COURT FILE NUMBER	2001-
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ORPHAN WELL ASSOCIATION
RESPONDENT	BOW RIVER ENERGY LTD.
DOCUMENT	**BRIEF OF ARGUMENT OF THE ORPHAN WELL ASSOCIATION AND THE ALBERTA ENERGY REGULATOR**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

MLT Aikins LLP
2100, 222 3rd Avenue SW
Calgary, Alberta T2P 0B4
Phone: 403.693.5420/4347
Fax: 403.508.4349
Attention: Ryan Zahara/Catrina Webster
Email: rzahara@mltaikins.com/cwebster@mltaikins.com
File: 0147836.00001

TABLE OF CONTENTS

A. INTRODUCTION

1. This Brief is submitted on behalf of the Applicant, Orphan Well Association (the "**OWA**"), and the relief sought herein is supported by the Alberta Energy Regulator (the "**AER**"), in support of an application (the "**Receivership Application**") for the appointment of BDO Canada Limited as receiver and manager (the "**Receiver**") over the property, assets and undertakings located in the Province of Alberta (the "**Property**") of Bow River Energy Ltd. ("**Bow River**") and in opposition to the application (the "**SAVO Application**") by 2270943 Alberta Ltd. ("**227 Alberta**") for a sale approval and vesting order (the "**SAVO**") in respect of certain assets (the "**227 Assets**") of Bow River.

2. The AER and OWA are seeking to enforce compliance with the end-of-life obligations of Bow River with respect to the licensed wells, facilities and pipeline segments of Bow River (the "**Licensed Assets**"), are acting in a bona fide regulatory capacity, do not stand to benefit financially and are not acting as a creditor of Bow River. The AER and the OWA's ultimate goal is to have the environmental and end-of-life obligations (collectively, the "**EOL Obligations**") of Bow River associated with the Licensed Assets satisfied or addressed by Bow River to the fullest extent possible.

3. The AER and the OWA at all times advised Bow River that it would not agree to any transaction that did not fully deal with the outstanding EOL Obligations of Bow River within the *Companies' Creditors Arrangement Act* RSC c C-36, as amended (the "***CCAA***") proceedings.[1] The AER and the OWA cannot now be estopped from objecting to the SAVO and to any return of value to the creditors of Bow River prior to the satisfaction of the EOL Obligations of Bow River. There is no proposed sale or result presently before the Court that would allow Bow River to fully satisfy all of its EOL Obligations.

4. There is no legal precedent or authority for the approval of the transaction as contemplated by 227 Alberta's stalking horse asset purchase agreement dated July 17, 2020 and as amended on July 21, 2020 (the "**SH APA**") and the AER and the OWA submit that any SAVO in respect of the SH APA would be contrary to the decision of the Supreme Court of Canada (the "**SCC**") in the case of *Orphan Well Association and*

[1] *Companies' Creditors Arrangement Act*, 1985, c C-36, at **TAB "1"**.

Alberta Energy Regulator v. Grant Thornton Limited and ATB Financial 2019 SCC 5 ("***Redwater***").[2]

5. Bow River has advised that it will cease operations effective October 29, 2020[3] and after that date will not have any directors or officers, employees or contractors, and no financial resources to provide care and control of the Licensed Assets. Accordingly, on October 21, 2020, the AER issued Order AD 2020-033 (the "**Suspension and Abandonment Order**") to Bow River in respect of all of the Licensed Assets.[4] After October 29, 2020 there is no entity that will be in a position to have care and control of all of the Licensed Assets or that is capable of complying with the ongoing regulatory and legislative requirements associated with the Licensed Assets.[5]

6. The AER and the OWA submit that it is just and convenient, as well as necessary, that BDO Canada Limited be appointed as receiver and manager (the "**Receiver**") over the Property.

