creditor and the official receiver at least ten days before the meeting, among other things, a notice of meeting, together with the contemplated proposal. Among the documents included in the package to creditors contemplated by section 51(1) of the BIA is a proof of claim form, if not already sent.[28]

25. As proofs of claim have already been sent to creditors pursuant to the Claims Process, the Court may dispense with this requirement.

26. Further, the BIA is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives.[29] This Court has inherent jurisdiction pursuant to section 183 of the BIA to dispense with this requirement in order to achieve fairness in the bankruptcy process and to promote its underlying objectives.[30]

27. In the present case, it would be inconsistent with the objectives of the BIA and wholly unnecessary to require the Proposal Trustee to re-issue a proof of claim form and further

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[26] Order of the Honourable Justice KM Horner, granted November 2, 2022, *In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 and In the Matter of the Proposal of Petrolama Energy Canada Inc and In the Matter of the Plan of Reorganization Pursuant to the Business Corporations Act, RSA 2000, c B-9*, Court of King's Bench of Alberta Estate No. 25-2851343 at para 13 [*Petrolama Order*] [**TAB 10**].

[27] *Petrolama Order*, *supra* at para 13 [**TAB 10**].

[28] BIA, *supra* at s 51(1)(e) [**TAB 1**].

[29] *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at para 147 [*Petrowest*] [**TAB 11**].

[30] *Petrowest*, *supra* at para 147 [**TAB 11**]; Sam Babe, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring" (2020) Ann Rev Insolv 12 at 1 [**TAB 12**].

require creditors who have already proven their claims, to participate in yet another claims process. Promoting efficiency in a bankruptcy process is therefore another basis to dispense with this requirement.

D. The Court May Grant the Release Contained in the Proposal

28. The Proposal provides that all of the Released Parties are to be released from any and all Claims and other actions as specified in the Proposal, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Implementation Date, relating to or arising out of or in connection with the matters in the Proposal.[31] Further, the Proposal provides that each of the directors of the Company are to be released from all Director Claims upon the Implementation Date.[32]

29. The BIA prohibits certain types of claims from being released pursuant to sections 50(13) and 50(14).[33]

30. The Ontario Superior Court outlined the factors to be considered in insolvency proceedings when granting a release in favour of third parties, including directors of the debtor company, in *Re Lydian International Limited* and reiterated the same in *Harte Gold Corp (Re)* as follows:

    (a) whether the parties to be released from claims were necessary and essential to the restructuring efforts of the debtor company;

    (b) whether the claims to be released were rationally connected to the purpose of the restructuring and necessary for it;

    (c) whether the restructuring could succeed without the releases;

    (d) whether the parties being released were contributing to the restructuring; and

[31] Proposal of Kaden Energy Ltd, filed August 27, 2024, at Art 8.2(d).
[32] Proposal of Kaden Energy Ltd, filed August 27, 2024, at Art 8.4.
[33] BIA, *supra* at ss 50(13)-50(14) [**TAB 1**].

(e) whether the releases benefitted the debtors as well as the creditors generally.[34]

31. This Court recently approved certain releases, including in favour of the debtor companies' directors, in the Proposal Proceedings of Athabasca Minerals Inc.[35]

32. The Released Parties, including the Company's directors, have contributed materially to these Proposal Proceedings, including by negotiating the financing necessary to fund the Proposal and developing the Proposal itself. The Released Parties will be crucial to the forthcoming implementation of the Proposal, including with respect to the Proposal Trustee and its legal counsel, with continuing to administer the payments prescribed pursuant to the Proposal. The scope of the proposed Releases are narrow as they only include matters arising out of or in connection with the Debtor's Proposal Proceedings, and with respect to the Directors, the specifically enumerated Director Claims. It does not release the parties from any prohibited claims under the BIA. Further, the Proposal specifically contemplates that the Director's release will have no force or effect in the event that the Proposal is not fully implemented, and the Company is assigned into bankruptcy.[36] As such, the Releases are fair and reasonable in the given circumstances and rationally connected to the implementation of the Proposal.

E. The Courts May Grant a Sealing Order

33. Pursuant to Part 6, Division 4, of the *Alberta Rules of Court*, AR 124/2010, the Court has the ability to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.[37]

34. The Supreme Court of Canada set out the test to determine whether a sealing order is appropriate in *Sierra Club of Canada v Canada (Minister of Finance)* and reaffirmed the same in *Sherman Estate v Donovan*. The relevant test is as follows:

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[34] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54 [**TAB 13**]; *Harte Gold Corp (Re)*, 2022 ONSC 653 at paras 80-86 [**TAB 14**].

[35] Order of the Honourable Justice JT Neilson, granted April 19, 2024, *In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended, and In the Matter of the Notice of Intention to Make a Proposal of Athabasca Minerals Inc et al*, Court of King's Bench of Alberta, In Bankruptcy and Insolvency Court File No. 25-3009380 at para 30 [**TAB 15**].

[36] Proposal of Kaden Energy Ltd, filed August 27, 2024, at Art 8.4.

[37] *Alberta Rules of Court*, AR 124/2010, Part 6, Division 4 [**TAB 16**].

(a) whether court openness poses a serious risk to an important public interest;

(b) whether the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[38]

35. In each of *Sierra Club* and *Sherman Estate*, the Supreme Court of Canada explicitly recognized that preserving confidential information that if otherwise disclosed could adversely harm a party's legitimate commercial interests, constituted an "important public interest" for the purposes of the above test.[39]

36. The Ontario Superior Court previously granted a sealing order in the Proposal Proceedings of Danier Leather Inc., finding it important to protect the commercial interests of the debtor company and other stakeholders.[40] Further, Chief Justice Morawetz recently applied the rearticulated test for a sealing order set out in *Sherman Estate* in the insolvency context to seal certain confidential and commercially sensitive documents appended to a receiver's report.[41]

37. In the present case, the Confidential Appendices consist of valuations obtained by the Proposal Trustee and the Company regarding the fair market and liquidation values of the Company's assets and operations. In the event the Proposal is not fully implemented, the Company will most likely undertake a sale process in an insolvency proceeding to satisfy the remaining indebtedness to creditors. The valuation evidence should not be placed on the public record even in the unlikely event that this transpires. As such, in the present circumstances the salutary effects of the proposed Sealing Order, being to protect the general commercial and confidential interests of the Company, outweigh the deleterious effects of restricting the accessibility of court proceedings.

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[38] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*Sierra Club*] [**TAB 17**]; *Sherman Estate v Donovan*, 2021 SCC 25 at paras 37-38 [*Sherman Estate*] [**TAB 18**].

[39] *Sierra Club*, *supra* at paras 55, 60-61 [**TAB 17**]; *Sherman Estate*, *supra* at para 41 [**TAB 18**].

[40] *Danier Leather Inc (Re)*, 2016 ONSC 1044 at paras 85-86 [**TAB 19**].

[41] *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347 at paras 23-24 [**TAB 20**].

IV. CONCLUSION:

38. At this time, the Proposal Trustee respectfully notes the following:

(a) the Proposal includes the statutory provisions required pursuant to the BIA;

(b) management of the Company has been acting in good faith both in the within Proposal Proceedings and in the development of the Proposal;

(c) Affected Creditors are treated equitably as they may select their payment option and creditors within each category will be treated similarly;

(d) the 24 Month Payment Election, if selected by creditors, falls within the higher end of the bankruptcy liquidation estimate provided in the Report to Creditors. While the Proposal Trustee is unable to predict whether a sale in bankruptcy would result in lesser or greater realizations to creditors, the Proposal Trustee notes there are risks associated with pursuing a liquidation;

(e) the Proposal allows the Company to restructure its balance sheet and, therefore, renders it more capable of handling its environmental liabilities as they arise;

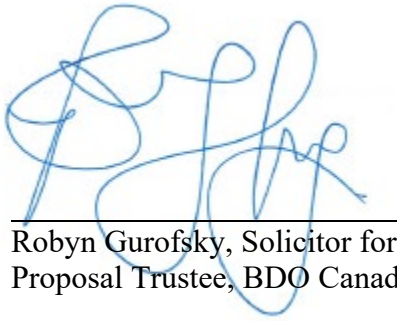
(f) the Proposal provides some certainty to creditors in respect to timing and amounts of distribution payments; and

(g) the Proposal allows the Company to continue operating in the ordinary course and develop its assets, which benefits the Company's employees and contractors, surrounding community, and suppliers.

39. Additionally, a substantial majority of Affected Creditors with Proven Claims have voted in favour of the Proposal, with 98% of Affected Creditors voting (96 creditors), holding 98% in value of claims voting ($11,122,374.09 in claims), affirming the Proposal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF SEPTEMBER, 2024.

FASKEN MARTINEAU DuMOULIN LLP

Per: 

Robyn Gurofsky, Solicitor for the
Proposal Trustee, BDO Canada Limited

LIST OF AUTHORITIES

TAB	
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 5420
3.	*Magnus One Energy Corp (Re),* 2009 ABQB 200
4.	*Kitchener Frame Limited (Re)*, 2012 ONSC 234
5.	*Gustafson Pontiac Buick Cadillac GMC Ltd (Re)*, 1995 CanLII 5775 (SK KB)
6.	*Campagna (Proposition de),* 2014 QCCS 5786
7.	*In the Matter of the Proposal of Grant Holden Rennie of the City of Toronto, in the Province of Ontario,* 2010 CanLII 8454 (ON SC)
8.	*Abou-Rached (In Bankruptcy)*, 2002 BCSC 1022
9.	*Mustang GP Ltd (Re),* 2015 ONSC 6562
10.	*Order of the Honourable Justice KM Horner, granted November 2, 2022, In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 and In the Matter of the Proposal of Petrolama Energy Canada Inc and In the Matter of the Plan of Reorganization Pursuant to the Business Corporations Act, RSA 2000, c B-9,* Court of King's Bench of Alberta Estate No. 25-2851343
11.	*Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41
12.	Babe, Sam, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring" (2020) Ann Rev Insolv 12
13.	*Lydian International Limited (Re)*, 2020 ONSC 4006
14.	*Harte Gold Corp (Re)*, 2022 ONSC 653
15.	Order of the Honourable Justice JT Neilson, granted April 19, 2024, *In the Matter of the Bankruptcy and Insolvency Act, RSC 1985, c B-3, as amended, and In the Matter of the Notice of Intention to Make a Proposal of Athabasca Minerals Inc et al*, Court of King's Bench of Alberta, In Bankruptcy and Insolvency Court File No. 25-3009380
16.	*Alberta Rules of Court,* AR 124/2010
17.	*Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41

18.	*Sherman Estate v Donovan,* 2021 SCC 25
19.	*Danier Leather Inc (Re),* 2016 ONSC 1044
20.	*Ontario Securities Commission v Bridging Finance Inc,* 2021 ONSC 4347

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Short Title

Most Recently Cited in: Tiamat Resources Inc v. Procyon Resources Corp, 2021 ABQB 509, 2021 CarswellAlta 1615, 29 Alta. L.R. (7th) 239, 335 A.C.W.S. (3d) 245, 91 C.B.R. (6th) 259, [2021] A.W.L.D. 3771 | (Alta. Q.B., Jun 25, 2021)

R.S.C. 1985, c. B-3, s. 1

s 1. Short title

Currency

1.Short title
This Act may be cited as the *Bankruptcy and Insolvency Act*.

Amendment History
1992, c. 27, s. 2

Currency
Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 50

s 50.

Currency

50.

50(1)Who may make a proposal

Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

50(1.1)Where proposal may not be made

A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

50(1.2)To whom proposal made

A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

50(1.3)Idem

Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, the proposal must be made to all secured creditors in respect of secured claims of that class.

50(1.4)Classes of secured claims

Secured claims may be included in the same class if the interests or rights of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts giving rise to the claims;

(b) the nature and rank of the security in respect of the claims;

(c) the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;

(d) the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and

(e) such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

50(1.5)Court may determine classes
The court may, on application made at any time after a notice of intention or a proposal is filed, determine, in accordance with subsection (1.4), the classes of secured claims appropriate to a proposal, and the class into which any particular secured claim falls.

50(1.6)Creditors' response
Subject to section 50.1 as regards included secured creditors, any creditor may respond to the proposal as made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

(a) sections 124 to 126, in the case of unsecured creditors; or

(b) sections 124 to 134, in the case of secured creditors.

50(1.7)Effect of filing proof of claim
Hereinafter in this Division, a reference to an unsecured creditor shall be deemed to include a secured creditor who has filed a proof of claim under subsection (1.6), and a reference to an unsecured claim shall be deemed to include that secured creditor's claim.

50(1.8)Voting
All questions relating to a proposal, except the question of accepting or refusing the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal was made.

50(2)Documents to be filed
Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and

(b) the prescribed statement of affairs.

50(2.1)Filing of documents with the official receiver
Copies of the documents referred to in subsection (2) must, at the time the proposal is filed under subsection 62(1), also be filed by the trustee with the official receiver in the locality of the debtor.

50(3)Approval of inspectors
A proposal made in respect of a bankrupt shall be approved by the inspectors before any further action is taken thereon.

50(4)Proposal, etc., not to be withdrawn
No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

50(4.1)Assignment not prevented
Subsection (4) shall not be construed as preventing an insolvent person in respect of whom a proposal has been made from subsequently making an assignment.

50(5)Duties of trustee
The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

50(6)Trustee to file cash-flow statement
The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

(a) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

(b) a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and

(c) a report containing prescribed representations by the person making the proposal regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the person making the proposal.

50(7)Creditors may obtain statement
Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50(8)Exception
The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (7) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50(9)Trustee protected
If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, he is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50(10)Trustee to monitor and report
Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

(a) file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at any time that the court may order; and

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101

do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

50(11)Report to creditors

An interim receiver who has been directed under subsection 47.1(2) to carry out the duties set out in subsection (10) in substitution for the trustee shall deliver a report on the state of the insolvent person's business and financial affairs, containing any prescribed information, to the trustee at least fifteen days before the meeting of creditors referred to in subsection 51(1), and the trustee shall send the report to the creditors and the official receiver, in the prescribed manner, at least ten days before the meeting of creditors referred to in that subsection.

50(12)Court may declare proposal as deemed refused by creditors

The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1 or a creditor, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

(a) the debtor has not acted, or is not acting, in good faith and with due diligence;

(b) the proposal will not likely be accepted by the creditors; or

(c) the creditors as a whole would be materially prejudiced if the application under this subsection is rejected.

50(12.1)Effect of declaration

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

50(13)Claims against directors — compromise

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

50(14)Exception

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

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

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

50(15)Powers of court

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

50(16)Application of other provisions

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

50(17)Determination of classes of claims

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

50(18)Resignation or removal of directors

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

Amendment History

1992, c. 27, s. 18; 1997, c. 12, s. 30(1)-(4), (6); 2001, c. 4, s. 27; 2004, c. 25, s. 32(1), (2); 2005, c. 47, s. 34; 2007, c. 36, s. 16

Currency

Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 51

s 51.

Currency

51.

51(1)Calling of meeting of creditors

The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy,

if not already sent; and

(f) a voting letter as prescribed.

51(2)In case of a prior meeting

Where a meeting of his creditors at which a statement or list of the debtor's assets, liabilities and creditors was presented was held before the trustee is required by this section to convene a meeting to consider the proposal and at the time when the debtor requires the convening of the meeting the condition of the debtor's estate remains substantially the same as at the time of the former meeting, the trustee may omit observance of the provisions of paragraphs (1)(b) and (c).

51(3)Chair of first meeting

The official receiver, or the nominee thereof, shall be the chair of the meeting referred to in subsection (1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

Amendment History
1992, c. 1, s. 20; 1992, c. 27, s. 20; 2005, c. 47, s. 123(b)

Currency
Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 58

s 58. Application for court approval

Currency

58.Application for court approval
On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

Amendment History
1992, c. 1, s. 20; 1992, c. 27, s. 23; 1997, c. 12, s. 35

Currency
Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 59

s 59.

Currency

59.

59(1)Court to hear report of trustee, etc.

The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

59(2)Court may refuse to approve the proposal

Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

59(3)Reasonable security

Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

59(4)Court may order amendment

If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

1997, c. 12, s. 36; 2000, c. 12, s. 10; 2007, c. 36, s. 21

Note:

S.C. 2000, c. 12, s. 10, amended s. 59 by replacing s. 59(3). Pursuant to S.C. 2000, c. 12, s. 21, the amendment applies only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21, on July 31, 2000. Prior to the amendment, s. 59(3) read as follows:

> *59.*
> *(3) Reasonable security*
> *Where any of the facts mentioned in section 173 and 177 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.*

Currency

Federal English Statutes reflect amendments current to May 22, 2024

Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 62

s 62.

Currency

62.

62(1)Filing of proposal

If a proposal is made in respect of an insolvent person, the trustee shall file with the official receiver a copy of the proposal and the prescribed statement of affairs.

62(1.1)Determination of claims

Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of an insolvent person, the time with respect to which the claims of creditors shall be determined is the time of the filing of

(a) the notice of intention; or

(b) the proposal, if no notice of intention was filed.

62(1.2)Determination of claims re bankrupt

Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of a bankrupt, the time with respect to which the claims of creditors shall be determined is the date on which the bankrupt became bankrupt.

62(2)On whom approval binding

Subject to subsection (2.1), a proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) all unsecured claims; and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, or represented by a proxyholder, at the meeting and voting on the resolution to accept the proposal.

62(2.1)When insolvent person is released from debt

A proposal accepted by the creditors and approved by the court does not release the insolvent person from any particular debt or liability referred to in subsection 178(1) unless the proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the proposal.

62(3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

Amendment History

1992, c. 27, s. 26; 1997, c. 12, s. 39; 2005, c. 47, s. 41; 2007, c. 36, s. 23

Currency

Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VI — Bankrupts (ss. 157.1-182)
Discharge of Bankrupts

R.S.C. 1985, c. B-3, s. 173

s 173.

Currency

173.

173(1)Facts for which discharge may be refused, suspended or granted conditionally

The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Note:

S.C. 1997, c. 12, s. 103(2), provides as follows:

> *(2) Application*
> *Paragraph 173(1)(m) or (n) of the Act, as enacted by subsection (1) [S.C. 1997, c. 12, s. 103(1)], applies to bankruptcies in respect of which proceedings are commenced after that paragraph comes into force [April 30, 1998].*

173(2)Application to farmers
Paragraphs (1)(b) and (c) do not apply in the case of an application for discharge by a bankrupt whose principal occupation and means of livelihood on the date of the initial bankruptcy event was farming or the tillage of the soil.

Amendment History
1997, c. 12, s. 103(1)

Currency
Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VIII — Offences (ss. 198-208)

R.S.C. 1985, c. B-3, s. 198

s 198.

Currency

198.
198(1)Bankruptcy offences
Any bankrupt who

(a) makes any fraudulent disposition of the bankrupt's property before or after the date of the initial bankruptcy event,

(b) refuses or neglects to answer fully and truthfully all proper questions put to the bankrupt at any examination held pursuant to this Act,

(c) makes a false entry or knowingly makes a material omission in a statement or accounting,

(d) after or within one year immediately preceding the date of the initial bankruptcy event, conceals, destroys, mutilates, falsifies, makes an omission in or disposes of, or is privy to the concealment, destruction, mutilation, falsification, omission from or disposition of, a book or document affecting or relating to the bankrupt's property or affairs, unless the bankrupt had no intent to conceal the state of the bankrupt's affairs,

(e) after or within one year immediately preceding the date of the initial bankruptcy event, obtains any credit or any property by false representations made by the bankrupt or made by any other person to the bankrupt's knowledge,

(f) after or within one year immediately preceding the date of the initial bankruptcy event, fraudulently conceals or removes any property of a value of fifty dollars or more or any debt due to or from the bankrupt, or

(g) after or within one year immediately preceding the date of the initial bankruptcy event, hypothecates, pawns, pledges or disposes of any property that the bankrupt has obtained on credit and has not paid for, unless in the case of a trader the hypothecation, pawning, pledging or disposing is in the ordinary way of trade and unless the bankrupt had no intent to defraud,

is guilty of an offence and is liable, on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year or to both, or on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

198(2)Failure to comply with duties
A bankrupt who, without reasonable cause, fails to comply with an order of the court made under section 68 or to do any of the things required of the bankrupt under section 158 is guilty of an offence and is liable

(a) on summary conviction, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both; or

(b) on conviction on indictment, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding three years, or to both.

Amendment History
1992, c. 27, s. 71; 1997, c. 12, s. 107

Currency
Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VIII — Offences (ss. 198-208)

R.S.C. 1985, c. B-3, s. 199

s 199. Failure to disclose fact of being undischarged

Currency

199.Failure to disclose fact of being undischarged
An undischarged bankrupt who

(a) engages in any trade or business without disclosing to all persons with whom the undischarged bankrupt enters into any business transaction that the undischarged bankrupt is an undischarged bankrupt, or

(b) obtains credit to a total of $1,000 or more from any person or persons without informing them that the undischarged bankrupt is an undischarged bankrupt,

is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both.

Amendment History
1992, c. 27, s. 72; 2005, c. 47, s. 111

Currency
Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VIII — Offences (ss. 198-208)

R.S.C. 1985, c. B-3, s. 200

s 200.

Currency

200.

200(1)Bankrupt failing to keep proper books of account

Any person becoming bankrupt or making a proposal who has on any previous occasion been bankrupt or made a proposal to the person's creditors is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, if

(a) being engaged in any trade or business, at any time within the period beginning on the day that is two years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, that person has not kept and preserved proper books of account; or

(b) within the period mentioned in paragraph (a), that person conceals, destroys, mutilates, falsifies or disposes of, or is privy to the concealment, destruction, mutilation, falsification or disposition of, any book or document affecting or relating to the person's property or affairs, unless the person had no intent to conceal the state of the person's affairs.

200(2)Proper books of account defined

For the purposes of this section, a debtor shall be deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, also accounts of all goods sold and purchased, and statements of annual and other stock-takings.

Amendment History

1992, c. 27, s. 73; 1997, c. 12, s. 108

Currency

Federal English Statutes reflect amendments current to May 22, 2024
Federal English Regulations Current to Gazette Vol. 158:11 (May 22, 2024)

End of Document

TAB 2

CITATION: In the Matter of the Proposal to Creditors of Conforti Holdings Limited, 2022 ONSC 5420
COURT FILE NO.: CV-31-2675583
DATE: 20220923

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE PROPOSAL TO CREDITORS OF CONFORTI HOLDINGS LIMITED, A CORPORATION INCORPORATED UNDER THE ONTARIO BUSINESS CORPORATIONS ACT, R.S.O. 1990, C. B.16

BEFORE: Justice Cavanagh

COUNSEL: *R. Brendan Bissel* and *Joël Turgeon*, for Crowe Soberman Inc. in its capacity as trustee to the proposal to creditors of Conforti Holdings Ltd.

Clifton P. Prophet, for the Moroccanoil, Inc.

Bobby Sachdeva and *Erin Craddock* for Conforti Holdings Limited

Carmine Scalzi for Antonio Conforti

Michael Noel for Cadillac Fairview

S. Michael Citak for Oxford Properties

J. Wuthmann for five landlords

HEARD: March 15, 2022

ENDORSEMENT

Introduction

[1] This is a motion by Crowe Soberman Inc. in its capacity as proposal trustee (in such capacity, the "Proposal Trustee") to the creditors of Conforti Holdings Limited (the "Company") in respect of the court's approval of the Company's amended proposal to creditors dated March 31, 2022 (the "Proposal") pursuant to s. 58 of the *Bankruptcy and Insolvency Act* (Canada) (the "*BIA*").

[2] Moroccanoil, Inc. ("Moroccanoil") is a contingent creditor of CHL. Moroccanoil opposes this motion.

[3] For the following reasons, I approve the Proposal.

Factual Background

Business of the Company

[4] The Company's business was the operation of hair salons in malls and commercial office spaces, almost all of which were indoors. Before these proceedings, there were 52 such locations. Now there are 35. The Company became insolvent due to reduced business caused by the pandemic and imposed restrictions. The Company currently has approximately 540 employees.

Notice of Intention to Make a Proposal and Creditors' Meeting

[5] The Company filed a notice of intention to make a proposal on September 28, 2020. Notice thereof was given to known creditors as declared by the Company. This notice excluded Moroccanoil until rectified from June 2021 onwards.

[6] Extensions of time to file a proposal were granted by the court on three occasions into March 2021. The Company filed a holding proposal on March 12, 2021. A holding proposal was necessary because the Company could not formulate a final proposal in the uncertain and ongoing pandemic circumstances. The creditors adjourned the creditors' meeting to October 28, 2021 and subsequently to March 31, 2022.

[7] The Company filed its substantive Proposal on March 21, 2022 which was re-amended on March 28, 2022. Both were forwarded to every known creditor and the Official Receiver together with a notice of reconvened meeting of creditors in respect of the meeting adjourned to March 31, 2022, the Proposal Trustee's report to creditors, and attendant documents tabled at the meeting. These documents were posted on the Proposal Trustee's website.

[8] The Proposal was updated at the March 31 creditors' meeting to address certain creditors' questions and comments as to section 65.11 of the *BIA*.

[9] The Proposal as re-amended and updated was approved by the requisite majorities at the March 31, 2022 meeting.

The U.S. litigation

[10] Moroccanoil is a manufacturer of luxury haircare and body care products. In April 2015, Moroccanoil commenced proceedings against Salon Distribution Inc. ("SDI"), a predecessor to the Company, and now the Company, in the United States District Court District of New Jersey (the "New Jersey Court"). In this litigation, Moroccanoil alleges that SDI and Mr. Conforti breached a settlement agreement with Moroccanoil. Moroccanoil moved before the New Jersey Court to enforce the settlement agreement in April 2015. Morrocanoil asserts that it is owed $2,807,478.12 by the Company. The Company and Mr. Conforti brought a cross-

motion in response. They claim damages from Moroccanoil for breach of an alleged obligation to supply products to the Company.

Terms of Proposal

[11] The material terms of the Proposal are:

a. Claims compromised are all claims of any person, excluding claims of security creditors.

b. The Proposal is made to the Crown.

c. The Company shall not dispose of assets other than as contemplated in the Proposal or in the normal course of business.

d. The order of payments under the Proposal is in accordance with the *BIA*:

i. Administrative fees and expenses (except as may be set out in the *BIA*).

ii. Proven unsecured claims of preferred creditors in accordance with the scheme for distribution set forth in the *BIA*.

iii. Proven unsecured claims and claims of landlords in accordance with the *BIA*.

e. Proposal Trustee to provide notice to all known affected creditors 30 days before the claims bar date.

f. Company to constitute a lump-sum Creditor Payment Fund of $2,430,000 upon court approval of the Proposal. This represents 22.7% of the dollar value of claims admitted for voting on the Proposal.

g. As stated in the Proposal, the Company and Mr. Conforti are in litigation with Moroccanoil in the United States. If the Company is successful on its claim against Moroccanoil and collects its claim, the Proposal provides for the "Paid Judgment and Bond Funds" to be added to the creditor payment fund in accordance with an agreement with the Company's principal, Mr. Conforti, which is anticipated to provide for him to retain a portion (expected to be 40%) of the Paid Judgment and Bond Funds in consideration for his financing of all of the Company's costs in the US proceeding.

h. All directors and officers to be released from all claims that arose on or before the filing date and that relate to an obligation of the Company where the director or officer is liable in such capacity, upon the issuance of a required certificate of full performance, such release to have no effect in case of the Company's bankruptcy.

i. No release of claims (i) based in fraud or gross negligence, or (ii) against directors or officers relating to contractual rights, based in misrepresentations or wrongful or oppressive conduct, asserted by secured creditors, or based in fraud.

j. *BIA* ss. 95 to 101 and any similar legislation do not apply to the Proposal or payments made thereunder.