B. BACKGROUND

7. The OWA is an independent non-profit organization that operates under the delegated legal authority of the AER. The mandate of the OWA is to safely decommission orphaned oil and gas wells, pipelines and production facilities where the owners of such wells, pipelines and production facilities are insolvent, and to restore the land on which these assets are located as close to the original state as possible.[6]

8. The AER was established by the *Responsible Energy Development Act* SA 2012 c R-17.3 and acts as the single regulator of all upstream oil and gas activities in the Province of Alberta. The AER's mandate includes providing efficient, safe, orderly and environmentally responsible development of energy resources in Alberta.

9. The AER, in carrying out its mandate, establishes rules and issues licenses, approvals, permits, orders, decisions and directions in furtherance of the purposes of AER

---

[2] *Orphan Well Association and Alberta Energy Regulator v. Grant Thornton Limited and ATB Financial,* 2019 SCC 5 ("**Redwater**"), at para. 128, at **TAB "2"**.
[3] Affidavit of Lars DePauw, sworn on October 21, 2020 (the "**OWA Affidavit**") at para. 14; Affidavit of Maria Lavelle, sworn on October 21, 2020 (the "**AER Affidavit**") at para. 27.
[4] OWA Affidavit, at para. 16; AER Affidavit, at para. 26.
[5] OWA Affidavit, at para. 14; AER Affidavit, at para. 27.
[6] OWA Affidavit, at para. 3.

administered legislation, including the *Oil and Gas Conservation Act* RSA 2000, c O-6 (the "***OGCA***").[7]

The SISP Application

10. On July 21, 2020, prior to the July 24, 2020 application (the "**SISP Application**") of Bow River for approval of the SISP and the SH APA, the AER sent correspondence to Bow River and the Monitor's counsel that the AER:

    a. reserved its position on a sales and investment solicitation process ("SISP") and the Stalking Horse Bid proposal pending the outcome of the sales process; and

    b. expressed concern regarding a potential outcome of the sales process where the stalking horse bidder selectively bid on assets to reduce their debt and left unfunded liabilities remaining.8

11. On July 24, 2020, at the SISP Application, this Honourable Court granted an Order approving the SISP and the SH APA between Bow River and 227 Alberta.[9] At the SISP Application, Maria Lavelle, Legal Counsel for the AER, advised the Court that the AER reserved its position respecting the SISP and the SH APA pending the outcome of the SISP. Ms. Lavelle specifically expressed concern respecting a proposal that would cherry-pick the best assets and leave the remaining assets and associated liabilities to be dealt with by the OWA. Ms. Lavelle made it clear that the AER may object to any SAVO that might arise as a result of the SISP on this basis.[10]

Following Completion of the SISP

12. On September 3, 2020, in response to a request for an update from the OWA on the Bow River *CCAA* sales process, the Monitor advised the OWA that Bow River is still in the process of conducting its evaluation of bids in consultation with Sayer Energy Advisors and the Monitor further advised that no *en bloc* bids were received.[11]

13. On September 4, 2020, the OWA advised the Monitor that the OWA's strong preference in all *CCAA* proceedings, including the Bow River *CCAA*, was to support *en bloc* bids

[7] AER Affidavit, at paras. 3-4.
[8] AER Affidavit, at para. 8.
[9] AER Affidavit, at para. 11.
[10] AER Affidavit, at para. 12 and Exhibit "C".
[11] OWA Affidavit, at para. 10 and Exhibit "A".

and advised that any transaction less than an *en bloc* bid will be opposed by the OWA. The OWA also expressed it's objection to relying on the *CCAA* process to transfer environmental liabilities to the OWA for the benefit of other parties without addressing the EOL Obligations of Bow River.[12]

14. On September 10, 2020, the AER and OWA met with Bow River and the Monitor to discuss the bids generated through the SISP and put forward a proposal (the "**Proposal**") for a series of transactions to sell certain of its assets, quitclaim some of its assets and to satisfy some, but not all of the EOL Obligations. The AER and the OWA reiterated their concerns that the Proposal did not address all of the EOL Obligations of Bow River[13].