Company failed to give notice of its NOI filing to Morrocanoil

[12] The Company filed a Notice of Intention to make a proposal on September 28, 2020 ("NOI"). Notice thereof was given to known creditors as declared by the Company. This notice excluded Moroccanoil until rectified from June 2021 onwards.

[13] The Company's position based on evidence given by its principal, Antonio Conforti, is that Morrocanoil was inadvertently left off the list of creditors set out in the NOI filing.

Moroccanoil becomes aware of the Company's NOI proceeding

[14] Moroccanoil is not included on the Company's statement of affairs either at the time that the notice of intention was filed on September 28, 2020 or when the holding proposal was filed on March 12, 2021.

[15] Moroccanoil learned of the Company's *BIA* proceedings on June 7, 2021 through its American attorneys in the US proceeding.

Initial failure by the Company to disclose a related party debt and security

[16] The Company, in its statement of affairs filed with its notice of intention on September 28, 2020, failed to disclose that Beauty Experts Inc. ("BEI"), a related corporation owned by the Company's principal, Mr. Conforti, was a secured creditor of the Company for approximately $1.5 million. The Company failed to disclose this in subsequent motions to the Court for extensions of time heard on October 26, 2020, December 14, 2020, and January 27, 2021.

[17] In the statement of affairs filed with its March 12, 2021 holding proposal, the Company included an indication that BEI was a secured creditor of the Company for approximately $1.5 million.

[18] Mr. Conforti's evidence is that he did not believe that he had to disclose the BEI debt or security because it was owed to a related third party.

Challenge to BEI security

[19] Moroccanoil made a motion challenging the BEI security. The Court released its reasons on May 31, 2022, holding that the BEI security was invalid. As a result, the

Proposal provides that the Company offers its creditors $2,430,000, including the $1.5 million set aside.

Analysis

[20] The issue on this motion is whether the Proposal should be approved.

General principles

[21] Pursuant to section 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold (a majority in number and two thirds in value of the votes of unsecured creditors of each class present, personally or by proxy, at a duly constituted meeting of creditors).

[22] On acceptance of a proposal by the creditors, the proposal trustee is required to apply to the court for an appointment for the hearing of an application for the court's approval of the proposal: s. 58 of *BIA*.

[23] The *BIA* provides in section 59(1) that the court shall, before approving the proposal, hear a report of the proposal trustee respecting the terms thereof and the conduct of the debtor and, in addition, hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

[24] Section 59(2) of the *BIA* provides that where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the expenses mentioned in sections 198 to 200.

[25] In order to satisfy s. 59(2), the courts have held that the following three-pronged test must be met: (a) the proposal is reasonable; (b) the proposal is calculated to benefit the general body of creditors; and (c) the proposal is made in good faith. See *Kitchener Frame Limited (Re)*, 2012 ONSC 234, at para. 19.

[26] On a motion for court approval of a proposal, the court must consider the interests of the debtor (in restructuring debt and staying in business), the creditors (in resolving claims in a reasonable fashion), and the public (in maintaining the integrity of the bankruptcy process and the need to preserve commercial morality). The court must also consider the interests of all stakeholders, and weigh the effects of the approval of the proposal against those of a bankruptcy. See *Re Wander (Proposal)*, 2007 ABQB 153, at para. 11; *Kitchener Frame*, at para. 20, 22.

[27] The courts have accorded significant deference to the majority vote of creditors at a meeting of creditors and courts have also accorded deference to the recommendation of the proposal trustee: *Kitchener Frame*, at para. 21.

[28] The burden of proving that the proposal should be approved by the court lies with the debtor making the proposal, although the court hears the proposal trustee's report. See *Magi (Syndic de)*, 2006 QCCS 5129 (CanLII), at para. 19.

[29] Subsection 59(3) of the *BIA* provides:

> Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Approval by requisite majorities (BIA, section 54(2)(d))

[30] Under s. 54(2)(d) of the *BIA*, the proposal must be accepted by a majority in number and two thirds in value of the creditors present and voting in each class of unsecured creditors. Here, there is only one class provided in the Proposal and the majorities are reached by way of approval of 26 of 27 unsecured creditors present and voting, representing all but $1 in value of claims accepted for voting purposes ($10,709,205.04).

[31] The only voting creditor that voted against the Proposal is Moroccanoil. Its claim, asserted in the U.S. Proceeding, was admitted at a value of $1, for voting purposes only, due to its contingency. If the amount claimed by Morrocanoil ($2,807,478.12) had been accepted as proved in full, the two thirds majority in value would still be reached.

Release of claims against directors and officers (BIA section 50(14))

[32] The Proposal's drafting in this respect copies the limitations set out in section 50(14) of the *BIA*.

Proposed order of distributions (BIA, section 60)

[33] The Proposal's order of distributions is in accordance with the *BIA*.

Should the Court refuse to approve the Proposal pursuant to s. 59(3) of the BIA?

[34] Morrocanoil relies on s. 59(3) of the *BIA*. Morrocanoil submits that facts mentioned in s. 173 (1)(o) of the *BIA* have been proved against the Company and the Company has not provided reasonable security for the payment of not less than fifty cents on the dollar.

[35] Morrocanoil submits that I should not approve the Proposal or, in the alternative, I should adjourn the approval hearing and require the Company to provide consideration sufficient to satisfy the fifty cent threshold mandated by subsection 59(3) of the *BIA*.

[36] The facts mentioned in s. 173(1)(o) of the *BIA* are "the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court".

[37] Morrocanoil submits that the Company has failed to perform the duties imposed on it under the *BIA* and, therefore, section 59(3) applies in the circumstances.

[38] Morrocanoil relies on subsection 50.4(1) of the *BIA* which provides that, on the commencement of an NOI, a debtor has a duty to file an initial creditor list which includes the names of creditors with claims amounting to two hundred and fifty dollars or more.

[39] The duties of a debtor include those set out in section 158. Subsection 158(d) of the *BIA* provides:

> **Duties of bankrupt**
>
> 158 A bankrupt shall
>
> …
>
> (d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorized the employment of a qualified person to assist in the preparation of the statement;

[40] Morrocanoil submits that the Company knowingly failed to disclose the Morrocanoil claim and the BEI debt and security on the Initial Creditor List.

[41] The Company submits that the failures to disclose the BEI debt and security and to disclose the Morrocanoil claim on the Initial Creditor List are administrative irregularities that are not failures by the Company to perform the duties imposed on it under the *BIA*.

[42] I disagree that the Company's failures should be dismissed as administrative irregularities. I am satisfied that the Company, with knowledge of the BEI debt (and the security BEI asserted for this debt) and with knowledge of the Morrocanoil claim, failed to disclose them on the Initial Creditor List.

[43] In failing to make these required disclosures, the Company failed to perform its duty under the *BIA*.

[44] Moroccanoil submits that in addition to the general duties set out in s. 158 of the *BIA*, all interested persons in a *BIA* proceeding, including a debtor, have a duty to act in good faith under s. 4.2(1) of the *BIA*. Morrocanoil submits that the Company has breached this duty of good faith. I have found that the Company failed to perform its duty under the *BIA*. Having so found, it is not necessary for me to analyze the application or effect of s. 4.2(1) of the *BIA*.

[45] I now address whether I should refuse to approve the Proposal, or adjourn the motion for approval, because the Company has not provided reasonable security for the payment of not less than fifty cents on the dollar on all unsecured claims provable against the debtor's estate.

[46] Morrocanoil relies on several authorities in support of its submission that I should not approve the Proposal.

[47] In *Wander (Proposal)*, 2007 ABQB 153 (CanLII), the debtor brought an application for court approval of his proposal to his unsecured creditors. The application was opposed by the largest unsecured creditor, the Canada Revenue Agency ("CRA"). The proposal affected eight unsecured creditors and CRA's claim represented about 60% of the total unsecured debt. Under the proposal, the debtor would pay an amount in 36 installments with the first installment due on filing of the proposal and continuing monthly payments thereafter. CRA's negative vote and proxy did not arrive in time for the meeting of creditors to vote on the proposal, and the proposal was approved by the votes of two creditors (with a combined claim value of $13,645.56 of total claims of $148,001). The proposal trustee recommended that the Court approve the proposal. CRA contended that s. 59(3) mandates performance security in the debtor's circumstance.

[48] The application judge in *Wander* reviewed the jurisprudence concerning the mandate for performance security under s. 59(3) of the *BIA* and its predecessor provisions, as well as parallel legislation in the United Kingdom. The application judge held, at para. 24, that performance security must be meaningful and the onus of proof of which rests on the debtor. The application judge, at para. 32, held that the prohibition against approving a proposal where any of the s. 173 facts have been proved against the debtor unless the debtor provides reasonable security for the payment serves to protect not only the interests of creditors but also the public's interest in commercial morality.

[49] In *Wander*, the application judge held that the debtor's proposal, viewed in its best light, provided for security only for the initial payment which equated to 0.027 per cent of the total amount due under the proposal. This security was held not to be reasonable performance security. The application judge held that there must be some evidence presented to justify the court exercising its discretion to lower the

percentage of performance security and there was none. The application for approval of the proposal was dismissed.

[50] The Company's Proposal provides for the Company to constitute a lump-sum Creditor Payment Fund of $2,430,000 to be paid to unsecured creditors. This represents between 16% and 22% of the claims of unsecured creditors. The variation is because of uncertainty concerning whether the Morrocanoil claim will be proven, whole or in part, as a claim. The funds to be paid are in the hands of the Company or the Proposal Trustee. The Company has shown that it is able to provide reasonable security for the amounts to be paid under the proposal, which are less than fifty cents on the dollar of all unsecured claims.

[51] The fact that the Company has provided security for the amounts to be paid under the Proposal distinguishes the facts on the motion before me from those in *Wander*.

[52] Morrocanoil also cites *Re Milan,* 2012 ONSC 2899. In *Milan,* the motion was for approval of a proposal that provided for payment of 15 cents on the dollar. The motion judge, Pattillo J., held that in the absence of the production by the debtor of any books and records and other relevant documents to enable the trustee to do an independent review of the debtor's affairs, there is no basis to permit the court or the creditors to determine that the amount being offered as a settlement is reasonable. Pattillo J. found that facts mentioned in s. 173 of the *BIA* had been proved. He held the proposal itself does not provide sufficient security for the proposed payments (which were to be provided by an individual known to the debtor).

[53] Pattillo J. declined to exercise his discretion provided for by s. 59(3) of the *BIA* for several reasons including his general concern arising from the debtor's failure to produce any books and records relating to his affairs, such that Pattillo J. was unable to accept that the debtor had no records or access to records in respect of his personal affairs and of his many and varied businesses. Pattillo J. was concerned with the secrecy shown by the evidence surrounding details of where the monies to fund the proposal were coming from and he found that the initial information that was provided was contradictory and lacking in detail. Pattillo J. held that the integrity of the bankruptcy proposal process requires full and complete disclosure by the proponent to enable creditors and the court to determine whether the proposal is reasonable and in the best interests of all interested parties. He found that this had not happened and that, by proceeding as he has, the debtor was attempting to use the proposal process to compromise all claims against him without properly accounting for his assets and any transactions that may constitute a preference or an improper transfer of property. The motion judge concluded that it is important for creditors in the bankruptcy process generally that a proper review of the debtor's assets take place. The debtor's approval motion was dismissed.

[54] The facts in *Milan* differ materially from those on the motion before me. The Company has disclosed the source of funding of payments to be made under the

Proposal, and these payments are secured. Unlike in *Milan*, there is no suggestion that the Company is using the proposal process to avoid a review of its financial affairs or to compromise possible claims in respect of transactions that may constitute a preference or an improper transfer of property. The reasons that Pattillo J. gave for declining to exercise his discretion under s. 59(3) to reduce the amount of security to less than 50 cents on the dollar do not apply on this motion.

[55] Morrocanoil also relies on *Sumner Company (1984) Ltd. (Bankrupt), Re*, 1987 CanLII 7591 (NB QB). In *Sumner*, an application was brought for court approval of a proposal. The application judge concluded that facts and offences under the statute had been committed such that it was mandatory for the court to refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct. The application judge noted that the proposal called for full payment to persons involved in the affairs of the bankrupt, in priority to the unsecured creditors, and he commented that three agreements that formed part of the proposal contained terms that were, as the application judge put it, "mind-boggling". The application judge, at para. 36, concluded that the proposal does not provide sufficient security and, accordingly, refused to approve the proposal. The application judge went on to consider the fact that a majority of creditors had voted to accept the proposal. The application judge, at para. 37, expressed his doubt that the creditors were able to appreciate the full implications of the proposal and the conditions attached to it. The application judge was satisfied that the creditors' interest will be better protected under a general bankruptcy then would be the case under the proposal. The application judge refused the application for approval of the proposal.

[56] The facts in *Sumner* are also materially different than those on the motion before me. The Proposal does not provide for payments to persons involved in the affairs of the Company in priority to unsecured creditors. The evidence does not support a finding that creditors are unable to appreciate the full implications of the Proposal.

[57] The Proposal was supported by all unsecured creditors except for Morrocanoil. At the hearing of this motion, several creditors appeared and made submissions supporting approval of the proposal. These creditors are landlords in malls where the Company operates hair salons. I accept that the landlords are in a different position than Morrocanoil because they will benefit from future rental receipts from the Company as a tenant. Nevertheless, I regard the support for the Proposal from the Company's creditors be a significant factor that supports the motion. If the Proposal is not approved, the result will be that the Company will be bankrupt, an outcome that will have negative effects for the Company, its landlords, suppliers, employees, and shareholders.

[58] I accept that the requirements (i) for support from the Company's creditors, and (ii) that the proposal provides for a better outcome than a bankruptcy, are separate from the requirement under s. 59(3), where it applies, that the court shall refuse to

approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct. In *Wander*, at para. 25, the application judge held that s. 59(2) and s. 59(3) should be read disjunctively. However, the circumstances which inform the exercise of discretion under s. 59(3) include the extent of approval by creditors and the fact that the outcome under the proposal is better than under a bankruptcy. This is shown in *Wander* and *Sumner*. The circumstances also include the public's interest in commercial morality.

[59] The evidence on this application in relation to the conduct of the Company is not, in my view, similar to the facts in *Wander*, *Milan*, or *Sumner*, where, notwithstanding support from creditors who voted at the creditors' meeting (in *Wander*, there was opposition by the largest creditor who failed to appear at the meeting), the hearing judge in each case declined to exercise discretion to approve security of less than 50 cents on the dollar of unsecured claims. I do not regard the Company's failure to disclose the Morrocanoil claim or the BEI debt and security on its Initial Creditor List to be conduct that rises to such a level that the public's perception of the bankruptcy process would be undermined if the Proposal is approved.

[60] On the evidence before me, I exercise my discretion to approve the Proposal notwithstanding that it provides security for payment of less than 50 cents on the dollar on all unsecured claims provable against the Company's estate.

Is the Proposal reasonable under s. 59(2) of the BIA?

[61] Under section 59(2) of the *BIA*, where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one or more of the offences mentioned in sections 198 to 200.

[62] The Proposal Trustee submits that the terms of the Proposal are calculated to benefit the general body of creditors. The Proposal Trustee's opinion is that the Proposal provides for a greater recovery than bankruptcy. The Proposal Trustee estimates, based on claims filed and not including contingent claims, that the return to creditors in the bankruptcy would be approximately 13%, versus approximately 20% under the Proposal.

[63] If the Proposal Trustee added contingent claims to the estimate (approximately $3.2 million, including Morrocanoil's claim), the return to creditors in a bankruptcy would be approximately 11% versus 16% under the Proposal. In addition, the Proposal offers funding and a vehicle for the Company to seek to recover on a claim for damages against Morrocanoil, which, if successful, may result in additional creditor recovery.

[64] The Proposal Trustee notes that beyond creditors, the wider group of stakeholders of the Company, including 540 employees, suppliers and customers, have their interest in the Company's business preserved in a going concern proposal, unlike a bankruptcy and liquidation.

[65] The Proposal Trustee submits that the requirements of section 59(2) of the *BIA* are satisfied.

[66] I accept the submissions of the Proposal Trustee in this respect.

Disposition

[67] For these reasons, I approve the Proposal.

[68] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon and provided to me for approval.

Cavanagh J.

Date: September 23, 2022

TAB 3

Court of Queen's Bench of Alberta

Citation: Magnus One Energy Corp. (Re), 2009 ABQB 200

Date: 20090402
Docket: BE01 080637; BE01 080668
Registry: Calgary

Docket: BE01 080637

In the Matter of the Proposal of
Magnus One Energy Corp.

- and -

Docket: BE01 080668

In the Matter of the Proposal of
Magnus Energy Inc.

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Magnus Energy Inc. ("Magnus Energy") and Magnus One Energy Corp. ("Magnus One") apply for approval by the Court of their proposals filed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 and accepted by the required majority of their creditors. Two creditors, Pedro's Services Ltd. ("Pedro") and Taber Water Disposals Inc. ("Taber"), oppose the application on the basis that Magnus Energy and Magnus One have not acted in good faith and that factors set out under section 173 of the *Bankruptcy and Insolvency Act* can be established against them.

Facts

[2] Magnus Energy and Magnus One were oil and gas exploration and development companies engaged in operations primarily in Alberta and Saskatchewan. Magnus One is a wholly-owned subsidiary of Magnus Energy. They each filed a Notice of Intention to make a

Proposal under the *Bankruptcy and Insolvency Act* on June 18, 2008, naming RSM Richter Inc. as Trustee.

[3] The Magnus companies are no longer operating. Their assets available for distribution to creditors consist of cash on hand and minor accounts receivable. No value has been attributed to any of their undeveloped oil and gas properties.

[4] The parent company of Magnus Energy, Questerre Energy Corporation, holds security over all of the assets of Magnus Energy and Magnus One. As of August 31, 2008, the secured indebtedness owing to Questerre was approximately $4.3 million.

[5] Magnus Energy and Magnus One each filed a Proposal with the Official Receiver on September 5, 2008, and these Proposals were accepted by 91.7% of the creditors of Magnus Energy (22 out of 24 creditors) and 92.3% of the creditors of Magnus One (24 out of 26 creditors). The only creditors who voted against the Proposals were Pedro and Taber, who are controlled by the same principal. Pedro and Taber claim as unsecured creditors of both Magnus Energy and Magnus One pursuant to a default judgment obtained on November 14, 2007 in the amount of $50,557.32.

[6] Under the Proposals, Questerre agrees to be treated as an unsecured creditor for the purpose of most of its claim. Unsecured creditors would receive the lesser of $2,500 and the full amount of their claim plus a pro rata amount of remaining funds.

[7] At the meetings of creditors, the Trustee advised of ongoing discussions with the Energy Resources Conservation Board over abandonment liabilities relating to the wells drilled by the debtors and the priority of such contingent claims over other debts, and advised that Questerre had agreed to deal with such abandonment costs so that any claim by the ERCB would not impact the amount available for distribution under the Proposals. Counsel for Pedro raised the following matters at the meetings:

a) that the Trustee had not obtained a legal opinion on the validity of Questerre's security over the assets of the debtor companies, pointing out that litigation relating to the enforceability and priority of that security as against execution creditors was stayed as a result of the filing of the Notices of Intention. The Trustee responded that a legal opinion on the validity of the security had been obtained by Brookfield and K2, the previous secured creditors that had subsequently been bought out by Questerre, that he was satisfied with such opinion and did not believe that the expense of obtaining a further opinion was justifiable;
b) that the Trustee should closely scrutinize and segregate the debtors' legal costs and Questerre's legal costs as they had the same counsel. The Trustee noted that he did not believe this to be an issue, but agreed to do so; and
c) that counsel understood that more than $3 million of the unsecured debt of the debtors (excluding debt owed to Questerre) had been paid in full since February,

> 2008. The Trustee explained that the $3 million paid to creditors was incurred subsequent to Questerre's acquisition of Magnus Energy's debt, was paid by Questerre and went to the funding of flow-through share obligations. The Trustee was thus satisfied that no creditor had been preferred.

[8] Pedro and Taber's counsel also alleged at the meeting that at the time Magnus One's assets were transferred to Questerre, all of Magnus One's shares were under seizure, and it was their position that a sale could not be authorized and that the transaction was reviewable. The Trustee responded that he was of the view that the seizure of shares would not have prevented the transaction from occurring as Questerre as secured creditor could have affected the transfer of assets through the appointment of a receiver or by seizing the assets.

[9] The Trustee in its report to the Court on this approval application gives the opinion that the Proposals are advantageous for the creditors because they result in a greater distribution to the unsecured creditors, as there would be no distribution to unsecured creditors in a bankruptcy scenario.

Analysis

[10] Prior to approving a Proposal, the Court must be satisfied that:

I) the terms of the Proposal are reasonable,
ii) the terms of the Proposal are calculated to benefit the general body of creditors, and
iii) the Proposal is made in good faith.

[11] The Court must consider, not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality. I am not bound to approve the Proposals even though they have been recommended by the Trustee and given the overwhelming support of creditors, but substantial defence should be afforded to these views: The 2009 *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, at page 264, citing *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Sumner Co.* (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (NB Q.B.) ; *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); Re *National Fruit Exchange Inc*. (1948), 29 C.B.R. 125 (Que. S.C.); *Re Man With Axe Ltd.* (No. 1) (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.).; Re *Abou-Rached* (2002), 5 C.B.R. (4th) 165, 2002 CarswellBC 1642 (B.C. S.C.).; *Re Garrity* [2006] A.J. No. 890 (Q.B.).

[12] It is not suggested that the formalities of the *Bankruptcy and Insolvency Act*. have not been complied with nor that the Proposals do not have a reasonable possibility of being successfully completed in accordance with their terms.

[13] Pedro and Taber submit that the Proposals should not be approved because the debtor companies have not acted in good faith and that there are facts as set out under section 173 of the *Bankruptcy and Insolvency Act* that can be established against them.

[14] Firstly, these creditors allege that they were not given proper notice of a plan of arrangement involving Magnus Energy and Questerre that received final approval of the Court on October 31, 2007. Pursuant to that plan of arrangement, Magnus Energy shares were transferred to Questerre in return for Questerre shares. The final order provides that the Court is satisfied that service of the application was effected in accordance with the interim order, which required that the application, meeting materials and the interim order be served on Magnus Energy shareholders, its directors and auditors. There was no requirement to serve creditors. The affidavit of the President of Magnus Energy that supported the application for an initial order states that no creditors of Magnus Energy would be adversely affected by the arrangement, as they would continue to hold rights as creditors, and that neither Magnus nor Questerre had entered into the arrangement for the purpose of hindering, delaying or defrauding creditors. Pedro and Taber were thus not entitled to notice of the arrangement, although it appears from comments of their counsel that they were aware of it in any event.

[15] With respect to the arrangement, Pedro and Taber suggest that a press release that gave specific details of the plan of arrangement and the Court approval process was somehow flawed because it referred to the arrangement as a “merger”. This complaint is unfounded, as the press release is quite specific with respect to the arrangement details.

[16] Pedro and Taber also allege that no proper disclosure of the insolvent situation of the Magnus entities was made to the Court at the time the arrangement was approved. However, it is clear from the record that the Court had before it at both the interim and final order stage the Information Circular that was sent to Magnus shareholders that would have included disclosure as mandated by securities regulation, including reference to financial statements that would disclose the details of secured debt.

[17] The principal of Pedro and Taber also states that he is “not aware” if Magnus or Questerre disclosed to the Court the fact that “Questerre intended to assert in due course a security position over other creditors.” It is, however, also clear from the record that it was a condition of the arrangement that all secured debt of Magnus would be paid or satisfied.

[18] The gist of the objection by Pedro and Taber appears to be that Questerre took an assignment of Magnus Energy’s secured debt on October 16, 2007, which they allege resulted in abuse. The specifics of that alleged abuse are as follows:

[19] A. Following the plan of arrangement and assignment of secured debt, in January, 2008, Pedro and Taber registered writs of enforcement against Magnus Energy and Magnus One, and served various garnishee summons from January 17, 2008 to February 21, 2008. On February 12, 2008 Questerre demanded payment of its secured debt and issued a Notice of Intention to Enforce Security to Magnus Energy and Magnus One in the amount of indebtedness then

outstanding, roughly $17 million. Questerre as secured creditor claimed priority over any funds realized by Pedro and Taber through their garnishee summons on the basis that Questerre's security interest had been registered in the Personal Property Registry on December 19, 2007, before Pedro and Taber's writ of enforcement.

[20] Pedro and Taber complain that the question of who was entitled to funds paid into Court pursuant to the garnishees was stayed by the debtors' Notices of Intention. A decision by the debtor companies to exercise their legitimate rights to attempt to resolve their debts through the proposal mechanisms of the *Bankruptcy and Insolvency Act* cannot be considered bad faith.

[21] B. On March 19, 2008, Magnus Energy and Magnus One transferred oil and gas assets to Questerre in partial satisfaction of the roughly $22 million of secured debt that was at that time owed to Questerre. The transfer satisfied debt to the extent of $19.5 million, leaving $2,226.618 owing to Questerre. An independent valuation of the assets was obtained, and the Trustee advised that the property transferred was valued at about $17.5 million by such report. To be conservative, the secured debt was debited at the higher amount of $19.5 million.

[22] On March 18, 2008, as instructed by Pedro and Taber, a bailiff attended at the registered office of the Magnus companies and the offices of counsel for Questerre and left a Notice of Seizure of the shares of Magnus One "pursuant to Section 51 of the *[Securities Transfer Act]* and Section 57 (2) [of an unspecified Act]". Section 57(2) of the *Civil Enforcement Act* provides that an agency may seize "the interest of an enforcement debtor" in a security issued by a private company by serving a notice of seizure on the issuer at its chief executive office. Section 57(4) provides that the interest of an enforcement debtor in a security seized is subject to a prior security interest, the seizure does not affect the prior security interest, and the ability of the agency to deal with the security is limited to those rights and powers that the enforcement debtor would have had but for the seizure. The security held by Questerre over the assets of Magnus Energy appears to extend to all of the property of Magnus Energy, including the shares of Magnus One.

[23] The attempted seizure thus gives rise to a number of issues relating to validity and priority that were not addressed in the submissions made at the hearing before me, but nevertheless, Pedro and Taber submit that the assignment of properties to Questerre can and should be attacked by the Trustee because no approval by the shareholders of Magnus One to a sale of substantially all of the property of the corporation was obtained as required by the *Business Corporation Act*, as Magnus Energy was not in a position to consent to a special resolution authorizing the sale because the shares were under seizure. Even if I was satisfied that the seizure had been validly executed and was unaffected by s. 57(4) of the *Civil Enforcement Act*, the party who would be entitled to raise an objection to the conveyance of assets would be the bailiff, pursuant to section 57.1 of the *Civil Enforcement Act*, and no such objection is in evidence.

C. Pedro and Taber also submit, as they did at the creditor meetings, that the debtors paid roughly 3.5 million to various creditors when other payables were left unpaid, giving rise to

undue preferences. A press release issued by Questerre on November 2, 2007 after the arrangement had been completed indicates that Questerre would be using proceeds of a private placement of securities to fund the flow-through commitments of Magnus, including Magnus' share of drilling costs committed with respect to a particular well.

[24] The Trustee explains that Questerre loaned the money in question to the Magnus companies so that they could meet their flow-through share obligations. He is satisfied that the payments were made in order to preserve an asset of the companies and that only creditors providing new work were paid. He is therefore satisfied that there was no significant undue preference of creditors.

[25] Pedro and Taber submit that the disclosure relating to the Proposals is deficient because they speculate that the reason Questerre is willing to give up its secured creditors status in order to benefit the unsecured creditors is that there must be significant undisclosed tax losses that are of great benefit to Questerre and that the extent of that benefit should be disclosed. The Trustee agrees that there may be some tax losses totalling roughly $2 million, but submits that it is sheer speculation at this time as to whether these losses may be available to Questerre for use in the future. I am satisfied that the issue of the possible use of tax losses is not information so material that it makes the disclosure to creditors or the Court in these applications deficient.

[26] Pedro and Taber also submit that it is obvious that the remaining assets of the Magnus companies are not of a value equal to fifty cents on the dollar on the amount of their unsecured liabilities as set out in s. 173(1)(a) of the *Bankruptcy and Insolvency Act* and that I must thus refuse to approve the Proposals without reasonable security. I am satisfied by the evidence of the conveyance of assets to Questerre to reduce secured debt that this state of affairs has arisen from circumstances for which the Magnus companies cannot justly be held responsible, and therefore, section 173.(1)(a) does not require me to order security. In coming to this determination, I take into account Questerre's agreement to be treated as an unsecured creditor for the remainder of its debt.

[27] I therefore do not find either lack of good faith or proof of facts under section 173 that would preclude the approval of these Proposals. I am satisfied that the terms of the Proposals are reasonable, that they are calculated to benefit the general body of creditors, and that no creditors are being unduly prejudiced. There is nothing in the evidence before me that calls into question the integrity of the process or the requirements of commercial morality. It is persuasive that Questerre is willing to forego the remainder of its secured position and to take on the potentially material contingent claim for reclamation and abondment liabilities in order to allow Proposals with some recovery to the unsecured creditors, and I am persuaded that the situation is substantially better for unsecured creditors than it would be under a general bankruptcy. I therefore approve the Proposals. If the parties wish to make representation with respect to costs, they may do so.

Heard on the 27th day of January, 2009.
Dated at the City of Calgary, Alberta this 2nd day of April, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

John L. Ircandia
Borden Ladner Gervais LLP
for the Applicant

James R. Farrington
Krushel Farrington
for Pedro's Services Ltd. and
Taber Water Disposal Inc.

TAB 4

CITATION: Kitchener Frame Limited (Re), 2012 ONSC 234
COURT FILE NO.: CV-11-9298-00CL
DATE: 20120203

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

RE: **IN THE MATTER OF THE CONSOLIDATED PROPOSAL OF KITCHENER FRAME LIMITED AND THYSSENKRUPP BUDD CANADA, INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Edward A. Sellers and Jeremy E. Dacks, for the Applicants**

Hugh O'Reilly, Non-Union Representative Counsel

L. N. Gottheil, Union Representative Counsel

John Porter, for Ernst & Young Inc., Proposal Trustee

Michael McGraw, for CIBC Mellon Trust Company

Deborah McPhail, for Financial Services Commission of Ontario

ENDORSEMENT

[1] At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

[2] Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee

[13] An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

[14] On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

[15] The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

[16] The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

[17] Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

[18] The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

[19] In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer (Re)* (1994), 25 CBR (3d) 113; *Steeves (Re)*, 25 CBR (4th) 317; *Magnus One Energy Corp. (Re)*, 53 CBR (5th) 243.

[20] The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell (Re)* 2003, 40 CBR (4th) 53.

[21] The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re* [1998] O.J. No. 322 (Ont. Bktcy). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One, supra*.

[22] With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik, supra*, and *Farrell, supra*.

[23] In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

[24] With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

[25] With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

[26] On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

[27] With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors

TAB 5

Bankruptcy
No. 155 J.C. R.

IN THE QUEEN'S BENCH
PROVINCE OF SASKATCHEWAN
IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF GUSTAFSON PONTIAC BUICK CADILLAC GMC LTD. AND IN THE MATTER OF AN APPLICATION PURSUANT TO SS. 58 and 59 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, as am. S.C. 1992, c. 27

Kevin A. Clarke for Gustafson Pontiac Buick Cadillac GMC Ltd.
Diana K. Lee for Oak Bluff Estates Ltd.
Clark Sullivan on behalf of the trustee, Deloitte & Touche Inc.

JUDGMENT MALONE J.
February 23, 1995

This is an application pursuant to ss. 58 and 59 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as am. S.C. 1992, c. 27 (the "Act"), for the approval of a proposal made pursuant to s. 50 of the Act by Gustafson Pontiac Buick Cadillac GMC Ltd. ("Gustafson") to its various creditors. The application is opposed by one of the creditors, namely, Oak Bluff Estates Ltd. ("Oak Bluff"). At the meeting of the unsecured creditors to approve the proposal, six unsecured creditors voted against the approval representing approximately $430,000 of the indebtedness of the Gustafson. Forty-four unsecured creditors voted in favour of the proposal, representing approximately $1,800,000 of the indebtedness and thus the statutory requirement for the approval of the proposal was met. Only Oak Bluff, representing approximately 3% of the indebtedness, appeared in opposition to the application for Court approval.

The grounds for its opposition are set out in a letter to counsel for the Gustafson dated December 1, 1994, as follows:

> At the moment, we anticipate opposing the application on the following grounds:
>
> 1.That, under the proposal, GM and GMAC, were a separate class of unsecured creditors and, as that class did not approve the proposal, the proposal was not properly approved by the creditors in accordance with Section 54(2)(d) of the Bankruptcy and Insolvency Act, or alternatively, that the proposal fails to treat all of the unsecured creditors equally.
>
> 2.The proposal is primarily calculated to benefit Prairie Security Fund and the guarantors of the secured creditors of the corporation and not the general body of creditors.

3.The fact that any payment to the unsecured creditors is dependant upon successful negotiations with the Bank of Montreal, Prairie Security Fund and an outside investor means the proposal is effectively nothing more than a "holding proposal".

4.Insufficient evidence has been presented to the unsecured creditors of the fairness of the transfer prices under the proposal to Prairie Security Fund.

5.That without the favourable vote of Prairie Security Fund for its unsecured indebtedness, the proposal would have been defeated.

6.The proposal does not comply with the requirements of the Bankruptcy and Insolvency Act because it does not provide that all monies payable under the proposal, specifically those monies payable to GM and GMAC, shall be paid to the trustee as required by Section 60(2) of the Bankruptcy and Insolvency Act.

With respect to the first and sixth grounds of objection, I note the trustee described GM and GMAC as "franchise creditors" in his report to the unsecured creditors. This is an unfortunate description as the Act contemplates only three categories of creditors - preferred, secured and unsecured. Nevertheless, I am not prepared to withhold approval to the proposal on this basis. GM and GMAC are presumably in a position to terminate their relationship with Gustafson at any time which would effectively put an end to Gustafson's ability to sell or lease GM products. They have not chosen to do so. I assume therefore that if they had been categorized as unsecured creditors, they would have voted in favour of the proposal with the other approving creditors.

Furthermore, counsel for Gustafson points out that objections one and six, as well as four, deal with the valuation of security or the classification of creditors and as such should have been raised at the meeting of creditors pursuant to s. 135 of the Act for disposition by the trustee and not upon this application. Support for this proposition is found in the cases of Re Toronto Permanent Furniture Showrooms Co. (1960), 1 C.B.R. (N.S.) 1 (Ont. S.C.); Re Light's Travel Service Ltd. (1985), 56 C.B.R. (N.S.) 175 (B.C.S.C.) and Darabaner v. Banque Imperiale du Can. et Lefaivre, 2 C.B.R. (N.S.) 88 (Que.Q.B.).

With respect to objections two and five, I note that the vast majority of the creditors have not appeared to oppose the proposal and I therefore assume, do not take exception to the advantage, if any, to be gained by Prairie Security Fund Ltd.

With respect to objection three, the fact the proposal may be considered a "holding proposal" is not, in my opinion, sufficient to withhold approval thereof. The case

cited by counsel for Oak Bluff (Fisher Oil & Gas Corporation and Peat Marwick Limited v. Guaranty Bank & Trust Company (1982), 44 C.B.R. (N.S.) 225 (Ont. C.A.)) is not of assistance to her in this regard.

The criteria to be followed by the Court on an application of this nature is set out in ss. 59(2) of the Act as follows:

59.(1) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal . . . .

If the proposal is approved, the parties agree that the unsecured creditors of Gustafson will receive approximately 10ï¿½ to 11ï¿½ on the dollar of the indebtedness owed. If it is not approved, Gustafson will be placed in bankruptcy and the creditors will receive nothing.

In Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada, 3rd ed., (Toronto: Carswell, 1993, updated Release 8, 1994) Vol. 1, p. 2-144.6, under the heading "Conditions that Must be Met Before the Court Will Approve a Proposal" the authors state as follows:

(a) Generally

Under s. 59(2), the court before it can approve a proposal must be satisfied; (a) that the terms are reasonable; (b) that the terms are calculated to benefit the general body of creditors; and (c) that the proposal is made in good faith. . . .

In determining whether to approve a proposal, the court must consider not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality: Re Gardner (1921), 1 C.B.R. 424 (Ont. S.C.); Re Sumner Co. (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (N.B.Q.B.); Re Stone (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); Re National Fruit Exchange Inc. (1948), 29 C.B.R. 125 (Que.S.C.); Re The Man With The Axe Ltd. (No. 2) (1961, 2 C.B.R. (N.S.) 12 (Man. Q.B.).

Further, at p. 2-144.8 the authors state:

If, however, a large majority of creditors, i.e., substantially in excess of the statutory majority, have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of the creditors: Re McIntyre (1922), 2 C.B.R. 396 (N.B.K.B.); Re Landsmann & Wexler (1936), 17 C.B.R. 240 (Que.S.C.); _cole Int. de Haute Esthetique Edith Serei Inc. (Receiver of) v. Edith Serei Int. (1987) Inc. (1989), 78 C.B.R. (N.S.) 36 (C.S.

Qu,); Re Leger and Lamoureaux (1925), 7 C.B.R. 280 (Que.S.C.); Re Slavik (1922), 12 C.B.R. (3d) 157 (B.C.S.C.); Re Slavik (1993), 21 C.B.R. (3d) 278 (B.C.S.C.).

In my opinion, Gustafson has met the criteria set out in the Act and the authorities referred to in Bankruptcy and Insolvency Law of Canada, and accordingly the proposal as attached to the draft order filed herein is approved. I make no order as to costs.

J.

TAB 6

Unofficial English Translation

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

No: **200-11-021546-141**

DATE: **November 10, 2014**

PRESIDING: THE HONOURABLE DANIEL DUMAIS, J.S.C.

IN THE MATTER OF THE PROPOSAL OF:

JEAN-FRANÇOIS CAMPAGNA

Debtor

and

LEMIEUX NOLET

Trustee

and

ACIER PICARD INC.

Opposing creditor

JUDGMENT
on a petition for homologation of a composition proposal and opposition

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[1] On February 21, 2014, the debtor Campagna submitted a proposal to his

[80] It argues that the $50,000.00 offered, including a maximum of $10,000.00 for the trustee's costs, is inadequate even on the basis of the pessimistic scenario in table O-15, which also indicates that a similar minimal amount would be recovered.

[81] It adds that it is unfair, unjustified and unreasonable for the creditors to waive their recourse under sections 91 to 101 of the BIA in the context of this proposal, when many questions still remain after a study of the debtor's overall financial situation.

3.4 The decision

[82] In the instant case, none of the facts referred to at section 173 of the BIA are proved. Subsection 59(3) therefore does not apply.

[83] Similarly, it has not been demonstrated that the debtor committed any of the offences set out in sections 198 to 200 of the BIA.

[84] The matter must therefore be analyzed according to the test in subsection 59(2), to wit: are the conditions of the proposal reasonable or calculated to benefit the general body of creditors?

[85] As already stated and summarized by Lemelin J. in the matter of the proposal of *Marie-André Laforce v. Gérald Robitaille et associés Ltée*.[28]

> [TRANSLATION]
>
> [20] To dispose of an application for approval of a proposal, the Court must weigh the interests of three parties: the proposer, the creditors and the public.

[86] There is scant doubt that the debtor's proposal was made in his best interests. It enables him to pay all his debts with an amount that he can definitely pay, considering his assets and the conditions of his new job. It enables him to make a new start without great sacrifice. He wipes out his liabilities and keeps almost everything that he owns.

[87] That being said, it is far less clear that the arrangement satisfies the interests of the body of creditors. It will be recalled that four of the ten creditors that voted were opposed. According to the evidence, five of those that voted in favour did so before the first meeting when they did not have the additional information obtained later and set forth in table O-15. They did not know that 9209-4119 Quebec Inc. had assets, and they had no knowledge of the circumstances of Ms. Rondeau's hypothec. According to the options proposed to them, the choice was between a dividend of about 0.5% in a bankruptcy scenario and approximately 3% according to the proposal scenario.

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[28] 2001 CanLII 147 (QCCS)

[88] After the amendment increasing the proposal from $20,000.00 to $50,000.00, of which a maximum of $10,000.00 was for the trustee's fees, the dividend was to double to about 6%. This amount would be paid partially after the sale of the immovable property on Chouinard Street,[29] and the remainder could be spread over a period of up to five (5) years.

[89] While it is true that a bird in the hand is worth two in the bush, it is necessary to consider the overall situation. The trustee obviously cannot predict with certainty how much money would be realized with a hypothetical bankruptcy. But that must not serve as a hindrance and become a rule making any proposal appear more advantageous than the risks and difficulties of realizing the assets in the case of a bankruptcy.

[90] Thus, we cannot disregard the fact that the debtor has rights to three immovable properties and a sailboat and that he seems to have some equity despite the hypothecs granted, especially because Ms. Rondeau's hypothec in the amount of $130,000.00 is debatable, as the trustee acknowledged.

[91] More concretely, table O-15 shows that the immovable property on Chouinard Street represents equity of $18,078.00 for the debtor according to a pessimistic scenario and $24,978.00 in an optimistic scenario. This amount is already one-half of the proposed amount.

[92] As for the family residence valued at $301,500.00, it is expected to be sold for $286,500.00 less payment of a brokerage commission of $22,920.00 and legal fees of $2,000.00. If that is the case, and this assumption appears to be clearly conservative, the remaining equity will be $76,560.00, of which one-half will go to the debtor, in the event that Ms. Rondeau's hypothec is declared inapplicable. This balance takes into account additional legal fees of $6,000.00, in the event of contestation.

[93] As for the sailboat, it is apparently worth $14,000.00 and the debtor owns half of it.

[94] To that is added the value of the shares in 9209-4119 Quebec Inc. There is no guarantee of obtaining equity but the fact is that it has assets and possibly claims, if it has not received what it is owed. Here, the Court is referring to paragraphs 70 to 75 of this judgment setting forth the property and interests of this company.

[95] Moreover, the debtor is currently making a good salary and can temporarily devote a portion of it to debt service.

[29] See letter R-1.

[96] In such a context, the Court does not see how the dividend, estimated at 6%, is reasonable and benefits the creditors. If there is a creditor who seems to benefit from this proposal, it is Ms. Rondeau. Was she not granted a hypothec of $130,000.00, in October 2013, on a personal immovable property belonging to the debtor in respect of a note executed by 9209-4119 Quebec Inc.?

[97] In the matter of the proposal of *Technique Acoustique (L.R.) Inc*., cited by the parties during the hearing, the Court of Appeal wrote:

> [TRANSLATION]
>
> [82] It is not surprising in the circumstances that the judge considered the dividend of eight cents on the dollar proposed to the unsecured creditors to be inadequate and insufficient.[30]

[98] In the matter of the amended proposal of *Caméléon Construction Inc*. *v. Pinsky, Bisson Inc*.[31] Dufresne J. deemed the offer of thirteen cents on the dollar not to benefit the creditors.

[99] The fact that the debtor deemed it necessary to increase his offer from $20,000.00 to $50,000.00 is evidence that the first proposal was scarcely beneficial, regardless of what the trustee thought. The court is not convinced that the amended proposal, which is clearly better, is reasonable and benefits the general body of creditors, given the known facts and the questions arising therefrom.

[100] As for the public's interest, the court must ensure that the proposal and the process followed reflect a degree of commercial morality and maintain the integrity of the regime set out under the BIA.

[101] It is necessary to ensure fairness in the treatment of the creditors and the debtor. It is possible to understand and accept that the creditors lose money. That is inherent in the process, the objective of which is to help and rehabilitate unfortunate debtors. Debtors are allowed to start fresh. But the process should not give the impression that the debtor is greatly favoured, when his situation is compared with to the economic constraints on those to whom he owes money.

[102] But that is precisely what is looming on the horizon if the proposal is homologated. The debtor will keep his house, his immovable properties (except the one on Chouinard Street, which is for sale),[32] his boat, his shares in 9209-4119 Quebec Inc., and the assets owned by the company. He will keep all that in addition to his current

---

[30] *Supra* note 20.
[31] 2010 QCCS 2348 at para. 32.
[32] See exhibit R-1.

salary of $64,000.00 plus a performance bonus. As for the ordinary creditors, over five years they will receive an amount estimated at 6% of what they are owed.

[103] This situation does not appear reasonable to the court because the debtor's financial situation will be almost unchanged, whereas the creditors will incur substantial losses.[33]

[104] If the proposal is approved, the investigation and review process possible under the BIA in the case of bankruptcy will not take place. It may be that these verifications will contribute nothing more, but at least the integrity of the system will be recognized.

[105] That is the conclusion drawn by Gascon J. (now of the Supreme Court of Canada) in *Magi*:

> [96] When one is faced, as here, with a situation where many questions still remain unanswered, where there is not an overwhelming vote in favour of a proposal, where the recovery offered to the unsecured creditors is minimal, and where many issues remain yet to be investigated, the requirements of commercial morality and the integrity of the proposal process would not be served by the approval of the Proposal submitted by the Debtor.[34]

[106] The trustee acknowledged in its testimony that there was probably reason to scrutinize the debtor's assets and recent transactions, but that there was a strong risk that it might not be useful from an economic standpoint, given the costs that would be incurred. That may be true; we do not know. Even so, the economic risk must not prompt the court every time to approve a proposal that, at least at first glance, leaves one perplexed. The BIA requires that the court ensure respect for the integrity of the system and the commercial morality arising therefrom.

[107] The onus is on the person who makes a proposal to establish that it is reasonable and benefits the general body of creditors and not only himself. In this instance, the Court is not convinced that the conditions have been fulfilled.

[108] The application for homologation of the proposal will therefore be dismissed so that the creditors, through the trustee, may [TRANSLATION] "examine the debtor's affairs in the more rigorous and restrictive framework of bankruptcy."[35]

---

[33] *Supra* note 28, at para. 34.
[34] *Supra* note 20.
See *also In the matter of the proposal of Technique Acoustique (L.R.) Inc*., *supra* note 20 at para. 79.
[35] *Supra* note 28 at para. 42.

FOR THESE REASONS, THE COURT:

[109] **ALLOWS** the opposition to the application for homologation;

[110] **REFUSES** homologation of the debtor's amended composition proposal;

[111] **DECLARES** the debtor to be bankrupt;

[112] **ORDERS** the trustee to the proposal to act in accordance with the prescriptions of the *Bankruptcy and Insolvency Act* within the required time period, given the refusal to homologate the debtor's amended proposal;

[113] **WITH COSTS** in favour of the opposing creditor.

_____

DANIEL DUMAIS, J.S.C.

Mtre Patrick Bédard
Mtre Annie Vaillancourt
Bédard Poulin
Box (207)

For the opposing creditor

Mtre Martin Simard
Bernier Beaudry inc.
Box (127)

For the debtor

Mtre François Valin
BCF avocats
Box (12)

For the trustee

Date of hearing: September 11, 2014

TAB 7

Ontario
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

In the Matter of the Proposal of Grant Holden Rennie of the
City of Toronto, in the Province of Ontario

Estate No.: 31-1120405

February 24, 2010

Appearances:	Bruce A. Simpson	-for the Applicant
	Miles D. O'Reilly, Q.C.	-for the Trustee

Heard: January 25, 2010 and
February 3, 2010

Reasons

[1] This was the application by Grant Holden Rennie (the "Debtor") for Court approval of his proposal under Division I of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). The hearing occurred on two separate days before me. It proceeded on the report of Killen Landau & Associates Ltd., trustee under the Proposal (the "Trustee"), and other documents filed at the hearing. These include the January 22, 2010, declaration of the Debtor (the "Debtor's Declaration"), and the January 21, 2010, declaration of the Debtor's father, John MacLeod Rennie (the "Father's Declaration")[1]. The Court heard submissions and argument from counsel on behalf of the Debtor and the Trustee.

[1] The Father's Declaration was commissioned by one of Mr. Simpson's staff, Laura Whitney Carbis. It is commissioned in excess of the authority granted her by the Minster in appointing her a Commissioner for Oaths, as her appointment was territorially limited to the City of Toronto, and Ms. Carbis purports to have

[18] If we add $54,000.00 to the amount of surplus income prescribed for this family unit, and the recreational vehicles, creditors should expect to receive in a bankruptcy (which is what would follow from a refusal of Court approval of the Proposal) in excess of $65,000.00, subject, of course to fees of the trustee, and any legal fees to enforce the trustee's rights in the Cottage. This is nearly double that offered in the Proposal. If this analysis holds true, then how can any Court, exercising its discretion under s. 59(2) BIA, even according any deference to the creditors' slimly expressed wishes, find that the Proposal is reasonable or calculated to benefit the general body of creditors?

[19] It cannot.

[20] The analysis does not, however, end there. The Debtor has claimed, presumably on behalf of his parents, that the doctrine of the equity of exoneration applies to the facts at bar. As a result, the Debtor claims that his 1/3 interest in the Cottage is charged with the entire amount of the mortgage to CIBC, resulting in absolutely no equity being available to his creditors.

[21] Curiously, the Trustee, who would, *prima facie*, become trustee in bankruptcy on any deemed assignment if the Proposal is not approved by the Court, supports this position. Perhaps the Trustee confuses its role in working with the Debtor to craft and present the Proposal with its overarching duty to the creditors to maximize return.

[22] In effect, the Debtor, and his father, in their declarations, state that there was agreement between the three co-owners that the mortgage placed by all three over the Cottage in 2004 was for the entire benefit of the Debtor and that, as a result, the

TAB 8

Citation: Abou-Rached (In Bankruptcy) 2002 BCSC 1022

Date: 20020708
Docket: 219307VA01
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF

ROGER GEORGES ABOU-RACHED

Docket: 219301VA01
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN BANKRUPTCY

IN THE MATTER OF THE PROPOSAL OF

R.A.R. INVESTMENTS LTD.

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE ROSS

Appearing in person for the Trustee, Campbell Saunders Ltd.	David A. Gray, M. Nielsen
Counsel for Genesee Enterprises Ltd.	Bruce E. McLeod

Counsel for Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd.	Alan E. Keats
Counsel for Roger Abou-Rached & R.A.R. Investments Ltd.	Andrew G. Sandilands
Counsel for Stanley Rodham Investments Ltd., Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda Consult S.A., Yarold Trading Ltd.	Jennifer L. Harry
Counsel for Georges Abou-Rached, Hilda Abou-Rached, RAR Consulting Ltd., Garmeco Canada International Consulting Engineers Ltd.	Heather M. Ferris
Dates and Place of Hearing:	April 9 to 11, 2002 April 24 to 26, 2002 Vancouver, B.C.

> retainer, will have no claim in the estate for that amount.

[29] The Trustee estimates that, with the amendment, the creditors in Option A will realize at least 15 cents on the dollar for their claims.

[30] The Trustee recommended the Proposals, stating:

> According to the Statement of Affairs, there are no unencumbered assets that would be available to the unsecured creditors in a Bankruptcy scenario. The amount of excess income that would be available is minimal and, in all likelihood, would be less than the Trustee's fees and disbursements.
>
> The only potential recovery available to the Estate would require the voiding of the various transfers, sales and pledges described herein. As indicated in this report, this would require further investigation and, in all likelihood, expensive litigation. The cost of this process would be great and beyond the availability of funds from tangible assets. Any effort in this regard would therefore require funding by the Creditors and there is no certainty that the required funding would be forthcoming. Finally, the conclusion of further investigation may be that all of the transactions are bona fide and for fair consideration.
>
> Accordingly, at this time we are unable to estimate with any degree of certainty the estimated realization in a Bankruptcy scenario. The terms of the Proposal, on the other hand, offer the creditors certainty as to recovery with the right to elect the potential recovery of all of their claims (under Option B) or a portion of their claims (under Option A).

In fact, the situation at the outset of the hearing and prior to the amendment was that recovery under the Proposals would have been in the order of 4 or 5 cents on the dollar.

[31] The meeting of creditors was held on January 28, 2002. In the Proposal of Roger Georges Abou-Rached, the following was the result of the creditors' vote:

For:	48	$13,198,794.64	87.78%
Against:	2	$ 1,837,369.98	12.22%
		$15,036,164.62	

In the Proposal of R.A.R. Investments Ltd., the following was the result of the creditors' vote:

For:	48	$11,542,876.46	86.26%
Against:	2	$ 1,837,369.98	13.74%
		$13,380,846.44	

[32] Creditors Genesee and the Defendants by Counterclaim voted against the Proposals. Their claims were with respect to the judgment arising from the litigation and the award of special costs.