15. On September 16, 2020, the AER and the OWA again met with Bow River, the Monitor and 227 Alberta. The AER and OWA again expressed their concern at that meeting that a significant amount of EOL Obligations would not be addressed through the Proposal and that 227 Alberta would be repaid the amounts owed to it in priority to Bow River addressing those EOL Obligations[14].

16. On September 17, 2020, the AER requested information from 227 Alberta respecting the value of the stalking horse bid by 227 Alberta and how that value was determined.[15] On September 17, 2020, counsel for 227 Alberta advised that 227 Alberta was of the view that should the AER grant its license and transfer of the assets as contemplated by the SH APA, the stalking horse bid value would represent the entirety of the debt owed to the debenture holders of Bow River and is not reflective of the value of the assets being purchased which is much lower than the amount of the bid.[16]

17. On September 21, 2020, the AER advised counsel for Bow River, with a copy to 227 Alberta, that the AER was not supportive of the Stalking Horse Bid and intended to object at the SAVO Application. The AER also advised counsel for Bow River that it intended to object to the proposal on the basis that the proposal is contrary to the Supreme Court of Canada's decision in *Redwater*.[17]

---

[12] OWA Affidavit, at para. 11 and Exhibit "A".
[13] AER Affidavit, at para. 16
[14] AER Affidavit at para. 20
[15] AER Affidavit, at para. 21.
[16] AER Affidavit, at para. 22 and Exhibit "D".
[17] AER Affidavit, at para. 23. And Exhibit "E".

18. On September 28, 2020, the AER further advised counsel for 227 Alberta that the primary reason for the AER's objection to the Stalking Horse Bid was due to the unfunded liability that would result from the proposal and the fact that the proposal prioritized the debt of a secured creditor over the EOL Obligations.[18] The AER also specifically reiterated its concern that the bid value was for the entirety of the debt owed to the debenture holders of Bow River, and was not reflective of the actual value of the assets being purchased, which may be much lower than the amount of the bid.[19]

19. On September 29, 2020, the OWA advised counsel for 227 Alberta of the following:

    a. the OWA has consistently maintained its position that the OWA would object to a *CCAA* sales process that would result in assets being dealt with by the OWA;

    b. the OWA is unable to fund a CCAA; and

    c. the OWA is willing to consider funding a receiver if Bow River plans to *cease CCAA proceedings*.[20]

20. On October 6, 2020, the AER advised 227 Alberta that the application for eligibility to obtain a business associate code (the "**BA Code**") necessary to hold relevant regulatory licenses and approvals from the AER was being closed, as the application was incomplete, and the AER was not in a position to evaluate unreasonable risk in the application until the insolvency process [of Bow River] is exhausted.[21]

21. On October 15, 2020, counsel for Bow River advised the OWA, the AER, the Saskatchewan Ministry of Energy and Resources, and Indian Oil and Gas Canada that Bow River will cease operations in Alberta and Saskatchewan after October 29, 2020. Bow River's counsel further advised that Bow River's present directors and officers will resign, all Bow River employees and contractors will be terminated and after October 29, 2020, Bow River would no longer have the financial resources to maintain care and custody of its properties or comply with its legislative and regulatory obligations.[22]

---

[18] AER Affidavit, at para. 24.
[19] AER Affidavit, at para. 25 and Exhibit "F".
[20] OWA Affidavit, at para. 13 and Exhibit "C".
[21] Affidavit of Robert Dumaine, at para 25 and Exhibit "E"; AER Affidavit, at para. 26 and Exhibit "G".
[22] OWA Affidavit, at para. 14 and Exhibit "D"; AER Affidavit, at para. 27 and Exhibit "I".

22. On October 20, 2020, Bow River served an application seeking authorization from the Court to repay the interim financing facility (the "**Interim Financing**") to 227 Alberta advanced during the course of the *CCAA* proceedings and seeking to discharge BDO Canada Limited in its capacity as the monitor (the "**Monitor**") in the *CCAA* Proceedings.[23]

23. On October 21, 2020, the AER issued the Suspension and Abandonment Order.

C. ISSUES

24. The issues to be determined by this Honourable Court are:

> **Issue 1 - Whether the application for the SAVO in respect of the SH APA brought by 227 Alberta should be dismissed**; and
>
> **Issue 2 - Whether it is appropriate to grant a Receivership Order over the Property of Bow River**.