[33] Following the meeting of creditors, a series of appeals were brought. Registrar Sainty, in reasons dated April 3, 2002, with respect to one appeal, allowed the unsecured claim of the Defendants by Counterclaim at 70% rather than the 50% allowed by the Trustee in the RAR proposal. Accordingly, the

Abou-Rached's conduct in the course of the Litigation, I have nonetheless concluded that the requirements of commercial morality do not necessitate a refusal to approve the Proposals. I find the Proposals to be reasonable.

B. Are the Proposals Calculated to Benefit the General Body of Creditors?

[78] Courts have refused to approve proposals on this basis where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of the assets of the debtor and the encumbrances against those assets; where the proposal, by it terms, is bound to fail; or where the Trustee is able to delegate his duties to a group of the creditors, see ***Houlden & Morawetz, 2001 Annotated, Bankruptcy & Insolvency Act*** at para. E15(10)(c); ***Re Lofchik***, *supra*.

[79] In the case of these Proposals, the Trustee and supporting creditors note that the Proposals provide for an evenhanded distribution. The claims of the family have not been included; nor have claims of related parties. There has been, it is submitted, full disclosure of assets and encumbrances. Moreover, it is submitted that the recovery is greater under the Proposals than it would be in the event of a bankruptcy.

[84] For the reasons enumerated by the Trustee and in the earlier discussion with respect to reasonableness, I have concluded that the Proposals are in the interests of the creditors.

V. ARE ANY OF THE FACTS ENUMERATED IN SECTION 172 MADE OUT AGAINST THE DEBTORS?

[85] Section 59(3) of the ***Act*** provides:

> Where any of the facts mentioned in s. 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payments of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

[86] In this case, the dissenting creditors submit that the Proposals should not be approved because s. 173 facts are present and the Proposals do not provide for recovery of fifty cents on the dollar.

[87] The following provisions of s. 173 of the ***Act*** are at issue in these proceedings:

> 173.(1) The facts referred to in section 172 are:
>
> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured

[133] The application for cross-examination is denied.

VII. REASONABLE SECURITY

[134] The final issue, a fact pursuant to s. 173 having been proved, is whether the Proposal should be approved. It is common ground that the Proposals do not provide reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims. The question is whether, pursuant to s. 59(3) of the ***Act***, the court is prepared to grant approval on the basis of some lesser recovery.

[135] Given that the Proposals are viable and secured and given the paucity of assets of the debtors otherwise available to the creditors, I am prepared to exercise my discretion under s. 59(3) and approve the Proposals as amended.

VII. DISPOSITION

[136] In the result, the Proposals of Mr. Abou-Rached and RAR, as amended, are approved. The appeals from the decision of the Trustee are dismissed. The application for cross-examination is dismissed.

"C. Ross, J."
The Honourable Madam Justice C. Ross

TAB 9

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

BEFORE: Justice H. A. Rady

COUNSEL: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

Introduction

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

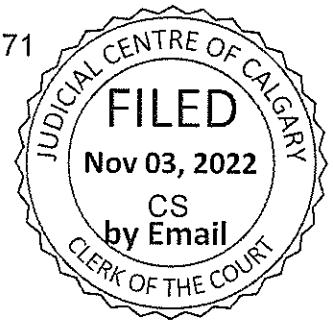
d) the D & O charge

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

TAB 10

C110271



COM

ESTATE NUMBER	25-2851343
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDINGS	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT,* RSC 1985, c B-3 AND IN THE MATTER OF THE PROPOSAL OF PETROLAMA ENERGY CANADA INC. AND IN THE MATTER OF THE PLAN OF REORGANIZATION PURSUANT TO THE *BUSINESS CORPORATIONS ACT*, RSA 2000, c B-9
APPLICANT	ALVAREZ & MARSAL CANADA INC., in its capacity as proposal trustee of Petrolama Energy Canada Inc.
DOCUMENT	**ORDER (Proposal and Plan Approval)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	BLAKE, CASSELS & GRAYDON LLP 855 2nd St. SW, Suite 3500 Calgary, AB T2P 4J8 Attn: Kelly Bourassa/James Reid Phone: (403) 260-9697/(403)-260-9731 Email: kelly.bourassa@blakes.com james.reid@blakes.com File: 99766/19

DATE ON WHICH ORDER WAS PRONOUNCED:	November 2, 2022
LOCATION WHERE ORDER WAS PRONOUNCED:	Calgary Courts Centre
NAME OF JUSTICE WHO MADE THIS ORDER:	The Honourable Justice K.M. Horner

UPON THE APPLICATION (the "**Application**") of Alvarez & Marsal Canada Inc. in its capacity as proposal trustee ("**Proposal Trustee**") and not in its personal or corporate capacity, filed October 25, 2022, in respect of the within *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**") proceedings for an order approving a proposal of Petrolama Energy Canada Inc. ("**Petrolama**" or the "**Company**") filed with the Official Receiver on September 30, 2022 (the "**Proposal**"), and the plan of reorganization (the "**Plan**") contemplated therein;

I hereby certify this to be a true copy of
the original Order (Proposal and Plan Approval)
Dated this 03 day of NOV 2022
for Clerk of the Court

AND UPON having been advised that the Proposal was presented to the Affected Creditors at the meeting of creditors held October 13, 2022 to October 18, 2022, and was approved by the requisite majority of Affected Creditors with Affected Claims, either in person or by proxy or voting letter;

AND UPON having read the Proposal, the Third Report of the Proposal Trustee dated October 25, 2022, filed, and the Affidavit of Service of Marica Ceko sworn November 1, 2022, filed;

AND UPON being satisfied that the Company has complied with the statutory requirements of Part III, Division 1 of the BIA;

AND UPON HEARING the submissions of counsel for the Proposal Trustee, the Company, the Successful Bidder (884304 Alberta Ltd.) or its nominee (the "**Successful Bidder**"), and any other counsel in attendance at the hearing of the Application;

IT IS HEREBY ORDERED AND DECLARED THAT:

DEFINITIONS

1. The capitalized terms used herein, including in the preamble, and not otherwise defined shall have the meanings attributed to them in the Proposal attached hereto as **Schedule "A"**.

SERVICE

2. The time for service of the Application for this Order, including the notice of hearing contemplated in section 58(b) of the BIA, is hereby abridged and service of notice of this Application and supporting materials upon those persons named in the service list attached hereto as **Schedule "B"** (the "**Service List**") is hereby declared good and sufficient, and no other Person is required to have been served with notice of this Application.

SANCTION AND IMPLEMENTATION OF THE PROPOSAL AND THE PLAN

3. The Proposal is the Successful Bid.

4. The Proposal is fair and reasonable and calculated for the benefit of the general body of creditors and is hereby finally and absolutely sanctioned and approved pursuant to the provisions of the BIA.

5. The arrangement forming part of the Plan is a reorganization as contemplated by section 192 of the *Business Corporations Act*, RSA 2000, c B-9 (the "**ABCA**") and is hereby sanctioned and approved.

6. The Company is authorized and directed to take all actions necessary or appropriate to enter into, implement, and consummate the Proposal including, without limitation, completing the Plan.

7. The Proposal Trustee and Company are hereby authorized and directed to take all actions necessary or appropriate to perform their respective functions and fulfill their respective obligations and duties as applicable under the Proposal to facilitate the implementation and completion of the Proposal, including filing the Proposal Trustee's Certificate, as contemplated in Section 10.3 of the Proposal.

8. As of the Proposal Implementation Date, the Proposal and all associated steps, transactions, arrangements, assignments, releases and reorganizations effected thereby as set out therein are hereby approved, binding, and effective upon the Company, all Affected Creditors, all Unaffected Creditors, the Existing Shareholders, the Successful Bidder, and all other Persons and parties affected by the Proposal.

9. The steps to occur, to be taken and effected pursuant to Section 7.1 of the Proposal, and the releases to be effected pursuant to Section 8.1 of the Proposal, are deemed to occur, be taken and effected, and be effective in the sequential order contemplated by Section 7.1 on Proposal Implementation, beginning at the Effective Time.

10. Scott Holmes will be appointed as director of Petrolama in accordance with Section 192(3)(b) of the ABCA.

11. Petrolama is hereby authorized and directed to file articles of reorganization in the prescribed form with the registrar of corporations appointed under the ABCA pursuant to section 192(4) of the ABCA to reflect the reorganization approved in paragraphs 8 and 9 above.

12. The Directors' and Officers' Charge, and the Interim Lender Charge are hereby fully satisfied, released, and discharged.

13. Upon completion by the Proposal Trustee of its duties in respect of the Company pursuant to the Proposal, the BIA, the Orders, and payment and satisfaction of all costs which are the subject of the Administration Charge, the Proposal Trustee shall file with the Court the Final

Certificate, stating that all of its duties in respect of the Company pursuant to the Proposal, the BIA and the Orders have been completed and thereupon, without further Order of the Court, the Proposal Trustee will be discharged from its duties as Proposal Trustee of the Company, and the Administration Charge will be terminated and released.

14. The Proposal, any payments or distributions made in connection with the Proposal, and the transactions contemplated by and to be implemented pursuant to the Proposal shall not be void or voidable under federal or provincial law and shall not constitute and shall not be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances, transfers at undervalue, or other reviewable transactions under any applicable federal or provincial legislation relating to preferences, settlements, assignments, fraudulent conveyances or transfers at undervalue.

15. Any and all security interests (whether contractual, statutory, or otherwise), hypothecs, caveats, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise in favour of any Creditor, other than Unaffected Creditors, or which any Creditor, other than an Unaffected Creditor, holds by way of subrogation are terminated and discharged, and any registrar of any personal property security registry or any real property registry is hereby authorized and directed to discharge any such encumbrance.

CONTINUATION OF OBLIGATIONS AND AGREEMENTS

16. All Obligations and agreements listed in Schedule "B" to the Proposal will be and remain in full force and effect, unamended, as at the Proposal Implementation Date, and no party to any such Obligation or agreement will, on or following the Proposal Implementation Date, accelerate, terminate, refuse to renew, rescind, refuse to perform or otherwise repudiate its Obligations thereunder, or enforce or exercise (or purport to enforce or exercise) any right or remedy under or in respect of any such Obligation, agreement or lease, by reason:

(a) of any event which occurred prior to, and not continuing after, the Proposal Implementation Date or which is or continues to be suspended or waived under the Proposal, which would have entitled any other party thereto to enforce those rights or remedies;

(b) that the Company has sought or obtained relief or has taken steps as part of the Proposal or under the BIA or ABCA;

(c) of any default or event of default arising as a result of the financial condition or insolvency of Petrolama;

(d) of the effect upon Petrolama of the completion of any of the transactions contemplated under the Proposal; or

(e) of any restructurings, reorganizations or amendments effected pursuant to the Proposal.

NO DEFAULT

17. From and after the Proposal Implementation Date, all Persons shall be deemed to have waived any and all defaults or events of default, third party change of control rights, other contractual rights, or any non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, instrument, credit document, lease, licence, guarantee, agreement for sale or other agreement, written or oral, in each case relating to, arising out of, or in connection with the BIA Proceedings, the Plan, the Proposal, the Arrangement Agreement and the transactions contemplated thereby and any proceedings commenced with respect to or in connection with the Proposal, including any order, and any and all amendments or supplements thereto. Any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection with any of the foregoing shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse Petrolama from performing its obligations under the Proposal.

RELEASES

18. On the Proposal Implementation Date and in the sequence set forth in the Proposal, the releases referred to in Section 8.1 of the Proposal shall be binding and effective as set out in the Proposal.

19. Upon the filing by the Proposal Trustee of the Final Certificate, the releases referred to in Section 8.2 of the Proposal shall be binding and effective as set out in the Proposal.

20. Without limiting anything in the Proposal, all Claims (other than Unaffected Claims) are forever barred and extinguished, the Company is discharged and released from any and all Claims of any nature or kind in accordance with the Proposal, the ability of any Person to proceed against the Company in respect of or relating to any Claims (other than Unaffected Claims) is forever

discharged and restrained and all proceedings with respect to, in connection with or relating to such Claims are permanently stayed, subject only to the rights of the Affected Creditors and Unaffected Creditors as provided for in the Proposal, provided that nothing shall release or discharge (a) the Company from any Obligation owed to any Person pursuant to the Proposal, or (b) a Released Party from any criminal or fraudulent conduct.

21. The right to commence, take, apply for, issue or continue any and all steps or proceedings, including administrative hearings and orders, declarations or assessments commenced, taken or proceeded with or that may be commenced, taken or proceeded with against any Released Parties that are released in respect of all Claims and any other matter released pursuant to Article 8 of the Proposal and paragraph 20 hereof are hereby stayed, suspended and forever extinguished.

ORDER FOR REORGANIZATION

22. This Order constitutes an order for reorganization pursuant to section 192 of the ABCA.

GENERAL

23. The Company, the Proposal Trustee, the Affected Creditors, or any other interested Person may apply to the Court for advice and direction in respect of any matter arising from or under the Proposal.

24. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Company, the Proposal Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals regulatory and administrative bodies are hereby respectfully requested to make such orders as to provide such assistance to the Proposal Trustee, as an officer of this Court, or any duly authorized foreign representative, as may be necessary or desirable to give effect to this Order or to assist the Proposal Trustee and its agents in carrying out the terms of this Order.

SERVICE

25. Service of this Order shall be made to those persons named in the Service List and shall be deemed good and sufficient by:

    (a) the delivery of this Order to them and all Persons appearing at the Application by e-mail, facsimile, courier, registered mail or personal delivery; and

(b) the posting of this Order on the website established by the Proposal Trustee in the BIA Proceedings.

Karen Horner

J.C.K.B.A

TAB 11

SUPREME COURT OF CANADA

CITATION: Peace River Hydro Partners *v.* Petrowest Corp., 2022 SCC 41

APPEAL HEARD: January 19, 2022
JUDGMENT RENDERED: November 10, 2022
DOCKET: 39547

BETWEEN:

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation
Appellants

and

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. and Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd.
Respondents

- and -

Canadian Commercial Arbitration Center, Arbitration Place, Chartered Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and Canadian Federation of Independent Business

Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 189)	Côté J. (Wagner C.J. and Moldaver, Rowe and Kasirer JJ. concurring)
CONCURRING REASONS: (paras. 190 to 199)	Jamal J. (Karakatsanis, Brown and Martin JJ. concurring)

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

Peace River Hydro Partners,
Acciona Infrastructure Canada Inc.,
Samsung C&T Canada Ltd.,
Acciona Infraestructuras S.A. and
Samsung C&T Corporation *Appellants*

v.

Petrowest Corporation,
Petrowest Civil Services LP by its general partner, Petrowest GP Ltd.,
carrying on business as RBEE Crushing,
Petrowest Construction LP by its general partner Petrowest GP Ltd.,
carrying on business as Quigley Contracting,
Petrowest Services Rentals LP by its general partner Petrowest GP Ltd.,
carrying on business as Nu-Northern Tractor Rentals,
Petrowest GP Ltd., as general partner of Petrowest Civil Services LP,
Petrowest Construction LP and Petrowest Services Rentals LP,
Trans Carrier Ltd. and
Ernst & Young Inc. in its capacity as court-appointed receiver and
manager of Petrowest Corporation, Petrowest Civil Services LP,
Petrowest Construction LP, Petrowest Services Rentals LP,
Petrowest GP Ltd. and
Trans Carrier Ltd. *Respondents*

and

Canadian Commercial Arbitration Center,
Arbitration Place,
Chartered Institute of Arbitrators (Canada) Inc.,
Insolvency Institute of Canada and
Canadian Federation of Independent Business *Interveners*

Indexed as: Peace River Hydro Partners *v.* Petrowest Corp.

2022 SCC 41

impecuniosity alone does not render an arbitration agreement incapable of being performed (D. St. John Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (24th ed. 2015), at p. 379; Casey, at ch. 3.5.1; D. Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (2nd ed. 2010), at p. 355). Legal impediments may also lead to an incapacity to perform an arbitration agreement. For example, an arbitration agreement may be incapable of being performed because the subject matter of the dispute is covered by an express legislative override of the parties' right to arbitrate (see *Seidel*, at para. 40).

(ii) The *BIA* Provides Jurisdiction to Find an Arbitration Agreement "Inoperative"

[146] The broad and flexible powers granted to superior courts under the *BIA*, particularly in the receivership context, provide further support for the foregoing interpretation of s. 15(2) of the *Arbitration Act*. The *Arbitration Act* and the *BIA* are not incompatible, such that no paramountcy concerns arise.

[147] The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives (*Century Services*, at para. 15; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43). Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters (Houlden,

Morawetz and Sarra, at § 8:2; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333, at para. 8 (CanLII)).

[148] Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, "take any . . . action that the court considers advisable", if the court considers it "just or convenient to do so". This very expansive wording has been interpreted as giving judges the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise" in relation to court-ordered receiverships (*DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538, at para. 20; see also Houlden, Morawetz and Sarra, at § 12:18; *Dianor*, at paras. 57-58). Section 243(1)(c) thus permits a court to do not only what "justice dictates" but also what "practicality demands" (*Dianor*, at para. 57; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)), at p. 185).

[149] In my view, practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Said differently, ss. 243(1)(c) and 183(1) provide a statutory basis on which a court may, in certain circumstances, find an arbitration agreement inoperative within the meaning of s. 15(2) of the *Arbitration Act*.

[150] Peace River resists this interpretation, relying on s. 72(1) of the *BIA* as interpreted by this Court in *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. In short, it argues that s. 243(1)(c)

TAB 12

2020 ANNREVINSOLV 12

Annual Review of Insolvency Law
Editor: ARIL Society

12 — Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring

Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring

Sam Babe [*]

I. — INTRODUCTION

The jurisdiction of provincial superior courts in Canada pre-dates Confederation and is continued by section 129 of the *Constitution Act, 1867*. [1] Section 96 of the *Constitution Act, 1867* contemplates and preserves the continued existence of superior courts and their jurisdiction by requiring that superior court judges be appointed by the Governor General rather than by the provinces. [2] This jurisdiction of superior courts is further confirmed in provincial statutes such as Ontario's *Courts of Justice Act* (*OCJA*) [3] and Alberta's *Judicature Act* (*AJA*). [4]

These same superior courts are given jurisdiction over federal insolvency and restructuring matters by section 183 of the *Bankruptcy and Insolvency Act* (*BIA*) [5] and section 9 of the *Companies' Creditors Arrangement Act* (*CCAA*). [6] Provincial statutes such as the *OCJA* and the *AJA* also give these superior courts jurisdiction over receiverships, including equitable receiverships not otherwise falling under section 243 of the *BIA*. [7] Such provincial statutes may also give a superior court explicit jurisdiction to make often-sought vesting orders. [8]

In the case of *BIA* proceedings, section 183 vests the superior courts with "such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction". [9] In *Sam Lévy & Associés Inc v Azco Mining Inc*, Justice Binnie, for the Supreme Court of Canada (the "SCC"), described the intent of what he viewed as a broad grant of powers:

> On the face of it, the intent of this provision is to confer on the bankruptcy court powers and duties co-extensive with Parliament's jurisdiction over "Bankruptcy" under s. 91(21) of the *Constitution Act, 1867* except insofar as that jurisdiction has been limited or specifically assigned elsewhere by Parliament itself.
>
> ... The broad scope of authority conferred on Parliament has been passed along to the bankruptcy court in s. 183(1) of the Act, which confers a correspondingly broad jurisdiction. [10]

The jurisdiction given to superior courts in section 183 has been interpreted to preserve the superior courts' inherent jurisdiction. [11] In particular, courts have pointed to the references to "auxiliary" and "ancillary" jurisdiction, [12] with the preceding reference to "original" jurisdiction meaning simply the court's supervisory role in bankruptcy. [13] The phrase "auxiliary and ancillary jurisdiction" dates back to the original *Bankruptcy Act of 1919*, [14] which "constituted" bankruptcy courts and placed the responsibility for such courts on the provinces. Where section 183(1) now begins with "The following courts are invested...", its predecessor section in the *Bankruptcy Act of 1919* began with "The following named courts are constituted Courts of Bankruptcy and invested..." [emphasis added]. In *Re Canadian Western Steel Corp*, the Ontario Court of Appeal (the "ONCA") held that creating federal (or, in its words, "Dominion") courts while manning them with provincial

courts and judges was *ultra vires*. [15] Parliament's solution was simply to delete the above-underlined words, such that the section no longer purported to "constitute" any court, [16] a solution that the courts accepted. [17]

This relevance of this history is that the phrase "original, auxiliary and ancillary jurisdiction" was originally part of a grant of statutory discretion to courts that the Act created, not a continuance of the jurisdiction of existing courts. As a vestige of this original *Bankruptcy Act of 1919* language, *BIA* subsection 183(1) still purports to "invest" the bankruptcy courts with jurisdiction, terminology that makes no sense where such jurisdiction is already inherent.

This article will explore the concepts of inherent jurisdiction and statutory discretion and how they are being applied and refined in recent insolvency, restructuring and related case law. Given the complexity and urgency of many insolvencies and restructurings, it is not only essential for the courts to rely on such fonts of judicial discretion, but also to do so with precision. In their seminal article from 13 years ago, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", Professor Sarra and Justice Jackson of the Saskatchewan Court of Appeal (the "SKCA"), writing extrajudicially, urged continued discussion of the concepts and applications of inherent jurisdiction and statutory discretion. [18] This article attempts to contribute to that project.

II. — REFINING THE CONCEPT OF INHERENT JURISDICTION

Perhaps the most famous account of a superior court's inherent jurisdiction is that of Justice Cave in his 1667 decision in *Peacock v Bell and Kendall*: "And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so..." [19]

Since at least that time, it has been the law in common law jurisdictions that where a right exists, a remedy exists and thus a court exists to enforce the right by granting such remedy. [20] The SCC has described the purpose of such jurisdiction as "simply to ensure that a right will not be without a superior court forum in which it can be recognized" and so jurisdiction will lie with a superior court unless statute states otherwise or grants jurisdiction to another court. [21] The SCC has described it as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so", and which is derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law". [22] The SCC has also described the doctrine of inherent jurisdiction as "amorphous" in nature, [23] with the result that the parameters of what a superior court judge may do or not do under the power of inherent jurisdiction are not known. [24]

Modern SCC jurisprudence has, however, also described inherent jurisdiction in narrower terms, as simply ensuring that a superior court can function as a court of law to fulfill its mandate to administer justice and as including the authority to control its own process, to prevent abuses of such process and to "ensure the machinery of the court functions in an orderly and effective manner". [25] Other courts and commentators have urged that a superior court's inherent jurisdiction should be distinguished from, among other things, its general jurisdiction as a court of common law and equity; [26] its "inherent" independence, protected by the Constitution; [27] its equitable power to grant injunctions; [28] its supervisory jurisdiction over inferior courts and tribunals; [29] and application of the maxim "where there is a right there is a remedy". [30]

While such distinctions distill the concept of inherent jurisdiction down to jurisdiction over the court's own process, some have pushed further for a delineation between inherent jurisdiction and the inherent power that is ancillary to the substantive jurisdiction of any court or tribunal, allowing such body to regulate procedure within such substantive jurisdiction. [31] As stated by Justice Rothstein in *R v Cunningham*: "in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law". [32]

The distinction between the inherent jurisdiction that is exclusive to a superior court and the inherent power possessed by any court or tribunal is drawn in two recent decisions by Bankruptcy Registrar Balmanoukian of the Nova Scotia Supreme Court. In *Re Scotian Distribution Services Limited*, [33] Registrar Balmanoukian noted that a registrar has no inherent jurisdiction because

it derives its authority only from the *BIA* and the "Bankruptcy and Insolvency General Rules" (the Bankruptcy Rules). [34] Soon thereafter, in *Re Eastern Infrastructure Inc*, Registrar Balmanoukian found that he nevertheless had jurisdiction to control his Court's own process, under section 192 of the *BIA*, by which a registrar derives their powers and jurisdiction, and at common law. [35]

Is then the contrast between a superior court's inherent jurisdiction and a statutory court's inherent powers a distinction without a difference? In the recent Federal Court of Canada (the "Federal Court") decision in *Buck v Canada (Attorney General)*, Justice Strickland declined to apply British Columbia Supreme Court ("BCSC") interlocutory injunction precedent because, unlike that superior court, the Federal Court is a statutory court and not a court of inherent jurisdiction. [36] However, in a more recent judgment of the Federal Court in *Re Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23*, [37] Justice Gleeson applied the reasoning of the Federal Court of Appeal in *Minister of National Revenue v RBC Life Insurance Co*, where Justice Stratas had described the Federal Court's inherent powers as "analogous to" and "just like" inherent jurisdiction:

> [35] The Supreme Court has confirmed the existence of "plenary powers" in the Federal Courts, analogous to the inherent powers of provincial superior courts: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626 at paragraphs 35 to 38 (a case arising in another context, but stating a principle of universal application). These plenary powers are especially live in situations where the Court is exercising its "superintending *v* power over the Minister's actions in administering and enforcing the Act.": *Derakhshani*, supra at paragraphs 10-11.
>
> [36] In my view, the Federal Courts' power to investigate, detect and, if necessary, redress abuses of its own processes is a plenary power that exists outside of any statutory grant, an "immanent attribute" part of its "essential character" as a court, just like the provincial superior courts with inherent jurisdiction: see *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725 at paragraph 30. The Federal Courts' power to control the integrity of its own processes is part of its core function, essential for the due administration of justice, the preservation of the rule of law and the maintenance of a proper balance of power among the legislative, executive and judicial branches of government. Without that power, any court — even a court under section 101 of the *Constitution Act, 1867* — is emasculated, and is not really a court at all. See *MacMillan Bloedel*, *supra* at paragraphs 30-38, citing with approval K. Mason, "The Inherent Jurisdiction of the Court" (1983) 57 A.L.J. 449 at page 449 and I.H. Jacobs, "The Inherent Jurisdiction of the Court" (1970), 23 CLP 23; and see also *Crevier v. Quebec (A.G.)*, 1981 CanLII 30 (SCC), [1981] 2 SCR 220. [38]

This view on the co-extensivity of the inherent powers of a statutory court with a superior court's inherent jurisdiction, at least in terms of controlling process, is consistent with the SCC jurisprudence surveyed by Justice LaForme of the ONCA in *R v Fercan Developments Inc*:

> The Supreme Court of Canada has discussed the power of statutory courts to control their process in *Cunningham* and in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3. Other than noting that this power cannot contravene explicit statutory provisions or constitutional principles like the separation of power, the court did not discuss the outer limits of a statutory court's ability to control its own process in either decision. However, in both cases, the court treated a statutory court's ability to control its own process as largely parallel to a superior court's ability to control its own process. [39]

However, in a footnote at the end of the above passage, Justice LaForme clarifies that control of the process is but one aspect of inherent jurisdiction:

> For the sake of clarity, I am not saying that a statutory court's power to control its own process is the same as a superior court's inherent jurisdiction. A superior court's inherent jurisdiction is a reserve or fund of authority

> that provides a number of different powers, including the power to control the court's process: *Parsons v Ontario*, 2015 ONCA 158, 125 OR (3d) 168 (Ont CA), at paras 63--70. [40]

To the extent that a superior court's inherent jurisdiction is broader than the inherent power of a statutory court, the court possessing only inherent power will be somewhat handicapped in what solutions it can craft or relief it can grant. This would not be an issue in the case of a provincial bankruptcy master who can refer matters to a superior court where appropriate. It might also not be much of an issue in the Federal Court, where usually only a narrow set of insolvency-related questions are dealt with, such as priority disputes with the Crown or questions of director liability, which questions are often peripheral to the main insolvency or restructuring proceeding by the time they come to the Federal Court. One instance where the relatively narrow scope of powers of a statutory court could be of concern is in the case of the territorial courts. Although they are deemed to be superior courts, given jurisdiction under Part II of the *CCAA* and invested, under paragraph 183(1)(h) of the *BIA*, with jurisdiction in bankruptcy and other *BIA* proceedings, they are, like the Federal Court or courts of appeal, ultimately just statutory bodies without inherent jurisdiction. [41]

The restriction of inherent jurisdiction to a superior court's own procedure is seen in the ONCA's 2005 *Re Stelco Inc* ("*Stelco*") decision, where it ruled that the inherent jurisdiction of the Ontario Superior Court of Justice (the "OSCJ") in the context of a *CCAA* proceeding was limited to the court's own process, being the supervision of the restructuring, but did not extend to the company's processes, such the removal of directors. [42] Similarly, in 2006, the ONCA ruled in *Re Ivaco Inc* that the OSCJ did not have inherent jurisdiction to order a transfer of the head office of a *CCAA* company. [43]

Attorney General for Ontario v Persons Unknown is a recent decision involving the OSCJ's application of inherent jurisdiction to control its own process. [44] Certain tenant advocates moved before Justice Myers for an order setting aside an order of Chief Justice Morawetz whereby the latter had ended an effective moratorium on residential evictions imposed by an earlier order responding to the COVID-19 crisis. Since Chief Justice Morawetz's earlier order had been made to protect the health and safety of the Court's own enforcement officers, rather than to impose a moratorium on the evictions which those officers normally facilitated, Justice Myers, taking a perhaps expansive view of what constitutes "the court's own processes", held that Chief Justice Morawetz was, by both orders, simply exercising his jurisdiction to control the Court's own processes, and nothing more. [45]

Inherent jurisdiction can also only be exercised where it will not conflict with statute or rules of the court. In its 1976 decision in *Baxter Student Housing Ltd v College Housing Co-operative Ltd* ("*Baxter*"), the SCC held that the Manitoba Court of the Queens' Bench (the "MBQB") did not have inherent jurisdiction to grant a receiver what amounted to a mortgage borrowings charge ranking in priority to builders' liens because the Manitoba *Mechanics' Lien Act* [46] specified that such liens were to rank ahead of, among other things, "all payments or advances made on account of any conveyance or mortgage". [47] Justice Dickson, for the Court, expressed this limit to inherent jurisdiction:

> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities, which a court simply cannot do. [48]

Petrowest Corporation v Peace River Hydro Partners is a recent decision that appears to push the limits of what is permitted on *Baxter* principles. [49] Justice Iyer of the BCSC was presented with a motion to have collection actions by a *BIA* receiver stayed pursuant to section 15 of the British Columbia *Arbitration Act* so that contractual arbitration clauses would be honoured. Relying on decisions that exercised discretion under section 11 of the *CCAA*, as well as two prior *BIA* decisions, one of which did not consider the conflict with the *Arbitration Act*, [50] and the other which only considered it in *obiter dicta*, [51] Justice Iyer held that inherent jurisdiction ought to be exercised to override the arbitration clauses and that the exercise of such jurisdiction was not prevented by the conflicting provincial statute. [52]

Curiously, Justice Iyer suggests that, to the extent her exercise of inherent jurisdiction conflicts with the *Arbitration Act*, paramountcy would require that her exercise of inherent jurisdiction should prevail. [53] Justice Iyer appears to be holding up an exercise of inherent jurisdiction in a *BIA* proceeding as equivalent, for purposes of a paramountcy analysis, to an exercise of discretion conferred by the *BIA*. The doctrine of paramountcy and its application to conflicts between provincial statutes and exercise of discretion under the *CCAA* or *BIA* is the focus of Part VII of this article. It suffices to say for now that paramountcy does not apply where no federal statute is engaged and so cannot be triggered simply by a conflict between a provincial statute and an exercise of inherent jurisdiction.

In *Total Traffic Services Inc v Kone*, Justice Christie of the OSCJ granted a *Mareva* injunction, on an *ex parte* basis, against a bookkeeper who was alleged to have misappropriated company funds. [54] While Justice Christie recognized that the Court had inherent jurisdiction to make such ancillary orders as would be necessary to give effect to the injunction or would otherwise be appropriate, she declined to exercise such inherent jurisdiction to grant the plaintiff a registrable purchase money security interest ("PMSI") in a mobile home trailer and a speed boat, which the defendant was alleged to have purchased with the funds. [55] Justice Christie was likely correct in that conclusion given that the PMSI is a creature of statute, being the Ontario *Personal Property Security Act*, [56] governed by very specific statutory rules about its creation and priority, and an ersatz PMSI granted by the Court could not have avoided conflict with those statutory provisions.

A recent, prominent example of the use of inherent jurisdiction by a court to control its own processes where no enactment of Parliament or the legislature prevents it is Chief Justice Morawetz's decision in *Podgurski*, [57] which accompanied an omnibus order made in response to the COVID-19 crisis. The motion, order and decision in *Podgurski* were the result of a carefully crafted and coordinated response to the COVID-19 crisis by the judiciary and the Superintendent of Bankruptcy, with analogous orders made in each province and territory. The history of this nationwide endeavor is set out in the parallel Quebec Superior Court decision in *Proposition de St-Pierre*. [58] Although, as discussed in Part IV below, Chief Justice Morawetz found sufficient statutory discretion in the *BIA* to make the suspensions of time periods and other changes required, [59] he relied on his inherent jurisdiction to make an omnibus order applicable to all applicable *BIA* proceedings before the OSCJ within the chosen time frame. [60]

Even matters directly relating to the court's own process may, however, be removed from the court's inherent jurisdiction. In its 2013 decision in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, the SCC ruled that a rule of the BCSC limited the court's jurisdiction to admit documents in languages other than English. [61] More recently, in *Colon v The Director, Business Corporations Act, Province of New Brunswick, and H Michael Greer* ("*Colon*"), the New Brunswick Court of Appeal (the "NB CA") observed that inherent jurisdiction is "mostly dormant". The reasoning behind the NB CA's conclusion was that inherent jurisdiction of the superior court is primarily concerned with control of its processes, those processes are largely codified in the New Brunswick *Judicature Act* and the *Rules of Court* and inherent jurisdiction cannot be exercised in contravention of such legislation or regulations. [62]

The opposite view was taken by the Saskatchewan Court of Queen's Bench (the "SKQB") in *Poffenroth Agri Ltd v Brown* ("*Poffenroth Agri*"), [63] where Justice Robertson took the preservation of the Court's inherent jurisdiction in Rule 1-4(3) of "The Queen's Bench Rules" [64] to mean that such jurisdiction could be invoked to oust an otherwise absolute right under the Rules to discontinue a proceeding, where it was necessary to prevent an abuse of process. Rule 1-4(3) reads: "Nothing in these rules prevents or is to be interpreted as preventing the Court, as a superior court, from exercising its inherent jurisdiction." [65] Justice Robertson stated: "*The Queen's Bench Rules* are made by the court to serve the court. The court retains inherent jurisdiction to depart from and even to deviate from *The Queen's Bench Rules*. Rule 1-4(3) expressly recognizes that inherent jurisdiction..." [66]

Justice Robertson's decision was upheld by the SKCA, which found no reversible error in Justice Robertson's use of inherent jurisdiction. [67]

The key to reconciling the use of inherent jurisdiction to oust rules of the court in *Poffenroth Agri* with the seemingly contradictory British Columbia and New Brunswick jurisprudence or, for that matter, *Baxter* itself, is the unusual fact that, as Justice Robertson remarks, in Saskatchewan the "Queen's Bench Rules are made by the court". [68] Under the Saskatchewan *Judicature Act*, the judges of the SKQB "may make rules of court", without any requirement of ministerial approval and/or involvement of a rules committee partly composed of non-judges. [69] "The Queen's Bench Rules" are thus not expressions of legislative will that cannot be contradicted by application of inherent jurisdiction. Of the common law provinces, the only other to give superior court judges such a degree of independence and control is Nova Scotia. [70]

Jackson & Sarra note that courts will necessarily weigh equities in deciding how to exercise their discretion under the *BIA* or the *CCAA*, thereby drawing on their equitable jurisdiction, as distinct from their inherent jurisdiction. [71] The possible confusion between equitable and inherent jurisdiction is illustrated by the recent decision in *Paragon Capital Corporation Ltd v Starke Dominion Ltd* ("*Paragon*") where the Alberta Court of Appeal (the "ABCA") heard an appeal of a conditional charging order obtained in a foreclosure action by the mortgagor defendant's law firm in respect of fees owed to it. [72] Justice Yamauchi of the Alberta Court of Queen's Bench (the "ABQB") purported to draw on the Court's equitable jurisdiction to grant the charging order where the law firm had not provided evidence that it would not be paid in the absence of a charge, as required under the applicable Rule. [73] In dissent on the appeal, Justice Antonio interpreted the jurisdiction invoked to possibly be misidentified inherent jurisdiction and found that the ABQB ought not to have invoked such jurisdiction to, effectively, alter the test clearly set out in the Rule. [74]

Justice Bielby, for the ABCA majority, agreed that all the ABQB's jurisdiction to grant the order had to have come from the Rule itself and not from the equitable jurisdiction that Justice Yamauchi invoked. [75] Justice Bielby found, however, that the words used in the Rule, their context and their grammatical or ordinary sense did not answer the question of the scope of the discretion afforded by the Rule, and so consideration of the Rule's purpose was necessary. [76] Requiring counsel to establish at the outset of its application that a charge was the only way it would get paid would require an exhaustion of all collection efforts and other recourses. In the face of a client's deepening insolvency and resulting actions by secured and judgment creditors, that would leave counsel with no sources of payment of its unsecured claim, a result that would frustrate the very purpose of the Rule. [77]

The relationship between inherent jurisdiction and statute will be explored further in Part VI, below.

The *BIA* is a more specific and detailed statute than the *CCAA* and, except for its commercial proposal provisions, has different objectives than the *CCAA*. In broad strokes, the former is aimed at equitable or rateable distribution of assets, whereas the latter is aimed at preservation of a company. For those reasons, in his 2006 decision in *Re Residential Warranty Co of Canada Inc*, Justice Topolniksi of the ABQB espoused caution in applying *CCAA* inherent jurisdiction cases to *BIA* matters, [78] and the ABCA went on to caution that there should not be frequent resort to inherent jurisdiction in *BIA* matters. [79]

When exercising inherent jurisdiction in *CCAA* matters, courts might also bear in mind that the *CCAA* itself is now a more specific and detailed statute than it was prior to its 2009 amendments. Among other things, those amendments facilitated purposes other than preservation of a *CCAA* company, including asset sales akin to what would be seen in a receivership, without the requirement that the company be saved through a plan of arrangement. [80]

III. — THE STATUTORY CLOAK

In his 1999 decision in *Re Royal Oak Mines Inc*, Justice Farley, as he then was, applied the reasoning of *Baxter* in a *CCAA* context, holding that the priority given to builders' liens under the British Columbia *Builders Lien Act* (*BCBLA*) [81] eliminated the *CCAA* court's inherent jurisdiction to subordinate such liens to court-ordered charges. [82] At that time, the view that the priority given to such charges was an exercise of inherent jurisdiction was shared by other courts. [83] However, that view shifted as the broad statutory discretion given to a court by section 11 of the *CCAA* to make orders "on such terms as it may impose"

came to be seen to include the discretion to grant charges in priority not only to claims of contractually secured creditors, but also to statutory liens. [84] In 2002, in *Re Sulphur Corporation of Canada Ltd* ("*Sulphur Corp*"), Justice Lovecchio described then subsection 11(3) of the *CCAA* as giving inherent jurisdiction a "statutory cloak", such that the court could "use its inherent jurisdiction in the exercise of a discretion granted under the *CCAA*" to make charges in priority to liens under the *BCBLA*. [85]

The idea of inherent jurisdiction "cloaked" in statute did not, however, gain much traction, as both the British Columbia Court of Appeal (the "BCCA") in *Re Skeena Cellulose Inc* ("*Skeena Cellulose*") [86] and the ONCA in *Stelco* [87] held that, when making *CCAA* orders affecting the rights of third parties, a court was exercising the discretion given by section 11 of the *CCAA* and not the inherent jurisdiction that such discretion supplanted. Jackson & Sarra reached the same conclusion. [88] *Skeena Cellulose* and *Stelco* would subsequently be cited approvingly by the SCC in *Century Services Inc v Canada (Attorney General)* as authority for the proposition that where courts have "purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute" they are "in most cases simply construing the authority supplied by the *CCAA* itself". [89] Most recently, the suggestion in *Stelco* that the discretion under section 11 of the *CCAA* "supplants" inherent jurisdiction was also cited approvingly by the SCC in *9354-9186 Québec inc v Callidus Capital Corp*. [90]

A similar observation with respect to a court's discretion under the receivership provisions of section 243 of the *BIA* was made by the ONCA in *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*. [91] Subsection 243(1) gives a court the discretion to direct a receiver to, among other things, "take any other action that the court considers advisable", which language had been transferred in the 2009 *BIA* amendments from the prior interim receivership provisions of subsections 47(2) and 47.1(2). Whereas Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v Curragh Inc* [92] held that the language in then subsection 47(2)(c) preserved the court's inherent jurisdiction to do not only what "justice dictates" but also what "practicality demands", Justice Pepall noted in *Dianor* that the jurisdiction would have been more appropriately characterized as statutory. [93] Accordingly, *Dianor* confirmed that the court's broad discretion under *BIA* paragraph 243(1)(c) to appoint a receiver to "take any other action that the court considers advisable", and thus to do not only what "justice dictates" but also what "practicality demands", is not simply a preservation of the court's inherent jurisdiction. [94]

The description in *Stelco* [95] and *Callidus* [96] of statutory discretion under section 11 of the *CCAA* having supplanted inherent jurisdiction and the observations of the NB CA in *Colon* [97] that inherent jurisdiction of the Court of Queen's Bench was largely dormant because it had been codified in the enabling statute and rules of the court leaves the impression that Justice Lovecchio's description in *Sulphur Corp* [98] of a grant of statutory discretion giving inherent jurisdiction a "statutory cloak" might not be such a misnomer. This is consistent with the observation, made at the outset of this article, that where subsection 183(1) of the *BIA* is interpreted to preserve inherent jurisdiction, its statutory predecessor, using the same language, contained, instead, a grant of statutory discretion,

To convincingly shed the idea of a "statutory cloak", one would either have to show empirically that superior courts, in appealing to their statutory discretion, are making orders categorically different than they do, or formerly did, when appealing to inherent jurisdiction or one would have to (re)define inherent jurisdiction so narrowly, such as by limiting it to control of procedure, such that it cannot be as wide-ranging a power as the statutory discretions granted by the *BIA* and *CCAA*.

IV. — STATUTORY DISCRETION

The grant of statutory discretion is exemplified in provisions such as section 11 of the *CCAA*, which empowers a court to "make any order that it considers appropriate in the circumstances", and in subsection 243(1) of the *BIA*, which empowers a court to appoint a receiver "if it considers it to be just or convenient to do so" to "take any other action that the court considers advisable". [99] Similarly, section 101 of the *OCJA* empowers a court to appoint a receiver "where it appear to a judge of the court to be just or convenient to do so" and on "such terms as are considered just". [100] The restructuring provisions of corporation statutes also grant a superior court discretion to approve arrangements and make any further order that it sees fit. [101]

In *Podgurski*, Chief Justice Morawetz found statutory discretion within section 66.31 of the *BIA* to increase the amounts of payment defaults and the time required to cause a deemed annulment of a consumer proposal under that section. [102] The section provides that a deemed annulment occurs "[u]nless the court has previously ordered otherwise". [103] He likewise found discretion under subsection 187(11) [104] of the *BIA* to extend the time periods for (1) holding meetings of creditors under sections 51, 66.15 and 102 of the *BIA*; (2) referring a matter to the court under subsection 170.1(3) of the *BIA*; and (3) holding mediation as required by paragraphs 105(4) and (10) of the "Bankruptcy Rules". [105] What Chief Justice Morawetz and the judges in the other provinces and territories who adopted his reasons in *Podgurski* could not achieve by statutory discretion was achieved by inherent jurisdiction or subsequent statutory amendments. As discussed in Part II, in order to make his order an omnibus order, Chief Justice Morawetz grounded it on his inherent jurisdiction. [106] In order to extend or suspend time periods in other sections of the *BIA* and the "Bankruptcy Rules" not dealt with in *Podgurski*, Parliament passed Bill C-20 as the *Time Limits and Other Periods Act (COVID-19)*. [107]

One of the *BIA* time periods not addressed in *Podgurski* is the subsection 50.4(9) five-month cap on the aggregate duration of extensions to file a proposal beyond the 30-day period following the filing of a notice of intention to make a proposal. [108] Before any order had been made under the *Time Limits and Other Periods Act (COVID-19)* extending this time limit, the issue of whether it could nonetheless be extended arose before the OSCJ in *Durham Sports Barn Inc Bankruptcy Proposal* [109] . In *Podgurski*, Chief Justice Morawetz had contrasted the time periods he did extend by exercise of his statutory discretion under subsection 187(11) with the time periods where there is, to use the words of Registrar Ferron in *Re IDG Environmental Solutions Inc*, an "intervening statutory event consequent upon default". [110] Pursuant to subsection 50.4(8), a deemed assignment in bankruptcy is the automatic consequence of a failure to file a proposal prior to the expiry of any extension granted pursuant to subsection 50.4(9). [111] Registrar Ferron had held that subsection 187(11) did not apply where there was a deemed assignment in bankruptcy or other intervening statutory event consequent upon default. [112] In addition to this general rule as to the application of subsection 187(11), subsection 50.4(10) of the *BIA* explicitly states that subsection 187(11) does not apply to allow any extension to the time limits imposed by subsection 50.4(9). [113]

In *Durham Sports*, Justice Gilmore granted a stay extension in excess of what is permitted under subsection 50.4(9) of the *BIA*. She purported to be relying on her inherent jurisdiction, but did not consider the specific prohibition in subsection 50.4(10) of the *BIA*. [114] Justice Gilmore held that an overly strict and technical compliance with subsection 50.4(9) would be contrary to the purpose of the *BIA*. In *Podgurski*, Chief Justice Morawetz had noted that technical objections in the interpretation of the *BIA* should be limited only to what is necessary because the Act is a commercial statute, the administration of which is largely in the hands of business people. [115] Applying section 50.4(10) to prohibit the application of subsection 187(11) to the subsection 50.4(9) extensions is not, however, overly strict or technical. On the contrary, by negating the unambiguous expression of the legislative will in subsection 50.4(10) of the *BIA*, Justice Gilmore's purported exercise of inherent jurisdiction seems to be a clear violation of *Baxter* principles.

The scope of the discretion given by section 11 of the *CCAA* was the central issue in *Callidus*, where the SCC allowed the appeal of the decision of the Québec Court of Appeal (the "QCCA") and reinstated the decision of the Québec Superior Court (the "QCSC") because it construed the statutory discretion given to the QCSC by section 11 of the *CCAA* more broadly than did the QCCA. [116] The QCSC had dismissed an application by a creditor group to permit a secured creditor ("Callidus") to vote on its own plan in the *CCAA* proceedings of its debtor ("Bluberi"). The plan had been brought by Callidus to compromise litigation claims threatened against it by Bluberi. Callidus had previously been the winning bidder, through a credit bid, of all of Bluberi's assets other than the claims against Callidus. Callidus had excluded $3 million of its secured debt from its credit bid so as to remain the ranking secured creditor in the *CCAA* proceedings. Callidus's vote in favour of the plan was required in order to cross the two-thirds in value of claims voting threshold required under section 6(1) of the *CCAA*. Justice Michaud of the QCSC had held that allowing Callidus to vote on the plan would serve an improper purpose and give rise to a substantial injustice. He also approved, without any creditor vote, a litigation financing agreement to allow Bluberi to pursue its claims against Callidus.

Justice Schrager for a unanimous QCCA found that seeking a settlement of litigation for valuable consideration could not be considered an improper purpose, especially when it would result in substantial recovery for employees and smaller creditors. [117] Justice Schrager found that Justice Michaud's reliance on improper purpose was not based in any statutory discretion and resembled an application of the doctrine of equitable subordination, despite the fact that equity should not be used to exclude *CCAA* voting rights. [118]

Contrary to what the QCCA had found, the SCC held that the QCSC's decision not to allow Callidus to vote on its own plan was grounded in statutory discretion and, in particular, section 11 of the *CCAA,* which required Callidus to have exercised due diligence. The SCC found that Callidus had not exercised due diligence in valuing its claim and security. [119] Callidus's $3 million debt was secured by nothing more than Bluberi's only asset, its retained claims against Callidus. Where Callidus valued that security at zero in order to be able to vote in its plan, the SCC held that it ought to have made that valuation earlier. As a result, there was no justification for appellate intervention in the QCSC's decision to bar Callidus from voting based on its finding of improper purpose. [120]

The discretion granted to superior courts under the arrangement provisions of business corporation statutes has also been interpreted to be broad. In *Re Rifco Inc*, Justice Grosse found that section 193 of the *Alberta Business Corporation Act* grants the court a "broad, though not unbounded, discretion to approve the arrangement as proposed by the applicants or as amended by the Court, or to refuse to approve the arrangement, and, in either case, to make any further order the Court sees fit," which power "includes the power to make orders on at least some ancillary issues that arise and require a decision in order for the Court to carry out its function" under the section. [121] The concordant section 192 of the *Canada Business Corporations Act* was held by Justice Koehnen of the Ontario SCJ to provide a broad procedure aimed at restructuring that ought to be broadly and liberally interpreted. [122]

A significant reason why the distinction between statutory discretion and inherent jurisdiction is important is the different standard of review applicable to each upon appeal. As Jackson & Sarra note, appellate courts are likely to give deference to an appropriate exercise of statutory discretion but will apply the standard of correctness to exercises of inherent jurisdiction. [123] In the insolvency and restructuring context, this contrast may be especially pronounced, as *CCAA* and *BIA* courts are accorded a higher level of deference due to their expertise and presumed familiarity with the proceeding before them. In *Callidus*, the SCC held that deference owed by an appellate court to the factual findings of a motion judge is heightened in the case of a *CCAA* judge who has single-handedly overseen a lengthy proceeding since its inception, who has thereby obtained "extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings" and who is exercising the broad statutory discretion granted by section 11 of the *CCAA* to make any order that they consider appropriate to respond to the circumstances of the case. [124] This deference is owed as long as the *CCAA* judge exercises their discretion reasonably and in furtherance of the remedial purpose of the *CCAA*, and has given proper attention to the "baseline" considerations in section 11: (1) that the relief sought is appropriate in the circumstances and (2) that the moving party has been acting in good faith and with due diligence. [125] The ONCA had previously hinted at this heightened level of deference to a *CCAA* judge on a number of occasions. [126]

In *Re Harmon International Industries Inc*, Justice Jackson cited *Callidus* in extending a heightened level of deference to a SKQB judge presiding over a *BIA* receivership proceeding, stressing that the courts' practice was for a single judge to have carriage of such a proceeding. [127] Both the SCC and the SKCA therefore appear to view this heightened deference to *CCAA* and *BIA* judges as a rule of general application.

Not every jurisdiction, however, exercises the practice of designating a single judge to have carriage of such proceedings. As an example, in Ontario, it is not universally the case that a *CCAA* or *BIA p*roceeding will be seized by a single judge, as was the case in each of *Callidus* and *Harmon International*. It is therefore not clear what level of deference would be owed to a superior court judge who has not been seized of a *CCAA* or *BIA* matter since its beginning or, for that matter, to any superior court judge

at the outset of such a proceeding. Similarly, it is not clear if a *Callidus* or *Harmon International* level of deference should be accorded to a judge who has had carriage of a lengthy trial outside of the insolvency and restructuring context.