D. LAW AND ARGUMENT

Issue 1 – Whether the application for the SAVO in respect of the SH APA brought by 227 Alberta should be dismissed? Answer: Yes

25. The SAVO Application filed by 227 Alberta should be dismissed by this Court. There are a number of factors that support dismissing the SAVO Application, which are set out in further detail below. The AER and the OWA are not prevented from objecting to the SAVO being granted by either issue estoppel or *res judicata* or because the SISP and SH APA were previously approved by the Court on July 24, 2020.

26. The AER and OWA submit that neither the SISP nor the Court's approval of the SH APA prevents them from enforcing valid regulatory obligations against Bow River. As was described by the SCC in *Redwater*, the AER and OWA are not acting as creditors in this case:

> …*Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at paragraph 33 of *Northern Badger*:

[23] OWA Affidavit, at para. 15 and Exhibit "E".

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life…But the obligations of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgement for money, nor is that the object of the whole process. Rather it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

Based on the analysis in *Northern Badger* it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims".[24]

27. In these circumstances, the AER is acting under its provincial mandate to prevent the public from bearing the cost of an unsuccessful oil and gas company's EOL Obligations.

28. In *Redwater*, the SCC also definitively determined that an insolvent oil and gas licensee remains liable to satisfy its environmental obligations, regardless of its insolvency, and any proceeds of the sale of its assets must first be used satisfy those environmental obligations, before any of its creditors are entitled to be repaid.

29. Bow River has advised that after October 29, 2020, it will be ceasing operations, will no longer have any officers and directors and all employees and contractors will be terminated. The AER has also issued the Suspension and Abandonment Order in respect of the Licensed Assets that requires Bow River to take certain steps regarding the Licensed Assets as set out in the terms of the Suspension and Abandonment Order. Accordingly, Bow River will not have any ability to consummate the transaction contemplated by the SH APA.

30. The *CCAA* proceedings of Bow River will not be extended beyond October 30, 2020, Bow River will no longer have access to any financial resources to carry on its operations, and if Bow River's application (the "**Discharge Application**") served on

[24] *Redwater*, paras. 134 and 135, at **TAB "2"**.

October 20, 2020 is granted the Interim Financing will be repaid in full and the Monitor will be discharged.

Terms of the SH APA

31. The terms of the SH APA itself also make it clear that the transaction contemplated thereunder is subject to certain AER approval and decisions before it can be advanced or completed. These terms include, but are not limited to the following:

    a. the SH APA was subject to the SAVO being granted (sections 2.6(c) and 3.2(b)) and if the SAVO was not granted than the SH APA would terminate;
    b. the SH APA remained subject to obtaining approvals from the AER, including but not limited to the approvals required in section 2.14 (b) and 3.1(a);
    c. in the SH APA it was a condition in favor of Bow River that prior to closing the AER shall provide a positive indication of approval of the licence transfers by Bow River to 227 Alberta (section 3.4(c)); and
    d. the entire SH APA was subject to the SAVO (section 12.2)[25].

32. The AER has provided its position on at least some of these requirements and at this time has advised 227 Alberta that the application for a BA Code pursuant to *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals* ("**Directive 067**")[26] was being closed, as the application was incomplete. 227 Alberta acknowledges that this Court, even if it were to approve the SH PSA, is not the proper forum for a determination of whether 227 Alberta will receive a BA Code. It was a requirement under section 2.14 of the SH APA that 227 Alberta obtain the BA Code prior to closing and it has not done so.

33. A further concern of the AER is that at present, 227 Alberta does not qualify to be a licensee, which is a requirement under the SH APA itself. After October 29, 2020, there will be no licensee able to provide care and control of the Licensed Assets.