V. — THE HIERARCHY: DISCRETION BEFORE JURISDICTION

Based on decisions that have held inherent jurisdiction to be a special and extraordinary power to be exercised only sparingly and in clear cases, [128] Jackson & Sarra propose a hierarchy of "judicial tools" to be used in sequence. [129] Once a superior court has interpreted a statute and exercised its common law jurisdiction to fill any apparent gap in furtherance of the purpose of the statute, so as to discern what discretion the statute confers, the court should first exercise such statutory discretion and, only as a last resort, look to its inherent jurisdiction. [130]

Jackson & Sarra's hierarchy was embraced by the SCC in *Century Services*, where Justice Deschamps for the majority stated:

> I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94). [131]

In *Dianor*, Justice Pepall for the ONCA held that a court should follow the same hierarchy in a *BIA* receivership. [132]

Jackson & Sarra state: "It is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances." [133] A number of recent decisions have adopted this restraint. In *Business Development Bank of Canada v Astoria Organic Matters Ltd*, the ONCA held that a finding of statutory discretion in *BIA* section 243 made consideration of inherent jurisdiction unnecessary. [134] In *Yukon (Government of) v Yukon Zinc Corporation*, the Yukon Supreme Court, citing the authority of *Dianor*, held that section 243(1) of the *BIA* conferred discretion broad enough to approve a receiver's partial disclaimer of an equipment lease, leaving the receiver with lease payment obligations in respect of only certain items deemed essential to the environmental integrity of a mine. [135] As in *Astoria Organic*, the finding of statutory discretion was held to make inquiry as to inherent jurisdiction unnecessary. [136] Finally, in *Re Accel Canada Holdings Limited*, Justice Horner of the ABQB found that she had the discretion under section 11.9 of the *CCAA* to order that certain information be disclosed and therefore declined to consider whether the order could also have been grounded on the court's inherent jurisdiction. [137]

In contrast to the courts in *Astoria Organic*, *Yukon Zinc* and *Accel*, in *Podgurski* Chief Justice Morawetz looked for, found and purported to exercise inherent jurisdiction even though he had already found and exercised statutory discretion to the same end. [138] Although he stated that the exercise of inherent jurisdiction was necessary, it is not clear why that was so. [139]

VI. — UNAMBIGUOUS EXPRESSION OF LEGISLATIVE WILL

In Part II, we discussed how the SCC in *Baxter* held that inherent jurisdiction cannot empower a judge to make an order "negating the unambiguous expression of the legislative will". [140] In *R c Caron*, the SCC clarified that a superior court may still exercise its inherent jurisdiction in matters that are regulated by statute or by rules of procedure, if it can do so without contravening any such statutory provision. [141] Thus, in *Podgurski*, Chief Justice Morawetz of the OSCJ found that he had inherent jurisdiction to extend the times specified in the *BIA* for doing certain actions because the provisions in question did not explicitly state that the court could not make such extensions. [142] This principle, that only an unambiguous expression of legislative intent can oust the court's inherent jurisdiction, also entails that the maxim of statutory interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another") does not apply to exclude exercise of a superior court's inherent jurisdiction. [143] Thus,

in *Aldebert v Country Boy Services*, Regional Senior Justice Ricchetti held that the OSCJ had inherent jurisdiction to award the costs of enforcement of a judgment beyond those costs specifically enumerated in the applicable Rule of the court. [144] This analysis was, however, rejected by Justice Conlan in *MCAP Service Corporation v LPIC*, who was, apparently, caught in the grip of the *expressio unius* maxim:

> It makes no common sense that the Rules Committee would fashion a Rule that explicitly delineates judgment enforcement steps whose costs are recoverable if there is in fact no limit on the categories of enforcement costs that may be recovered as they are entirely discretionary as provided for by subsection 131(1) of the CJA. [145]

Even where an exercise of inherent jurisdiction would not contradict an unambiguous expression of the legislative will, the legislation still has to leave a functional gap for inherent jurisdiction to fill. In *Cerberus Business Financial, LLC v B & W Heat Treating Canada, ULC*, [146] the OSCJ rejected a trustee in bankruptcy's argument that the court had inherent jurisdiction to extend the limitation period set out in the Ontario *Commercial Tenancies Act (OTCA)* [147] for disclaiming, retaining or assigning a lease. Where the operation of the *OTCA* is preserved in bankruptcy by section 146 of the *BIA*, section 38(2) of the *OTCA* gives a trustee three months after the commencement of the bankruptcy to make its election as to how it will deal with a lease. Citing *Baxter*, Justice McEwen held that he did not have inherent jurisdiction to extend a time period so clearly set out in the provincial statute. [148] Justice McEwen did, however, accept the trustee's alternate argument that the court was given the discretion to extend the time period by an Order in Council made pursuant to subsection 7.1(2) of the Ontario *Emergency Management and Civil Protection Act* [149] in response to the COVID-19 crisis. [150] The Order in Council suspended, for the duration of the declared emergency, all statutory, regulatory or by-law time periods for taking steps in proceedings, subject only to the discretion of the court, tribunal or other decision-maker responsible for a proceeding. [151]

VII. — DISCRETION AND PARAMOUNTCY

One result of exercising statutory discretion under the federal *BIA* or *CCAA* before exercising inherent jurisdiction is that the exercise of such statutory discretion can prevail due to paramountcy in the case of conflict with a provincial enactment, whereas inherent jurisdiction would have to cede on *Baxter* principles. [152] The doctrine of paramountcy applies where a provincial enactment and a federal enactment are each valid enactments within the constitutional powers of the respective legislating government, but where concurrent operation of the two laws results in conflict in operation between the two and/or frustration of the federal statute's purpose. [153] In accordance with the principle of co-operative federalism, it is presumed that federal Parliament intended the federal law to co-exist without conflict with provincial laws and courts ought therefore exercise judicial restraint and look first to interpretations that avoid conflict. [154]

In *Royal Bank of Canada v Reid-Built Homes Ltd*, Justice Graesser of the ABQB invoked paramountcy to overcome what he saw as a conflict between the priorities for liens in the Alberta *Builders' Lien Act* [155] and the provisions of the *BIA* concerning priorities for a receiver's claims for fees, disbursements and borrowings. [156] Justice Graesser followed the conclusion of the BCCA in *Yorkshire Trust co v Canusa Const Ltd* [157] that a conflict exists between court-ordered, first-ranking receivership charges and lien statutes that give priority to builders' liens over, among other things, any "receiving order". This conclusion was based on an (incorrect) interpretation of the meaning of "receiving order" to encompass "receivership order". [158] Finding the statutory discretion in subsection 243(6) of the *BIA* to give a receiver "a charge, ranking ahead of any or all of the secured creditors" for payment of the receiver's fees and non-operational disbursements, [159] and the statutory discretion in subsection 31(1) of the *BIA* to authorize a receiver to grant super-priority security for its borrowings for operation of the debtor's business, [160] Justice Graesser concluded that paramountcy justified the granting of such priorities in favour of a receiver's claims over *Builders' Lien Act* lien claims. [161]

In contrast to Justice Graesser's reliance in *Reid Built* on statutory discretion and paramountcy, in the 2013 decision *Re Comstock Canada Ltd*, Justice Morawetz, as he then was, felt that it was necessary to rely on inherent jurisdiction in order to grant an interim receiver's borrowings charge priority over construction lien claims:

> Section 50.6 of the BIA provides the authority to grant super-priority for interim financing for an insolvent debtor. There is no similar provision to provide such financing for an Interim Receiver under section 47.1[.] However, there is no provision that prohibits the granting of such super-priority. In view of the urgency of this situation, it seems to me that the objectives of PART III of the BIA and the expected proceedings under the CCAA would be frustrated if the Interim Receiver's Borrowing Charge was not granted. I was satisfied that, in these circumstances, the charge could be granted under the inherent jurisdiction of the court. [162]

Justice Morawetz recognized that his statutory discretion under subsection 47.2(1) of the *BIA* to grant a charge for the interim receiver's fees and disbursements was limited by subsection 47.2(2) to non-operational borrowings. [163] He did not, however, see the limitation in 47(2) as a general prohibition against super-priority charges for operational borrowings. Without considering subsection 31(1), which gives an interim receiver the power to grant security for borrowings, Justice Morawetz concluded that there was a gap in the *BIA* regarding charges for funding of an interim receiver's operational disbursements, a gap which the court's inherent jurisdiction could fill.

Although Justice Graesser granted the receiver's charges in *Reid Built* priority over builders' lien claims as well as over the claims of a secured creditor, he declined to give the receiver the same priority over a municipality's statutory lien claim for pre-receivership tax arrears. [164] While he found that he could give the charges created pursuant to *BIA* priority over a provincial lien, he declined to do so on the facts before him. In granting the receiver's appeal of that aspect of *Reid Built*, the ABCA held in *Edmonton v Alvarez* that the ABQB ought to have exercised its discretion under subsection 243(6) of the *BIA* to grant the receiver's charges priority over the property tax lien. [165] Although the ABCA spoke exclusively of statutory discretion without any reference to the ABQB's inherent jurisdiction, it made no mention of any conflict with the provincial lien statute or any appeal to paramountcy. The ABCA also did not note the restriction placed on *BIA* subsection 243(6) by subsection 243(7), and so did not specifically address the issue of from where the statutory discretion for a receiver's operational borrowings charge might be derived. [166] In the end, the SCC refused the municipality leave to appeal, without giving any reasons. [167]

The ABCA's avoidance of the issue of conflict between federal and provincial statutes and any resulting paramountcy is perhaps understandable given that the issue of paramountcy is to be approached with great caution. As discussed at the outset of this section, a court must look first to interpretations that avoid conflict in operation between a provincial enactment and a federal enactment or any frustration of the federal statute's purpose. In addition, even before a court can consider questions of paramountcy, provincial statutes require the party advancing the argument to give formal notice of the constitutional question being raised to both the federal and applicable provincial attorney generals. For example, subsection 24(2) of the *AJA* barred Justice Graesser from making the finding of paramountcy he did in *Reid Built* unless the federal and provincial Crowns had each received two weeks' notice of the constitutional question being raised. [168] Neither Crown is listed as having appeared before Justice Graesser or, subsequently, before the ABCA in *Edmonton v Alvarez*, and there is no mention in either decision of the Crowns having been served with notice of a constitutional question. At least in cases where the validity, rather than applicability, of a provincial enactment is being challenged, [169] failure to properly serve notice of constitutional question has been held to invalidate a court's decision. [170]

However, in *Re Indalex Ltd*, Justice Deschamps held that a failure to invoke paramountcy in the first instance when making an order under then section 11(3) of the *CCAA* (in that case a debtor-in-possession financing charge) that conflicts with a provincial statute was not fatal to the paramountcy of the *CCAA* order. [171] She held that court-ordered priority based on the *CCAA* has the same effect as a statutory priority, and that paramountcy, as a question of law, can be invoked for the first time on appeal. [172]

Statutory discretion can, of course, also be relied on in cases where the conflict lies not between a federal and provincial statute, but rather between two statutes of the same jurisdiction. A recent example at the federal level is the ABCA's decision in *Canada v Canada North Group Inc*, where *CCAA* debtor-in-possession financing provisions were taken to limit the priority otherwise given to source deduction deemed trusts. [173] A recent example at the provincial level is *Cerberus*, as discussed in Part IV. [174]

VIII. — CONCLUSION

As is demonstrated in this survey of recent decisions, explicit consideration of issues of inherent jurisdiction and statutory discretion, and of the distinction between the two, is now common in insolvency and restructuring cases. While we are still seeing decisions that conflate inherent jurisdiction and statutory discretion, still apply inherent jurisdiction in conflict with statute and/or still fail to apply the court's "tools" in accordance with the hierarchy adopted in *Century Services* [175] and *Dianor*, [176] by and large, the courts are wielding these tools with increasing precision.

In the decisions and commentary reviewed in this article, inherent jurisdiction has been described as "dormant" and "supplanted" by statute. There is pressure to narrow it in scope to jurisdiction to control a court's process, indistinguishable from the inherent powers of a statutory court. Inherent jurisdiction also does not benefit from the heightened deference paid by courts of appeal to superior courts' exercises of statutory discretion. Nor can inherent jurisdiction benefit from paramountcy where conflict arises with provincial statutes. Combined with how broadly statutory discretion under the *CCAA* and *BIA* has been interpreted, there seems little opportunity or reason for a superior court to appeal to its inherent jurisdiction in insolvency or restructuring, other than in the narrowest sense as the power to control its own process.

Footnotes

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1 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II. See also *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 (SCC) at paras 26--27 [*Liberty Net*].

2 *Ibid*.

3 *Courts of Justice Act*, RSO 1990, c C.43, s 11 [*OCJA*].

4 *Judicature Act*, RSA 2000, c J-2, s 5 [*AJA*].

5 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 183 [*BIA*].

6 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ss 2(1), 9 [*CCAA*]. See also *Winding-up and Restructuring Act*, RSC 1985, c W-11, ss 2(1), 12, 13.

7 *OCJA*, *supra* note 3, s 101. See also *AJA*, *supra* note 4, s 13(2).

8 See eg *OCJA*, *supra* note 3, s 100; *The Queen's Bench Act, 1998*, SS c Q-1.01, s 12.

9 *BIA*, *supra* note 5, s 183.

10 *Sam Lévy & Associés Inc v Azco Mining Inc*, 2001 SCC 92 (SCC) at paras 17, 38.

11 *BIA*, *supra* note 5, s 183(1). See also *Kingsway General Insurance Company v Residential Warranty Co of Canada Inc (Trustee of)*, 2006 ABCA 293 (Alta CA) at para 19 [*Residential Warranty*]; *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269 (Ont CA) at para 64 [*Astoria Organic*].

12 *Re Cheerio Toys & Games Ltd*, [1972] 2 OR 845, 27 DLR (3d) 24 (Ont CA) at paras 6--7. For a lengthy discussion of the auxiliary nature of inherent jurisdiction generally, see *Gillespie v Manitoba (Attorney General)*, 2000 MBCA 1 (Man CA) at paras 17--29. Also see subsection 31(2) of the *Interpretation Act*, RSC 1985, c I-21, which, under the heading "Ancillary Powers", reads: "Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given".

13 *Re Wiggins Limited*, [1931] OR 573, [1931] 4 DLR 338 (Ont CA) at para 27. It should also be noted that the term "court", as now used in 183(1) of the *BIA*, was initially defined to mean "the court which is invested with original jurisdiction in bankruptcy under this Act" [emphasis added]. See *The Bankruptcy Act of 1919*, 9 & 10 Geo V, SC 1919, c 36, s 2(l) [*Bankruptcy Act of 1919*].

14 *Bankruptcy Act of 1919*, *supra* note 13, s 63(1).

15 *Re Canadian Western Steel Corp* (1922), 2 CBR 494, 51 OLR 615 (Ont CA) at paras 24--31.

16 *The Bankruptcy Act Amendment Act*, 1922, Can, ch 8, s 8.

17 *Re Messervey's Ltd* (1922), 3 CBR 480, 23 OWN 41 (Ont SC).

18 Georgina R Jackson & Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2007* (Toronto: Carswell, 2008) at 2--3, 33 [Jackson & Sarra].

19 *Peacock v Bell and Kendall* (1667), 85 E.R. 84, 1 Wms. Saund. 73 (Eng. K.B.) at 74 [Wms. Saund.].

20 *Board v Board*, [1919] A.C. 956 (Jud. Com. of Privy Coun.).

21 See *Liberty Net*, *supra* note 1, at paras 29, 32.

22 *R c Caron*, 2011 SCC 5 (SCC) at para 24 [*Caron*], citing I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg Probs 23, at 27, 51.

23 *Ontario v Criminal Lawyers Association of Ontario*, 2013 SCC 43 (SCC) at para 22; cited in *Endean v British Columbia*, 2016 SCC 42 (SCC) at para 23.

24 *Re Stephen Francis Podgurski*, 2020 ONSC 2552 (Ont SCJ) at para 66 [*Podgurski*].

25 *R v Cunningham*, 2010 SCC 10 (SCC) at para 18 [*Cunningham*].

26 *Makis v Alberta Health Services*, 2020 ABCA 168 (Alta CA) at para 31 [*Makis*].

27 *Jonsson v Lymer*, 2020 ABCA 167 (Alta CA) at para 26 [*Jonsson*].

28 *Ibid*, at para 28.

29 *Ibid*, at para 27; William H Charles, "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010) 33:2 Dal LJ 63, at 70, 72 [Charles].

30 Charles, *supra* note 29, at 70, 72--73.

31 *Makis*, *supra* note 26, at para 31; Jonnette Watson Hamilton, "Three Leaves to Appeal the Claimed Jurisdiction of Court of Queen's Bench Over Vexatious Litigants" (9 July 2019) at 7--9, online (PDF): *University of Calgary Faculty of Law Blog* <ablawg.ca/wp-content/uploads/2019/07/Blog_JWH_VexatiousAppeals.pdf>.

32 *Cunningham*, *supra* note 25, at para 19. See also *407 International Inc v The Queen*, 2019 TCC 245 (TCC [Informal Procedure]) at paras 15--16 [*407 International*]; *Silver Wheaton Corp v The Queen*, 2019 TCC 170 (TCC [General Procedure]) at paras 52--54 [*Silver Wheaton*].

33 *Re Scotian Distribution Services Limited*, 2020 NSSC 158 (NS SC) at paras 23--24. With respect to masters generally, see *Balasubramaniam v RBC General Insurance Company*, 2020 ONSC 1627 (Ont SCJ) at para 32.

34 "Bankruptcy and Insolvency General Rules", CRC, c 368.

35 *Re Eastern Infrastructure Inc*, 2020 NSSC 220 (NS SC) at paras 21--23. This echoes what was said by Registrar Holmested almost a century earlier in *Re Tlustie* (1923), 3 CBR 654, 23 OWN 622 (Ont SC) at para 5:I am of the opinion that for the purpose of carrying out the Act there must be deemed to be vested in the Court the necessary power and jurisdiction to authorize and sanction acts necessary to be done by the trustee for the due administration and protection of the estate even though there be no specific provisions in the Act expressly conferring such power and jurisdiction.Similar observations have recently been made by the Tax Court of Canada in *407 International*, *supra* note 32, at paras 15--16, and *Silver Wheaton*, *supra* note 32, at paras 52--54.

36 *Buck v Canada (Attorney General)*, 2020 FC 769 (FC) at paras 50--51, affirmed 2021 CarswellNat 44 (FCA).

37 *Re Sections 12 and 21 of the Canadian Security Intelligence Service Act, RSC 1985, c C-23*, 2020 FC 616 (FC) at para 205.

38 *Ibid*, citing *Minister of National Revenue v RBC Life Insurance Co*, 2013 FCA 50 (FCA) at paras 35--36 [emphasis in original].

39 *R v Fercan Developments Inc*, 2016 ONCA 269 (Ont CA) at para 52, additional reasons 2016 CarswellOnt 8610 (Ont CA) [*Fercan*]. See also *Reference re Public Services Sustainability (2015) Act*, 2020 NSCA 53 (NS CA) at paras 13--18.

40 *Fercan*, *supra* note 39, n 2.

41 See the recent discussion, in a non-insolvency or restructuring context, in *R v Komoartok*, 2020 NUCA 12 (Nun CA) at para 17.

42 *Re Stelco Inc*, 2005 CarswellOnt 1188, [2005] OJ No 1171 (Ont CA) at para 38 [Stelco], reversing 2005 CarswellOnt 742, [2005] OJ No 729 (Ont SCJ [Commercial List]). For the historical distinction between inherent jurisdiction to control process in an existing proceeding and inherent jurisdiction to control a new proceeding, see *Jonsson*, *supra* note 27, at para 18. See also *Bluteau v Griffiths*, 2020 ONSC 2576 (Ont SCJ) at para 29.

43 *Re Ivaco Inc*, 2006 CarswellOnt 6292, [2006] OJ No 4152 (Ont CA) at paras 79--80, leave to appeal allowed 2007 CarswellOnt 2855, 2007 CarswellOnt 2856 (SCC). The ONCA did find that the court had discretion to do the same through section 191 of the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*].

44 *Attorney General for Ontario v Persons Unknown*, 2020 ONSC 4676 (Ont SCJ), appeal quashed *Ontario (Attorney General) v Nanji*, 2020 CarswellOnt 13242 (Ont CA).

45 *Ibid*, at para 34.

46 *The Mechanics' Liens Act,* RSM 1970, c M80, s 11.

47 *Baxter Student Housing Ltd v College Housing Co-operative Ltd* (1975), [1976] 2 SCR 475 (SCC) [*Baxter*]. The Manitoba QB has inherent jurisdiction pursuant to section 32 of *The Court of Queen's Bench Act*, CCSM, c C280.

48 *Baxter*, *supra* note 47, at 480.

49 *Petrowest Corporation v Peace River Hydro Partners*, 2019 BCSC 2221 (BC SC) [Petrowest], affirmed 2020 BCCA 339 (BC CA).

50 *Re Pope & Talbot Ltd*, 2009 BCSC 1552 (BC SC).

51 *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership*, 2018 BCSC 970 (BC SC), affirmed 2018 CarswellBC 1788 (BC CA).

52 *Petrowest*, *supra* note 49, at paras 42, 52.

53 *Ibid*, at para 42.

54 *Total Traffic Services Inc v Kone*, 2020 ONSC 4402 (Ont SCJ).

55 *Ibid*, at paras 21--22.

56 *Personal Property Security Act*, RSO 1990, c P10, s 20(3).

57 *Podgurski*, *supra* note 24.

58 *Proposition de St-Pierre*, 2020 QCCS 1374 (Que Bktcy) at paras 4--10. An unofficial translation is provided on the website of the Office of the Superintendent of Bankruptcy of Canada, "Quebec - Superior Court (Commercial Division)" (30 April 2020), online: *Government of Canada* <ic.gc.ca/eic/site/bsf-osb.nsf/eng/br04279.html>.

59 *Podgurski*, *supra* note 24, at paras 50, 64.

60 *Ibid*, at paras 72--73.

61 *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42 (SCC) at para 63.

62 *Colon v The Director, Business Corporations Act, Province of New Brunswick, and H Michael Greer*, 2019 NB CA 81 (NB CA) at paras 44, 46 [*Colon*].

63 *Poffenroth Agri Ltd v Brown*, 2020 SKQB 31 (Sask QB) at paras 15--22, affirmed 2020 CarswellSask 521 (Sask CA) [*Poffenroth Agri*].

64 "The Queen's Bench Rules", Sask Gaz 27 December 2013, 2684.

65 *Ibid*, s 1-4(3).

66 *Poffenroth Agri*, *supra* note 63, at para 15.

67 *Poffenroth Agri Ltd v Brown*, 2020 SKCA 121 (Sask CA) at para 9.

68 *Poffenroth Agri*, *supra* note 63, at para 15.

69 *The Queen's Bench Act, 1998*, SS c Q-1.01, s 28. Contrast with, among others, *Court Rules Act*, RSBC 1996, c 80, s 1; *Judicature Act*, RSNB 1973, c J-2, ss 73, 73.1.

70 *Judicature Act*, RSNS 1989, c 240, s 46.

71 Jackson & Sarra, *supra* note 18, at 3.

72 *Paragon Capital Corporation Ltd v Starke Dominion Ltd*, 2020 ABCA 216 (Alta CA) [*Paragon*].

73 *Paragon Capital Corporation Ltd v Starke Dominion Ltd*, 2018 ABQB 351 (Alta QB) at para 56, affirmed 2020 CarswellAlta 979 (Alta CA).

74 *Paragon*, *supra* note 72, at paras 119, 127.

75 *Ibid*, at para 24.

76 *Ibid*, at para 39.

77 *Ibid*, at paras 40--45.

78 *Re Residential Warranty Company of Canada Inc (Bankrupt)*, 2006 ABQB 236 (Alta QB) at paras 78--79, affirmed 2006 CarswellAlta 1354 (Alta CA).

79 *Residential Warranty*, *supra* note 11, at para 21.

80 *CCAA*, *supra* note 6, s 36.

81 *Builders Lien Act*, RSBC 1996, c 41.

82 *Re Royal Oak Mines Inc*, 1999 CarswellOnt 792, [1999] OJ No 864 (Ont Gen Div [Commercial List]) at para 8.

83 See eg *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 546 (Alta QB) at paras 32, 51.

84 The "on such terms as it may impose" language in then subsection 11(3) of the *CCAA* would be replaced in September 2009 with the current "any order that it considers appropriate" language in section 11 of the *CCAA*.

85 *Re Sulphur Corporation of Canada Ltd*, 2002 ABQB 682 (Alta QB) at paras 24, 37 [*Sulphur Corp*].

86 *Skeena Cellulose Inc v Clear Creek Contracting Ltd*, 2003 BCCA 344 (BC CA) at para 46 [Skeena Cellulose], affirming 2002 BCSC 1280 (BC SC).

87 *Stelco, supra* note 42, at paras 33, 36.

88 Jackson & Sarra, *supra* note 18, at 3.

89 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (SCC) at para 64 [*Century Services*]. See, however, the ABQB's decision in *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550 (Alta QB) at paras 22, 105, affirmed *Canada v Canada North Group Inc*, 2019 CarswellAlta 1815 (Alta CA), leave to appeal allowed *Her Majesty the Queen v Canada North Group Inc, et al*, 2020 CarswellAlta 549, 2020 CarswellAlta 550 (SCC), where Justice Topolniski refers to *CCAA* orders made prior to the 2009 amendments as having been exercises of inherent jurisdiction, despite elsewhere citing the exact passage from *Century Services* wherein the SCC rejected that view.

90 *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc) -and- Ernst & Young Inc*, 2018 QCCS 1040 (CS Que), reversed 2019 QCCA 171 (CA Que) [Callidus CA], reversed 2020 CarswellQue 236, 2020 CarswellQue 237 (SCC), reasons in full 2020 SCC 10 (SCC) at para 68 [*Callidus*].

91 *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 (Ont CA) at paras 52--53, additional reasons 2019 CarswellOnt 13563 (Ont CA), affirming 2016 ONSC 6086 (Ont SCJ [Commercial List]) [*Dianor*].

92 *Canada (Minister of Indian Affairs & Northern Development) v Curragh Inc*, 1994 CarswellOnt 294, [1994] OJ No 953 (Ont Gen Div [Commercial List]) at para 22.

93 *Dianor*, *supra* note 91, at para 53.

94 *Ibid*, at paras 53, 57--58, 72.

95 *Stelco*, *supra* note 42, at para 36.

96 *Callidus*, *supra* note 90.

97 *Colon*, *supra* note 62.

98 *Sulphur Corp*, *supra* note 85.

99 *CCAA*, *supra* note 6, s 11; *BIA*, *supra* note 5, s 243(1).

100 *OCJA*, *supra* note 3, s 101.

101 See eg: *CBCA*, *supra* note 43, s 192(4).

102 *Podgurski*, *supra* note 57, at para 50.

103 *BIA*, *supra* note 5, s 66.31.

104 Subsection 187(11) reads: "Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose."

105 *Podgurski*, *supra* note 57, at para 64.

106 *Ibid*, at paras 72--73.

107 *Time Limits and Other Periods Act (COVID-19)*, SC 2020, c 11, s 11, ss 7(1)--(2). The affected provisions of the *BIA* are ss 50.4(2), (6), (8)--(9), 51, 66.12(5), 66.15, 66.31(1), 102, and 170.1(3), as well as the "Bankruptcy Rules".

108 *BIA*, *supra* note 5, s 50.4(9).

109 *Durham Sports Barn Inc Bankruptcy Proposal*, 2020 ONSC 5938 (Ont SCJ) at paras 59--62 [*Durham Sports*].

110 *Podgurski*, *supra* note 57, at paras 57--61, citing *Re IDG Environmental Solutions Inc*, 1993 CarswellOnt 181, [1993] OJ No 771 (Ont Bktcy) at paras 7, 9, 12 [*IDG*].

111 *BIA*, *supra* note 5, s 50.4(9).

112 *IDG*, *supra* note 110, at para 7. See also *Re Wiggins*, 2003 CarswellOnt 3514, [2003] OJ No 3685 (Ont SCJ) at paras 7--8.

113 *BIA*, *supra* note 5, s 50.4(10). See also *Re Royalton Banquet & Convention Centre Ltd* (2007), 33 CBR (5th) 278 (Ont SCJ) at para 8.

114 *Durham Sports*, *supra* note 109, at para 61. Although not considered by Justice Gilmore, Justice Dunphy did essentially the same thing in *Re Dundee Oil and Gas Limited*, 2018 ONSC 1070 (Ont SCJ) at paras 13--15, also without considering s 50.4(10).

115 *Podgurski*, *supra* note 57, at para 49.

116 *Callidus*, *supra* note 90.

117 *Callidus* CA, *supra* note 90, at paras 63--65.

118 *Ibid*, at para 68.

119 *Callidus*, *supra* note 90, at para 80.

120 *Ibid*, at paras 81--82.

121 *Re Rifco Inc*, 2020 ABQB 366 (Alta QB) at paras 24--26.

122 *Re Sherritt International Corporation*, 2020 ONSC 5822 (Ont SCJ [Commercial List]) at para 28.

123 Jackson & Sarra, *supra* note 18, at 3, 12, 33.

124 *Callidus*, *supra* note 90, at paras 47--48.

125 *Ibid*, at para 49.

126 See *Algoma Steel Inc v Union Gas Ltd*, 2003 CarswellOnt 115, [2003] OJ No 71 (Ont CA) at para 16; *Stelco*, *supra* note 42, at paras 33, 36.

127 *Re Harmon International Industries Inc*, 2020 SKCA 95 (Sask CA) at paras 40--41 [*Harmon International*].

128 *Residential Warranty*, *supra* note 11, at para 20.

129 Jackson & Sarra, *supra* note 18.

130 *Ibid*, at 33.

131 *Century Services*, *supra* note 89, at para 65.

132 *Dianor*, *supra* note 91, at paras 31, 53, 57--58, 72.

133 Jackson & Sarra, *supra* note 18, at 19.

134 *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269 (Ont CA) at paras 61--65 [*Astoria Organic*].

135 *Yukon (Government of) v Yukon Zinc Corporation*, 2020 YKSC 16 (YT SC) at paras 47--50, 78, reversed in part 2021 CarswellYukon 18 (Y.T. C.A.).

136 *Ibid*, at para 79.

137 *Re Accel Canada Holdings Limited*, 2020 ABQB 116 (Alta QB) at para 10 [*Accel*]. It appears, however, that Justice Horner is a little undisciplined in her use of the terminology, as what she declines to consider is the use of what she variously calls the court's "inherent jurisdiction under s. 11 generally" (at para 6) and the court's "general jurisdiction in s. 11" (at para 10).

138 *Podgurski*, *supra* note 57, at paras 50, 64.

139 *Ibid*, at para 70.

140 *Baxter*, *supra* note 47, at 480.

141 *Caron*, *supra* note 22, at para 32.

142 *Podgurski*, *supra* note 57, at paras 69--70.

143 See *R c Hajian* (1995), 104 C.C.C. (3d) 562 (CS Que) at para 15; *R v Osborn* (1968), [1969] 1 OR 152 (Ont CA) at para 15, reversed (1970), [1971] SCR 184 (SCC). In contrast, see *Re Bolfan Estate* (1992), 87 DLR (4th) 119 (Ont Gen Div) at para 12.

144 *Aldebert v Country Boy Services*, 2020 ONSC 3136 (Ont SCJ) at paras 24--25 [*Country Boy*].

145 *MCAP Service Corporation v LPIC*, 2020 ONSC 4104 (Ont SCJ) at para 14.

146 *Cerberus Business Financial, LLC v B & W Heat Treating Canada, ULC*, 2020 ONSC 3781 (Ont SCJ) [*Cerberus*].

147 *Commercial Tenancies Act*, RSO 1990, c L7.

148 *Cerberus*, *supra* note 146, at paras 19--20. Contrast this with Justice Gilmore's decision in *Durham Sports*, *supra* note 109.

149 *Emergency Management and Civil Protection Ac*t, RSO 1990, c E9.

150 *Cerberus*, *supra* note 146, at para 21. Although Justice McEwen speaks of the court having "jurisdiction" under the Order in Council, it is clear that what he means is what we refer to as statutory discretion.

151 O Reg 73/20.

152 See *Skeena Cellulose*, *supra* note 86, at para 42.

153 *Alberta (Attorney General) v Moloney*, 2015 SCC 51 (SCC) at paras 17--18 [*Moloney*]. It should also be noted that the provincial enactment will only be inoperative to the extent of the conflict, and not absolutely: *Re Urbancorp Cumberland 2 GP Inc*, 2020 ONCA 197 (Ont CA) at para 70, additional reasons 2020 CarswellOnt 4921 (Ont CA).

154 *Moloney*, *supra* note 153, at para 27; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 (SCC) at para 21.

155 *Builders' Lien Act*, RSA 2000, c B-7.

156 *Royal Bank of Canada v Reid-Built Homes Ltd*, 2018 ABQB 124 (Alta QB) at paras 130, 134 [Reid Built], reversed *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 (Alta CA) [Edmonton v Alvarez], leave to appeal refused *City of Edmonton v Alvarez & Marsal Canada Inc, in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, et al*, 2019 CarswellAlta 2139 (SCC) [*Reid Built* SCC leave].

157 *Yorkshire Trust co v Canusa Const Ltd* (1984), 54 BCLR 75, 10 DLR (4th) 45 (BC CA) at paras 6--12.

158 This interpretation is incorrect because "receiving order" is simply pre-2005 terminology for a bankruptcy order, and thus categorically different from an order appointing a receiver. See *Cirillo v Royal Bank*, 2008 CarswellOnt 5942, 48 CBR (5th) 69 (Ont SCJ [Commercial List]) at para 24, affirmed 2009 CarswellOnt 1381 (Ont CA).

159 *Reid Built*, *supra* note 156, at para 27.

160 *Ibid*, at para 28. Where the grant of a receiver's charge under subsection 243(6) is limited by subsection 243(7) to non-operational borrowings, borrowing for the operation of a debtor's business is not explicitly excluded from the discretion under subsection 31(1), and subsections 31(2) through (4) all specifically contemplate operation of the debtor's business. In addition, the line-by-line analysis of Bill C-55 prepared by Industry Canada (as it was then named) makes it clear that the new powers to be granted to a receiver under the proposed revisions to subsection 31(1) were intended to be supplemental to the receiver's powers under the new Part XI of the BIA. See Industry Canada, "Archived — Bill C-55: clause by clause analysis: Bill Clause No. 24: Section No. 31(1) and (2)", online: *Government of Canada* <www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00790.html#bill24>:The reforms are technical amendments to reflect concurrent amendments to the interim receiver provisions and the receiver provisions. The role of interim receivers is to be reduced and, as such, they will not be granted powers under this section. At the same time, the role of receivers is expected to expand. By adding receivers to the parties that may use this provision will give receivers more flexibility in carrying on their duties.Justice Graesser effectively glosses over the distinction between a court granting a priority charge for a receiver's borrowings for operation of the debtor's business, which is what he ends up doing, and the priority given to such borrowings in section 31(1) of the *BIA* itself, where such borrowings have been authorized by the court. This gloss is perhaps forgivable because even though subsection 31(1) does not speak of a court giving security or giving a charge as do *BIA* subsections 47.2(1) and 243(6), a court-ordered charge is unnecessary because subsection 31(1) itself sets out the priorities, stating that such borrowings *must* be repaid in priority to creditor claims.

161 *Reid Built*, *supra* note 156, at paras 130, 134. Similar reasoning had previously been applied by the ABQB in *Sulphur Corp*, *supra* note 85, at paras 29--32, where Justice Lovecchio distinguished *Baxter* as being a decision dealing with conflict between a court's inherent jurisdiction and a provincial statute, rather than, as in the case before him, a conflict between a provincial statute and the federal *CCAA*.

162 *Re Comstock Canada Ltd*, 2013 ONSC 4700 (Ont SCJ) at para 20.

163 *Ibid*, at para 16.

164 See *Hamilton Wentworth Credit Union Ltd (Liquidator of) v Courtcliffe Parks Ltd*, 1995 CarswellOnt 374, [1995] OJ No 1482 (Ont Gen Div [Commercial List]) at para 41, additional reasons 1995 CarswellOnt 3559 (Ont Gen Div [Commercial List]) [*Hamilton Wentworth*].

165 *Edmonton v Alvarez*, *supra* note 156, at para 26.

166 The ABCA's confirmation of statutory discretion to grant receivership charges in priority to municipal tax liens stands in contrast to the view previously taken by Justice Blair, as he then was, in *Hamilton Wentworth*, *supra* note 164, at para 41, that a court had no inherent jurisdiction to grant a receiver priority for its fees and disbursements over a municipality's lien claim under provincial statute for pre-receivership tax arrears. *Hamilton-Wentworth* pre-dated both the 2009 enactment of section 243 of the *BIA* and the discretion given thereunder to grant a priority receivership charge for non-operational borrowings, and the contemporaneous 2009 amendments to subsection 31(1) of the *BIA*, which included, for the first time, receivers and interim receivers in the power to give security for operational borrowings. As a result, *Hamilton Wentworth* is not a counter-authority to the ABCA's decision in *Edmonton v Alvarez*.

167 *Reid Built* SCC leave, *supra* note 156.

168 *AJA*, *supra* note 4, s 24(2): When in a proceeding a question arises as to whether an enactment of the Parliament of Canada or of the Legislature of Alberta is the appropriate legislation applying to or governing any matter or issue, no decision may be made on it unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Solicitor General of Alberta.Other examples include *OCJA*, *supra* note 3, s 109; and *The Constitutional Questions Act*, 2012, SS 2012, c C-29.01, s 13.

169 The requirement of notice in such cases is, in Alberta, set out in subsection 24(1) of the *AJA*, *supra* note 4.

170 *Eaton v Brant County Board of Education* (1996), [1997] 1 SCR 241 (SCC) at para 53. A finding of paramountcy in the absence of notices of constitutional question would, at very least, diminish the precedential value of such a decision: *D & K Horizontal Drilling (1998) Ltd (Trustee of) v Alliance Pipeline Ltd*, 2002 SKQB 86 (Sask QB) at para 39, affirmed 2002 CarswellSask 825 (Sask CA).

171 *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 (SCC) at para 60.

172 *Ibid*, at paras 55, 60.

173 *Canada v Canada North Group Inc*, 2019 ABCA 314 (Alta CA), leave to appeal allowed *Her Majesty the Queen v Canada North Group Inc, et al*, 2020 CarswellAlta 549 (SCC).

174 *Cerberus*, *supra* note 146.

175 *Century Services*, *supra* note 89.

176 *Dianor*, *supra* note 91.

End of Document

TAB 13

CITATION: Lydian International Limited (Re), 2020 ONSC 4006
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2020-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon*, *Maria Konyukhova*, *Sanja Sopic*, and *Nicholas Avis*, for the Applicants

D. J. Miller and *Rachel Bergino*, for Alvarez & Marsal Inc.

Robert Mason and *Virginie Gauthier*, for Osisko Bermuda Limited

Pamela Huff and *Chris Burr*, for Resource Capital Fund VI L.P.

David Bish and *Michael Pickersgill*, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, *Hasan Ciftehan*, *Mehmet Ali Ekingen and Atilla Bozkay*, each in their capacity as a Shareholders of Lydian International Limited

HEARD by ZOOM Hearing and DECIDED: **June 29, 2020**

REASONS RELEASED: **July 10, 2020**

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe &Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII).

TAB 14

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

TAB 15

COURT FILE NUMBER & BANKRUPTCY ESTATE NUMBER	**25-3009380** / B301 009380
COURT	COURT OF KING'S BENCH OF ALBERTA, IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3 AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.
APPLICANTS	ATHABASCA MINERALS INC., AMI SILICA INC., AMI AGGREGATES INC., AMI ROCKCHAIN INC., TERRASHIFT ENGINEERING LTD., 2132561 ALBERTA LTD., and 2140534 ALBERTA LTD.
DOCUMENT	**TRANSACTION APPROVAL AND REVERSE VESTING ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Fasken Martineau DuMoulin LLP** Attn: Robyn Gurofsky / Jessica Cameron 3400 First Canadian Centre 350-7 Avenue SW Calgary, AB T2P 3N9 Telephone: (403) 261-9469/261-9468 Facsimile: (403) 261-5351 Email: rgurofsky@fasken.com / jcameron@fasken.com File No. 318938.00024

Clerk's Stamp

BANKRUPTCY AND INSOLVENCY
FILED
by Email
APR 19, 2024
Calgary
FAILLITE ET INSOLVABILITÉ

PP

DATE ON WHICH ORDER WAS PRONOUNCED: April 19, 2024

LOCATION WHERE ORDER WAS PRONOUNCED: Edmonton, Alberta

NAME OF JUSTICE WHO MADE THIS ORDER: The Honourable Justice J.T. Neilson

UPON THE APPLICATION of Athabasca Minerals Inc. ("**AMI**"), AMI Silica Inc., AMI Aggregates Inc., AMI RockChain Inc., TerraShift Engineering Ltd., 2132561 Alberta Ltd., and 2140534 Alberta Ltd. (collectively, the "**Companies**"), for an order, among other things, approving the reverse vesting share transaction (the "**Transaction**") in respect of AMI

contemplated by the Subscription Agreement between AMI and Badger Mining Corporation (the "**Purchaser**" or "**Badger**") dated February 9, 2024 (the "**Subscription Agreement**"), and attached as Exhibit "K" to the Third Affidavit of John David Churchill sworn February 26, 2024 (the "**Third Churchill Affidavit**");

AND UPON HAVING READ the within Notice of Application, the Third Churchill Affidavit, the Fourth Affidavit of John David Churchill sworn March 4, 2024, the Fifth Churchill Affidavit sworn April 5, 2024, including the Settlement Agreement between the Companies and JMAC Energy Services LLC ("**JMAC**") dated March 28, 2024, the Third Report of KSV Restructuring Inc. in its capacity as proposal trustee of the Companies (in such capacity, the "**Proposal Trustee**") dated February 29, 2024 (the "**Third Report**"), the Supplement to the Third Report of the Proposal Trustee dated March 7, 2024 (the "**Supplemental Third Report**"), the Fourth Report of the Proposal Trustee dated April 15, 2024 (the "**Fourth Report**"), the Affidavits of Service of Kim Picard, sworn March 7, 2024 and April 17, 2024, respectively, the Order of this Court granted on December 12, 2023 (the "**First Order**"), and the other pleadings previously filed in the within proposal proceedings;

AND UPON HEARING the submissions of counsel for the Companies, the Proposal Trustee, the Purchaser, JMAC, and such other counsel in attendance at the hearing of this application:

IT IS HEREBY ORDERED THAT:

SERVICE

1. Service of the notice of this application for this Order and supporting materials is hereby declared to be good and sufficient, no other person is required to have been served with notice of this application, and the time for service of this application is abridged to that actually given and this application is properly returnable today.

CAPITALIZED TERMS

2. Capitalized terms used but not otherwise defined in this Order shall have the meaning given to such terms in the Subscription Agreement and the First Order, as applicable.

APPROVAL OF THE TRANSACTIONS

3. The Subscription Agreement and the Transactions contemplated by it are hereby approved, and the execution of the Subscription Agreement by AMI is hereby authorized and approved, with such amendments as AMI and the Purchaser may agree to. AMI is hereby authorized and directed to perform its obligations under the Subscription Agreement and any ancillary documents related thereto, and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transactions. In the event of any conflict between the terms of the Subscription Agreement and this Order, this Order shall prevail.

4. Subject to the terms of the Subscription Agreement, this Order shall constitute the only authorization required in respect of AMI proceeding with the Transactions, and no shareholder or other approval shall be required in connection therewith.

REORGANIZATION

5. Subject to the terms of the Subscription Agreement, upon delivery of a certificate from the Proposal Trustee confirming Closing of the Transactions has occurred, substantially in the form set out in Schedule "A" hereto (the "**Proposal Trustee's Certificate**"), the following, among other things, shall occur and be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Subscription Agreement:

   a) the Purchaser shall deliver the Purchase Price Balance (for the subscription and purchase of the Purchased Shares), less the amount which is credit bid by the Purchaser pursuant to section 21 of the Interim Financing Agreement between the Companies and Badger in its capacity as Interim Lender dated March 4, 2024 (the "**Credit Bid**"), and the Escrow Amount, if applicable, to the Proposal Trustee, on behalf of and for the benefit of AMI, and such amount shall be dealt with in accordance with the Closing Sequence in the Subscription Agreement;

   b) the Terminated Employees shall be terminated by AMI or the Companies, as applicable;

c) all directors of AMI immediately prior to the Closing Date shall be deemed to resign and the new directors named on the Subscription Agreement shall be deemed to be appointed as directors of AMI;

d) each issued and outstanding Common Share held by a Company Shareholder immediately prior to the Closing Date shall be exchanged without any further act or formality thereof for consideration in the form of one ResidualCo Share for each Common Share formerly held by each Company Shareholder immediately prior to the Closing Date;

e) each Equity Interest that is issued and outstanding immediately prior to the Closing Date, together with any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre-emptive rights, options (including stock options or share purchase or equivalent plans), or other documents or instruments governing or having been created or granted in connection with the share capital of AMI shall be deemed terminated and cancelled for no consideration in accordance with and pursuant to the Reverse Vesting Order; and

f) AMI shall, in consideration for the Purchase Price, issue the Purchased Shares to the Purchaser in accordance with the Subscription Agreement, free and clear of and from any and all Claims, Losses and Encumbrances.

6. The Purchaser and AMI, in completing the Transactions, are authorized to:

a) execute and deliver any documents and assurances governing or giving effect to the Transactions as the Purchaser and/or AMI, in their discretion, may deem to be reasonably necessary or advisable to conclude the Transactions, including the execution of all such ancillary documents as may be contemplated in the Subscription Agreement or necessary or desirable for the completion and implementation of the Transactions, and all such ancillary documents are hereby ratified, approved and confirmed; and

b) take such steps as are, in the opinion of the Purchaser and/or AMI, necessary or incidental to the implementation of the Transactions.

7. The Proposal Trustee may rely on any documents, assurances, or written notices, from AMI, the Companies, and the Purchaser, as applicable, regarding the fulfillment of conditions to closing under the Subscription Agreement and shall have no liability with respect to delivery of the Proposal Trustee's Certificate following the receipt of such document, assurance, or written notice.

8. The Registrar appointed pursuant to Section 263 of the *Business Corporations Act*, RSA 2000, c B-9 ("**ABCA**") shall accept and receive any documents or instruments as may be required to permit or enable and effect the Transactions contemplated in the Subscription Agreement, filed by AMI, and the effective date for any certificate or authorization issued by the Registrar shall be the date of Closing.

9. The Purchaser, the Companies, and ResidualCo are hereby permitted to execute and file articles of amendment, amalgamation, continuance or reorganization or such other documents or instruments as may be required to permit or enable and effect the Reorganization, including, without limitation, the issuance of the Purchased Shares, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective notwithstanding any requirement under federal or provincial law to obtain director or shareholder approval with respect to such actions or to deliver any statutory declarations that may otherwise be required under corporate law to effect the Reorganization.

10. This Order shall constitute the only authorization required by the Purchaser, the Companies, or ResidualCo to proceed with the Transaction, including, without limitation, the Reorganization and, except as specifically provided in the Subscription Agreement, no director or shareholder approval shall be required and no authorization, approval or other action by or notice to or filing with any Governmental Authority or regulatory body exercising jurisdiction in respect of the Companies is required for the due execution, delivery and performance by the Purchaser, the Companies and by ResidualCo of the Subscription Agreement and the completion of the Transaction.

VESTING OF ASSETS AND LIABILITIES

11. Subject to the terms of the Subscription Agreement, upon delivery of the Proposal Trustee's Certificate, the following, among other things, shall occur and be deemed to occur in accordance with the timing, sequence, terms and conditions set forth in the Subscription Agreement:

a) all legal and beneficial right, title and interest of the Companies in and to the Transferred Assets (which, for certainty, does not include the Purchase Price) shall be transferred to ResidualCo and shall vest absolutely and exclusively with ResidualCo, and all Encumbrances attached to the Transferred Assets prior to the transfer shall continue to attach to the Transferred Assets following the transfer with the same nature and priority as they had immediately prior to their transfer;

b) all Transferred Liabilities shall be transferred to, assumed by and vest absolutely and exclusively with ResidualCo in consideration for the ResidualCo Notes and the Transferred Assets, and the Transferred Liabilities shall be novated and become obligations of ResidualCo and shall no longer, under any circumstances, be or represent obligations of the Companies;

c) the Companies shall be forever released and discharged from all Transferred Liabilities and all Encumbrances securing the Transferred Liabilities, and any obligations thereunder, shall be forever released and discharged in respect of the Companies and the Retained Assets;

d) the Retained Assets will be retained by AMI in each case free and clear of and from any and all Claims, Losses and Encumbrances including, as applicable, without limiting the generality of the foregoing: (i) any Encumbrances or charges created by the First Order or any other Order of the Court; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Alberta), or any other personal property registry system or pursuant to *The Lands Title Act* (Alberta) or any other land titles or similar registry system, all of which affect or relate to the Purchased Shares and/or the Retained Assets

shall be expunged and discharged as against the Purchased Shares and Retained Assets, as applicable, including but not limited to those Claims and Encumbrances set forth in the attached **Schedule "B": Claims and Encumbrances**, but shall not include the permitted encumbrances, caveats, interests, easements, and restrictive covenants listed in **Schedule "C"** (collectively the **"Permitted Encumbrances"**);

e) AMI shall satisfy the amounts owing under the ResidualCo Notes (including on behalf of the Subsidiaries, which in such case shall constitute a contribution of capital by AMI to the Subsidiaries) using the Purchase Price. If the aggregate principal amount of the ResidualCo Notes exceeds the Purchase Price then any such remaining unpaid principal amount of the ResidualCo Notes shall be extinguished for nil consideration and AMI and its Subsidiaries shall have no further liability or obligation to ResidualCo. If the aggregate principal amount of the ResidualCo Notes is less than the Purchase Price then any remaining Purchase Price shall vest in ResidualCo to be administered by the Proposal Trustee (as trustee of ResidualCo) for the benefit of ResidualCo's creditors (which creditors arise from the assumption of the Transferred Liabilities);

f) the Companies shall cease to be applicants in the Proposal Proceedings and the Companies shall be deemed to be released from the purview of the First Order and all other Orders of this Court granted in relation to the Proposal Proceedings;

g) ResidualCo shall replace the Companies as applicants and debtor, as applicable, in the Proposal Proceedings and shall be subject to the terms of all Orders granted in the Proposal Proceedings;

h) the Proposal Trustee's powers shall be enhanced in respect of ResidualCo, including the authority to authorize and direct ResidualCo to make an assignment in bankruptcy and the Proposal Trustee shall be authorized to be appointed as trustee in bankruptcy of the estate of ResidualCo; and

i) AMI shall cease to be a reporting issuer by Order of the Alberta Securities Commission and the Ontario Securities Commission under the securities legislation of the jurisdictions in which AMI is a reporting issuer.

12. As of the Effective Time:

a) AMI shall continue to hold all right, title and interest in and to the Retained Assets and Retained Contracts, free and clear of all Claims, Losses and Encumbrances other than the Retained Liabilities; and

b) AMI shall be deemed to have disposed of the Transferred Assets and shall have no right, title or interest in or to the Transferred Assets.

13. For greater certainty, any person that, prior to the Effective Time, had a Claim, Loss, or Encumbrance other than a Retained Liability against the Companies or their assets, properties or undertakings shall, as of the Effective Time, no longer have any such Claim, Loss, or Encumbrance against or in respect of the Companies or the Retained Assets, but shall have an equivalent Claim, Loss, or Encumbrance, as applicable, against: (a) the Transferred Assets, and (b) all amounts received by ResidualCo in satisfaction of the ResidualCo Notes (together, the "**ResidualCo Assets**"), to be administered by the Proposal Trustee in ResidualCo from and after the Effective Time, with the same attributes, rights, security, nature and priority as such Claim, Loss, or Encumbrance had immediately prior to its transfer to ResidualCo, and nothing in this Order limits, lessens, modifies (other than by change in debtor) or extinguishes the Claim, Loss, or Encumbrance of any Person as against the ResidualCo Assets to be administered by the Proposal Trustee in ResidualCo.

14. For greater certainty, from and after the Effective Time, all contracts, leases, licenses, and agreements to which the Companies are a party upon delivery of the Proposal Trustee's Certificate will be and shall remain in full force and effect upon and following delivery of the Proposal Trustee's Certificate and no individual firm, corporation, governmental body, agency, or any other entity (collectively a "**Person**") who is a party to any such arrangement may accelerate, terminate, rescind, refuse to perform, or otherwise repudiate

its obligations thereunder, or enforce or exercise any right (including any right of set-off, dilution, or other remedy) or make any demand under or in respect of any such arrangement, and no automatic termination will have any validity or effect, by reason of:

a) the insolvency of the Companies or the fact that the Companies sought or obtained relief under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**");

b) any compromises, releases, discharges, cancellations, transactions, arrangements, reorganizations or other steps taken or effected pursuant to the Subscription Agreement, the Transaction or the provisions of this Order, or any other Order of the Court in these proceedings;

c) any transfer or assignment, or any change of control of Companies arising from the implementation of the Subscription Agreement, the Transaction, or the provisions of this Order; or

d) any event that occurred on or prior to the delivery of the Proposal Trustee's Certificate and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults or events of default arising as a result of the insolvency of the Companies).

15. Notwithstanding paragraph 13, all cure costs shall be paid by the Purchaser or ResidualCo, as applicable and as set out in the Subscription Agreement, to the relevant counterparty to a Retained Contract, on or before the date that is 30 days following the Effective Time or such later date as may be agreed to by the Purchaser or ResidualCo, as applicable, and the relevant counterparty to a Retained Contract.

16. From and after the Effective Time, the Purchaser and/or AMI shall be authorized to take all steps as may be necessary to effect the discharge and release as against AMI and the Retained Assets of the Claims, Losses and Encumbrances that are transferred to and vested in ResidualCo pursuant to this Order.

17. Upon the delivery of the Proposal Trustee's Certificate, and upon filing of a certified copy of this Order, together with any applicable registration fees, all governmental authorities and any other applicable registrar or government ministries or authorities exercising jurisdiction with respect to AMI, the Retained Assets or the Transferred Assets (collectively, "**Governmental Authorities**") are hereby authorized, requested and directed to accept delivery of such Proposal Trustee's Certificate and certified copy of this Order as though they were originals and to register such transfers, interest authorizations, discharges and discharge statements of conveyance as may be required to give effect to the terms of this Order and the completion of the Transactions, and to discharge and release all Claims, Losses and Encumbrances other than Retained Liabilities against or in respect of the Companies and the Retained Assets, and presentment of this Order and the Proposal Trustee's Certificate shall be the sole and sufficient authority for the Governmental Authorities to do so.

RESIDUALCO MATTERS

18. John David Churchill (the "**First Director**") is hereby authorized, *nunc pro tunc*, to act as director and officer of ResidualCo and, in such capacity, is hereby authorized to take such steps and perform such tasks as are necessary or desirable to facilitate the Transactions.

19. Notwithstanding Section 106 of the ABCA, the First Director shall be entitled to tender his resignation as a director and officer upon the appointment of the Proposal Trustee in respect of ResidualCo in these proposal proceedings and the granting and issuance of this Order.

20. The First Director shall not incur any liability as a result of becoming a director or officer of ResidualCo, save and except for any liability or obligation incurred as a result of fraud, gross negligence, or wilful misconduct on their part.

21. ResidualCo shall be deemed to be the former employer of any former employees of AMI or the Companies who were terminated between the filing date, November 13, 2023, and the Effective Time, if any, whose claims against the Companies are transferred to ResidualCo pursuant to this Order, provided that such deeming: (i) shall be effective

immediately after the Effective Time; and (ii) will solely be for the purposes of termination pay and severance pay pursuant to the *Wage Earners Protection Program*. For greater certainty, the Terminated Employee Claims shall be and constitute Transferred Liabilities which, pursuant to this Order and the Closing Sequence, shall be discharged as against AMI and transferred to ResidualCo.

22. The administration of ResidualCo shall remain subject to the Proposal Trustee's appointment and oversight, and this Court's oversight and these proposal proceedings.

23. Following the satisfaction and discharge of all Transferred Liabilities, all outstanding ResidualCo Shares shall be cancelled for either: (i) no consideration; or (ii) in the event the Transferred Assets are sufficient to satisfy all Transferred Liabilities against ResidualCo, and notwithstanding any provision of the ABCA, such amounts as determined by the Proposal Trustee, in its capacity as Proposal Trustee or in its capacity as bankruptcy trustee, in its sole discretion. Following the foregoing, all such ResidualCo Shares together with any agreement, contract, plan, indenture, deed, certificate, subscription rights, conversion rights, pre-emptive rights, options (including stock options or share purchase or equivalent plans), or other documents or instruments governing or having been created or granted in connection with the share capital of ResidualCo shall be deemed terminated and cancelled in accordance with and pursuant to the this Order. The record date for such payment shall be set as the date of granting of this Order.

24. In addition to and without limiting the rights and protections afforded to the Proposal Trustee pursuant to the BIA, the First Order, and any subsequent Order granted by this Court in the within proceedings, the Proposal Trustee and its employees and representatives shall not incur any liability as a result of acting in accordance with this Order or administering ResidualCo, save and except for any gross negligence or wilful misconduct on the part of any such parties. All protections afforded to the Proposal Trustee pursuant to the First Order, any further Order granted in these proceedings or under the BIA shall continue to apply.

DISTRIBUTIONS & DISCHARGES OF PRIORITY CHARGES ON CLOSING

25. Upon exercise of the Credit Bid for the full amount of the indebtedness owing under the Interim Financing Agreement, all such indebtedness shall be deemed repaid in full by the Companies and the Interim Lender's Charge shall be released and discharged as against ResidualCo and the Transferred Assets.

26. As at the Effective Time, from the net proceeds received from the Purchase Price in satisfaction of the ResidualCo Notes, the Proposal Trustee is hereby authorized and empowered to make the following distributions in accordance with the below priority sequence:

a) **Settlement Amount** – The Settlement Amount shall be paid to JMAC Energy Services LLC in accordance with the terms of the Settlement Agreement and the Settlement Approval Order granted by this Court on April 19, 2024;

b) **Administration Charge** – The outstanding reasonable fees and disbursements of the Proposal Trustee, the Proposal Trustee's counsel, and the Companies' counsel, in each case, incurred at their standard rates and charges, which priority payment shall collectively not exceed $350,000, being the quantum of the approved Administration Charge. The Administration Charge shall otherwise not be released or discharged at this time, and will continue to attach to ResidualCo and the ResidualCo Assets to secure payment of the ongoing professional fees that might be incurred by the Proposal Trustee, the Proposal Trustee's counsel, or the Companies' counsel;

c) **Sale's Advisor Charge** – The outstanding obligations owing by the Companies to the Sales Advisor pursuant to the Engagement Letter between the parties dated December 5, 2023 and previously attached to the First Affidavit of David Churchill, sworn December 6, 2023 (the "**First Churchill Affidavit**") as Confidential Exhibit "1", which priority payment shall not exceed $450,000, being the quantum of the Sale's Advisor Charge, and upon payment of such

amount the Sale's Advisor Charge shall be released and discharged as against ResidualCo and the ResidualCo Assets; and

d) **KERP Charge** – The outstanding obligations owing by the Companies in accordance with the terms set forth in the Companies' key employee retention plan, as set forth in Confidential Exhibit "4" to the First Churchill Affidavit, which priority payment shall not exceed $260,000, being the quantum of the KERP Charge, and upon payment of such amounts the KERP Charge shall be released and discharged as against ResidualCo and the ResidualCo Assets.

27. The Directors' Charge granted pursuant to the First Order is hereby released and discharged as against ResidualCo and the ResidualCo Assets.

RELEASES AND OTHER PROTECTIONS

28. From and after the Effective Time, all Persons shall be absolutely and forever barred, estopped, foreclosed and permanently enjoined from pursuing, asserting, exercising, enforcing, issuing or continuing any steps or proceedings, or relying on any rights, remedies, claims or benefits in respect of or against the Companies, the Purchaser, the Proposal Trustee, the First Director, or the Retained Assets, in any way relating to, arising from or in respect of:

a) the Transferred Assets;

b) any and all Claims, Losses or Encumbrances other than the Retained Liabilities against or relating to the Companies, the Transferred Assets or the Retained Assets existing immediately prior to the Effective Time;

c) the insolvency of the Companies prior to the Effective Time;

d) the commencement or existence of the notice of intention proceedings; or

e) the completion of the Transactions.

29. From and after the Effective Time, the Purchaser and the Companies shall be released from all Claims, Losses and Encumbrances with respect to any Taxes of, in respect of, or

that relate to, the Companies, including, without limiting the generality of the foregoing, all Taxes that could be assessed against the Purchaser or the Companies (including their Affiliates and any predecessor corporations) pursuant to Sections 160 and 160.01 of the *Income Tax Act* (Canada) and Section 325 of the GST Legislation and including as a result of any future amendments or proposed amendments to such provisions or related provisions, or any provincial equivalent, in connection with the Companies; provided, as it relates to the Purchaser and the Companies, such release shall not apply to any Taxes in respect of the business and operations conducted by the Companies after the Effective Time. For greater certainty, nothing in this paragraph shall release or discharge any Claims with respect to Taxes or obligations in respect thereof that are transferred to ResidualCo.

30. From and after the Effective Time, (a) the Companies, and their respective current directors, officers, employees, legal counsel, representatives and advisors; (b) the Proposal Trustee, and its employees, representatives and legal counsel, (c) the Purchaser, and its current directors, officers, employees, legal counsel, representatives and advisors, (d) Canaccord Genuity Corp., in its capacity as Sales Advisor, and its employees and representatives, and (e) the First Director (collectively, the "**Released Parties**" and each a "**Released Party**") shall be and are hereby released and discharged from any and all claims that any Person may have or be entitled to assert against the Released Parties, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Time in any way relating to, arising out of, or in respect of, these proposal proceedings including the implementation of the Transaction and Settlement Agreement, the administration of ResidualCo, or with respect to their respective conduct in these proposal proceedings (collectively, the "**Released Claims**"), and any such Released Claims are hereby released, stayed, extinguished and forever barred, and the Released Parties shall have no liability in respect thereof, provided that the Released Claims shall not include any claim or liability that is determined by a court of competent jurisdiction to have constituted actual fraud, gross negligence, or wilful misconduct on the part of the applicable Released Party.

31. Other than as provided for in the Subscription Agreement, no action or other proceeding shall be commenced against any of the Released Parties in any way arising from or related to these proposal proceedings or ResidualCo, except with prior leave of this Court on not less than fifteen (15) days' prior written notice to the applicable Released Party and upon further order security, as security for costs, the full indemnity costs of the applicable Released Party in connection with any proposed action or proceeding as the Court hearing the motion for leave to proceed may deem just and appropriate.

MISCELLANEOUS MATTERS

32. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act* (Canada), AMI and the Companies are authorized, permitted and directed to, at the Effective Time, disclose to the Purchaser all human resources and payroll information in the Companies' records pertaining to past and current employees of the Companies. The Purchaser shall maintain and protect the privacy of such information in accordance with Applicable Law and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by AMI prior to the Effective Time.

33. The Proposal Trustee is directed to file with the Court a copy of the Proposal Trustee's Certificate forthwith after delivery thereof to the Purchaser.

34. Notwithstanding:

a) the pendency of these proceedings;

b) any application for a bankruptcy Order now or hereafter issued pursuant to the BIA or otherwise and any bankruptcy or receivership Order issued pursuant to any such application; or

c) the provisions of any federal or provincial statute,

the execution of the Subscription Agreement and the implementation of the Transactions shall be binding on any trustee or other administrator in respect of ResidualCo and any trustee in bankruptcy or receiver that may be appointed in respect of the Companies and

shall not be void or voidable by creditors of ResidualCo or the Companies, nor shall it constitute nor be deemed to be a transfer at undervalue, settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the BIA or any other applicable federal or provincial legislation or at common law, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

35. Following the Effective Time, the style of cause of these proposal proceedings shall be hereby amended by being deleted and replaced in its entirety by the following:

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3 AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 2585929 ALBERTA LTD.

36. The Companies, the Purchaser, the Proposal Trustee, and any other interested party shall be at liberty to apply for further advice, assistance and direction as may be necessary or desirable in order to give full force and effect to the terms of this Order and to assist and aid the parties in completing the Transactions.

37. This Court shall retain exclusive jurisdiction to, among other things, interpret, implement and enforce the terms and provisions of this Order, the Subscription Agreement and all amendments thereto, in connection with any dispute involving the Companies or ResidualCo, and to adjudicate, if necessary, any disputes concerning the Companies or ResidualCo related in any way to the Transactions.

38. This Court hereby requests the aid and recognition of any court, tribunal, or regulatory or administrative body having jurisdiction in Canada or in any of its provinces or territories or in any foreign jurisdiction, including the State of Wisconsin, United States, and the State of North Dakota, United States, to act in aid of and to be complimentary to this Court in carrying out the terms of this Order, to give effect to this Order and to assist the Proposal Trustee and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make

such orders and to provide such assistance to the Proposal Trustee, as an officer of the Court, as may be necessary or desirable to give effect to this Order.

39. Service of this Order shall be deemed good and sufficient:

a) By serving same on the persons who were served with notice of this Application and any other parties attending or represented at the hearing of this Application; and

b) By posting a copy of this Order on the Proposal Trustee's website at: https://www.ksvadvisory.com/experience/case/athabasca-minerals.

40. Service of this Order on any other person is hereby dispensed with.

41. Service of this Order may be effected by facsimile, electronic mail, personal delivery, or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

James J. Mulligan

Justice of the Court of King's Bench of Alberta

TAB 16

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court

Alta. Reg. 124/2010

Currency

made under the *Judicature Act*

Alta. Reg. 124/2010, as am. Alta. Reg. 124/2010, r. 15.15(3); 163/2010; 143/2011; 216/2011; 31/2012, s. 4(zz); 122/2012; 170/2012, s. 10(g); 62/2013, ss. 2, 7(b); 140/2013; 41/2014; 36/2015 [Not in force at date of publication. Repealed Alta. Reg. 145/2015, s. 4.]; 71/2015, s. 3; 76/2015, s. 3; 128/2015; 85/2016, s. 1; 25/2019; 156/2019, s. 2; 36/2020; 194/2020; 23/2021; 139/2021, s. 3; 72/2022; 136/2022, s. 1 [s. 1(13)(a) cannot be applied.]; 216/2022, s. 3; 218/2022, s. 10; 61/2023; 76/2023, s. 3; 126/2023.

Currency
Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alta. Reg. 124/2010, s. 6.28

s 6.28 Application of this Division

Currency

6.28Application of this Division

Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alta. Reg. 124/2010, s. 6.29

s 6.29 Restricted court access applications and orders

Currency

6.29Restricted court access applications and orders

An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alta. Reg. 124/2010, s. 6.30

s 6.30 When restricted court access application may be filed

Currency

6.30When restricted court access application may be filed
A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

Amendment History
Alta. Reg. 194/2020, s. 2

Currency
Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alta. Reg. 124/2010, s. 6.31

s 6.31 Timing of application and service

Currency

6.31Timing of application and service
An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Currency
Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.32

s 6.32 Notice to media

Currency

6.32Notice to media

When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

Amendment History

Alta. Reg. 163/2010, s. 3

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.33

s 6.33 Judge or applications judge assigned to application

Currency

6.33Judge or applications judge assigned to application

A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

Amendment History

Alta. Reg. 194/2020, s. 3; 136/2022, s. 1(5)

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.34

s 6.34 Application to seal or unseal court files

Currency

6.34Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

6.34(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

6.34(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alta. Reg. 124/2010, s. 6.35

s 6.35 Persons having standing at application

Currency

6.35Persons having standing at application

The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

Alta. Reg. 124/2010, s. 6.36

s 6.36 Confidentiality of information

Currency

6.36Confidentiality of information

Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

Currency

Alberta Current to Gazette Vol. 120:2 (January 31, 2024)

End of Document

TAB 17

Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

TAB 18

Most Negative Treatment: Distinguished
Most Recent Distinguished: T.Z. v. P.V.R. | 2022 SKQB 129, 2022 CarswellSask 256 | (Sask. Q.B., May 17, 2022)

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer JJ.

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants
Iris Fischer, Skye A. Sepp, for Respondents
Peter Scrutton, for Intervener, Attorney General of Ontario
Jacqueline Hughes, for Intervener, Attorney General of British Columbia
Ryder Gilliland, for Intervener, Canadian Civil Liberties Association
Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.e Evidence on appeal

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (New Brunswick, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the Charter is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also Mentuck, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

TAB 19

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

TAB 20

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2021 ONSC 4347
COURT FILE NO.: CV-21-00661458-00CL
DATE: 2021-06-22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ONTARIO SECURITIES COMMISSION

Applicant

AND:

BRIDGING FINANCE INC., BRIDGING INCOME FUND LP, BRIDGING MID-MARKET DEBT FUND LP, SB FUND GP INC., BRIDGING FINANCE GP INC., BRIDGING INCOME RSP FUND, BRIDGING MID-MARKET DEBT RSP FUND, BRIDGING PRIVATE DEBT INSTITUTIONAL LP, BRIDGING REAL ESTATE LENDING FUND LP, BRIDGING SMA 1 LP, BRIDGING INFRASTRUCTURE FUND LP, BRIDGING MJ GP INC., BRIDGING INDIGENOUS IMPACT FUND, BRIDGING FERN ALTERNATIVE CREDIT FUND, BRIDGING SMA 2 LP, BRIDGING SMA 2 GP INC., and BRIDGING PRIVATE DEBT INSTITUTIONAL RSP FUND

Respondents

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *John Finnigan, Grant Moffat and Adam Driedger*, for the Receiver

Carlo Rossi and Adam Gotfried, for the Ontario Securities Commission

Lawrence Thacker, for Natasha Sharpe

David Bish, for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco

Marc Wasserman and Justine Erickson, for BlackRock Financial Management, Inc.

Kyla Mahar, for RC Morris Capital Management Ltd. and RCM NGB Holdings Limited

Alex MacFarlane, James MacLellan and Charlotte Chien, for Zurich Insurance Company Ltd

Natasha MacParland, for Willoughby Asset Management Inc.

Steven Weisz and Shaun Parsons, for the University of Minnesota Foundation

Steve Graff, for Investors in various Bridging Funds

Melissa MacKewn, for David Sharpe

Fraser Dickson, for a former employee of Bridging Finance Inc.

Caitlin Fell, Sharon Kour, Pat Corney and Andy Kent, for the Ad-Hoc Group of Retail Investors

David Ullmann, for the Respondents, Thomas Canning (Maidstone) Limited, William Thomas, Robert Thomas, and 2190330 Ontario Ltd.

HEARD: June 16, 2021

AMENDED ENDORSEMENT

[1] This endorsement addresses the motion brought by PricewaterhouseCoopers Inc. ("PwC"), receiver of each of the Respondents (the "Receiver") for an order requesting, among other things, approval of the Key Employee Retention Plan ("KERP") and the KERP Charge; approving the formation, composition, and mandate of the Limited Partner Advisory Committees; tolling the applicable limitation periods in respect of any Misrepresentation Rights until the Tolling Termination Date; approving the Receiver's recommended course of action in connection with partial repayment of amounts owing under a credit facility made available by certain of the Respondents as described in Confidential Appendix "B" to the Third Report of the Receiver, dated June 9, 2021 (the "Third Report"); sealing Confidential Appendix "A" and Confidential Appendix "B" to the Third Report until further Order of the Court; and approval of the Third Report.

[2] This endorsement also addresses the motion brought by a group of retail investors in the Bridging Funds (the "Ad Hoc Group of Retail Investors") for an order appointing Weisz, Fell, Kour LLP ("WFK") as representative counsel ("Representative Counsel") for all retail investors holding units of the Bridging Funds, excluding investment advisors and institutional investors (the "Retail Investors").

[3] Capitalized terms not expressly defined herein are as defined in the Third Report.

[4] The factual background is set out in the Third Report.

[5] The Receiver is in the process of developing and implementing a strategy to maximize value for all stakeholders. This strategy will include a review of the consolidated portfolio of loans held by all of the Bridging Funds. There will also have to be a reconciliation of inter-fund accounts and review of inter-fund cash allocations.

[6] The objective of all stakeholders should be aligned with respect to the development and implementation of a strategy to maximize the value of the loan portfolio.

[7] However, the alignment of interests may very well be different when it comes to the reconciliation of inter-fund accounts and the review of inter-fund cash allocations. The Third

Report indicates that investors participated through the purchase of units of the Bridging Funds. The Bridging Funds marketed to investors include five limited partnership fund offerings, three RSP fund offerings and two investment trust fund offerings.

[8] It is premature to comment on how the assets realized from the loan portfolio will be divided among the funds, but it is conceivable that there will be disputes between the various funds with respect to asset allocation.

[9] It is against this background that the motions have to be considered.

[10] Certain relief sought by the Receiver was not opposed.

[11] The Receiver is of the view that in order to incentivize certain eligible employees to remain as employees of Bridging Finance Inc. ("BFI") during the course of these proceedings, a KERP should be approved, together with a related charge on the property of the Respondents in the maximum amount of $366,000 (the "KERP Charge") as security for payments under the KERP, which will ranks subordinate to the Receiver's Charge, the Receiver's Borrowing Charge and each Intercompany Charge, but in priority to all other security interests.

[12] As set out in Confidential Appendix "A" to the Third Report, the Receiver has allocated among Eligible Employees approximately $266,000 of the requested KERP Payments. The remaining $100,000 may be allocated among Eligible Employees or additional key Employees provided they meet certain criteria set out in the Bridging KERP.

[13] Courts have frequently recognized the utility and importance of KERPs in restructuring proceedings and have approved KERPs in numerous debtor-in-possession proceedings under both the *Companies' Creditors Arrangement Act* (the "CCAA") and receivership proceedings pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") and the *Courts of Justice Act* (the "CJA").

[14] The CCAA, the BIA and the CJA, as well as the *Securities Act* are silent with respect to the approval of KERPs and the granting of a charge to secure a KERP. Counsel to the Receiver submits that as such, the approval of a KERP and a KERP Charge are matters within the discretion of the court, grounded in the court's inherent and/or statutory jurisdiction to make any orders it sees fit. (See, for example: *Aralez Pharmaceuticals Inc., (Re),* 2018 ONSC 6980; *Cinram International Inc., (Re),* 2012 ONSC 3767 and *Grant Forest Products Inc., (Re),* [2009] O.J. No. 3344.)

[15] The factual and legal basis for the granting of the KERP is set out in the Receiver's factum at paragraphs 5 – 14.

[16] The Receiver recommends that the court exercise its discretion to approve the Bridging KERP and grant the KERP Charge.

[17] I accept this recommendation. The KERP and the KERP Charge are approved.

[18] The Receiver also seeks an order tolling the statutory limitation periods applicable to any "Misrepresentation Rights", as defined at paragraph 16 of the factum, until the stay of proceedings imposed against the Respondents and the Property pursuant to the Appointment Orders is terminated.

[19] The factual and legal basis for granting such relief is set out at paragraphs 16 – 22 of the factum.

[20] The Receiver recommends that the proposed Tolling Order be granted.

[21] I accept this recommendation. The Tolling Order is granted.

[22] The Receiver also recommends that its proposed course of action, as described in Confidential Appendix "B" to the Third Report in connection with a partial repayment of amounts owing under a Credit Facility made available to a borrower by certain of the Respondents should be approved. Having reviewed Confidential Appendix "B" to the Third Report, I am satisfied that the Receiver's recommended course of action should be approved.

[23] The considerations involved in the granting of a sealing order must take into account the recent Supreme Court decision in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38, where Kasirer J. wrote that:

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding

> the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[24] Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects. As such, the Sealing Order should be granted, pending further order of the court.

[25] Confidential Appendix "A" contains the Bridging KERP, which contains confidential and personal information with respect to the compensation of each Eligible Employee.

[26] Confidential Appendix "B" contains the Receiver's recommended course of action in connection with the proposed transaction. The terms of the proposed transactions are confidential and the Receiver submits the disclosure of such confidential commercially sensitive information at this time would undermine its efforts to maximize value for stakeholders.

[27] I am satisfied that no stakeholders will be materially prejudiced by sealing the Confidential Appendices and that the salutary effects of granting the Sealing Order outweigh any deleterious effects. As such, I am satisfied that the sealing order should be granted, pending further order of the court.

[28] In its Notice of Motion, the Receiver requested approval of payments to RC Morris. The request for such approval was deferred.

[29] The Receiver also requested approval of its activities as set out in the draft order. There was no opposition to this request which is granted.

[30] The balance of this endorsement addresses the Receiver's request for approval of limited partner advisory committees and the motion of the Ad Hoc Group of Retail Investors.

[31] The Receiver seeks court approval of the following two Limited Partner Advisory Committees:

> (a) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Funds generally (the "LPAC"); and
>
> (b) a limited partner advisory committee comprised of Unitholders representing Unitholders in the Bridging Indigenous Impact Fund (the "BIIF LPAC").

(the LPAC and the BIIF LPAC are referred to as the "Committees").

[32] The Receiver states that the primary functions of the Committees, will be to, among other things:

> (a) provide the Receiver with a confidential forum to obtain input and feedback on behalf of Unitholders in the Bridging Funds regarding actions or decisions of the Receiver, as considered appropriate by the Receiver; and
>
> (b) provide such other input and assistance to the Receiver regarding matters involving Bridging as the Receiver may reasonably request from time to time.

[33] The Receiver contends that the Committees will provide an efficient and cost-effective means for Unitholders to provide direct input to the Receiver but will not have any decision-making authority with respect to any of the Respondents or the Property. The proposed Committee Members represent a diverse cross-section of both retail and institutional Unitholders and each Committee Member will be bound by a confidentiality agreement satisfactory to the Receiver.

[34] Mr. Graff states that he represents 15 different investors in various Bridging Funds with over $400MM of claims, and he does not oppose the relief requested by the Receiver. He points out that his clients have received regular and effective communications from the Receiver.

[35] The appointment of the Committees is challenged by the Ad Hoc Group of Retail Investors. The Ad Hoc Group of Retail Investors are of the view that it is more appropriate to appoint WFK as Representative Counsel for all Retail Investors holding units of the Bridging Funds, excluding investment advisors and institutional investors.

[36] In its factum, counsel points out that the Retail Investors are concerned about recovery of their investments and the protection of their rights and are most concerned about fairness. There are over 25,000 Retail Investors who will bear the brunt of any shortfall. Counsel submits that this receivership was not commenced with the Retail Investors in mind and makes reference to an OSC publicly made statement that, “as a regulatory body, we do not normally recover money for investors.”

[37] Counsel submits that the receivership proceeding lacks meaningful input from the Retail Investors. Counsel also submits that it is not clear from the materials filed by the Receiver as to what role the Committees will perform, since the Receiver has not described what matters it proposes to consult with the Committees. Further, counsel raises concerns that the Committees will be dominated by investment advisors and institutional or professional investors, and this presents the appearance of conflicts.

[38] The gist of the submissions put forward by counsel is that the Retail Investors require representation by counsel whose sole focus and loyalty is to them. The appointment of Representative Counsel will also generally improve the efficiency of the receivership; communication with Retail Investors will be streamlined and a multiplicity of legal retainers avoided.

[39] I have concluded that the relief requested by the Receiver for the appointment of the LPACs should be granted – albeit with certain time limitations.

[40] As noted above, the Receiver is currently involved in the development and implementation of a strategy to maximize value for all stakeholders. A strategic review of the portfolio is in process and the Receiver is not in a position to confirm valuations for certain funds.

[41] It seems to me that the Committees will be in a position to provide the Receiver with meaningful input and feedback on behalf of Unitholders regarding actions or decisions of the Receiver. At this time the focus is on maximizing realizations for the benefit of Unitholders and the Committees may very well be in a position to provide meaningful assistance to the Receiver.

[42] I also note that although the OSC may have made a statement to the effect that "as a regulatory body, we do not normally recover money for investors", it is necessary to take into account that the Receiver was appointed pursuant to the provisions of section 129 of the *Securities Act* in a particular section 129(2) which provides:

> 129 [2] No order shall be made under subsection (1) unless the court is satisfied that,
>
> (a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company **is in the best interests of the creditors** of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of our subscribers to the person or company; or
>
> (b) it is appropriate for the due administration of Ontario securities law.
>
> (Emphasis added)

[43] I am also satisfied that the Receiver will take into account the best interests of all Unitholders.

[44] Counsel to the Ad Hoc Group of Retail Investors also questioned the proposed mandate of the Committees. At this point in time, the focus of the Committees is to provide input to the Receiver in connection with a strategic review of the portfolio in an effort to maximize value for all stakeholders. This review take some time but should not be extended for an unlimited time. For this reason, it seems to me that the appointment of the Committees should be time-limited to 60 days, subject to extension by court order. It is my expectation that at the end of 60 days, the Receiver should be in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of inter-fund accounts.

[45] Accordingly, I am satisfied that it is appropriate to approve the Committees as requested by the Receiver, on the terms set out in the proposed order, with the proviso that the appointment of the Committees is time-limited to 60 days, subject to extension by court order.

[46] With respect to the appointment of Representative Counsel, I am satisfied that the court has jurisdiction to appoint representative counsel under section 101 of the CJA, together with Rules 10.01 and 12.07 of the *Rules of Civil Procedure*.

[47] The issue is whether the appointment of Representative Counsel should be entertained at this time, or whether it is more appropriate to defer consideration of this issue until such time as the Receiver is in a position to report to the court on the portfolio review and also to provide information with respect to the reconciliation of interfund accounts. I have concluded that it is appropriate to defer consideration of this issue for the following reasons.

[48] First, the focus at the present time should be on the portfolio review and developing a strategy to maximize value for all stakeholders.

[49] Second, when the Receiver reports on this issue and provides information with respect to the reconciliation of interfund accounts, it may become clearer as to the role that Representative Counsel can play. It could very well be that the entitlement or potential entitlement of Unitholders in the various funds will differ, which could in turn require the appointment of different Representative Counsel for different funds. In my view, the potential role of Representative Counsel should focus on allocation issues as opposed to realization issues.

[50] The relief requested by the Ad Hoc Group of Retina Investors is dismissed, with leave to reassess the requested relief in 60 days.

[51] The appointment of Representative Counsel can be revisited at the time that the Receiver makes its report in 60 days.

[52] An order shall issue to reflect the foregoing.

Chief Justice G.B. Morawetz

Date: June 22, 2021