34. The AER has also advised that it would not support the transaction as contemplated by the SH APA and the condition that 227 Alberta obtain the required consents under section 3.1(a) of the SH APA cannot be satisfied.

---

[25] Affidavit of Daniel G. Belot (the "**Third Belot Affidavit**") sworn on July 17, 2020, at Exhibit "E", SH APA.
[26] AER Affidavit, at Exhibit "H"

35. The SAVO Application brought forward is flawed and should be dismissed as the form of the SH APA is not capable of being completed due to its own terms and due to the fact that Bow River will no longer have the capacity to complete the transaction contemplated thereunder after October 29, 2020.

The SAVO

36. Bow River has not brought forward the SAVO Application to vest title to the Licensed Assets set out in the SH APA or any other offer received through the SISP for approval by this Court and as contemplated by the terms of the SISP. 227 Alberta does not have standing under the terms of the SISP to bring forward the SAVO Application for approval of its own stalking-horse bid.

37. The SISP, at paragraphs 39 and 40, very clearly states that it is the Company that would bring the SAVO Application and does not contemplate that any of the bidders, including 227 Alberta would have standing to bring that application. The SISP also provided that the approvals required pursuant to the terms of the SISP are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a successful bid.[27]

38. The AER and OWA submit that allowing 227 Alberta to apply to approve its own stalking-horse bid would establish a novel precedent that could create uncertainty into any sale and investment solicitation processes conducted in the future and, in particular, ones involving stalking horse bidders. The debtor-company in the *CCAA* proceedings (and the counter-party of the proposed transaction under the SH APA) has declined to seek approval of the SH APA. This is a significant fact that the Court should consider when assessing whether to approve the SH APA. The AER and the OWA submit that this provides sufficient grounds for this Court to dismiss the SAVO Application brought by 227 Alberta.

39. The AER and OWA submit that Bow River could not obtain the SAVO in these conditions (even if it was advancing the SAVO Application) and 227 Alberta should not be allowed to use the sanctity of the SISP and the prior approval of the SH APA to try obtain a result

[27] Order: Approval of SISP Advisor, Stalking Horse & SISP filed on July 24, 2020 SISP at Schedule "A".

that is contrary to the law as outlined in *Redwater* and secure the return of all of its secured debt while avoiding the EOL Obligations of Bow River.

40. Notwithstanding that it is not Bow River who is bringing the SAVO Application, the AER and the OWA submit that the factors set out in section 36(3) of the *CCAA* are not satisfied in this case, and neither are the principles set out in the case of *Royal Bank of Canada v. Soundair Corp.*[28] ("***Soundair***"), such that this Court should not grant the SAVO.

41. Section 36(3) of the *CCAA* sets out the following factors to be considered on an application to dispose of assets outside of the ordinary course of business:[29]

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

42. The AER and the OWA will address each of these factors from section 36(3) below.

Whether the process leading to the proposed sale or disposition was reasonable in the circumstances

43. The OWA and the AER do not take issue with the process of the SISP conducted by Bow River to try and generate offers for a sale of assets or investment in its business.

[28] *Royal Bank of Canada v. Soundair Corp.* 1991 CarswellOnt 205, 83 DLR (4th) 76 (ONCA), at TAB "7" of the 227 Alberta's Book of Authorities ("**227 Alberta's BOA**").
[29] *CCAA*, section 36(3), at **TAB "1"**.

It is the result of the SISP and the fact that the SH APA will not address all of the EOL Obligations of Bow River, combined with the fact that it is the only transaction being brought forward for approval by this Court, that concerns the AER and the OWA.

44. Further, the fact that the SISP was conducted in accordance with its terms does not alleviate the responsibility of Bow River to comply with its EOL Obligations associated with its Licensed Assets. Both Bow River and 227 Alberta were aware of the EOL Obligations associated with the Licensed Assets and that those obligations would have to be satisfied prior to the creditors, including 227 Alberta, obtaining value from the estate of Bow River.

45. A final concern of the AER and the OWA with the process leading to the SH APA becoming a successful bid is the value of the credit bid compared to the actual value of the assets that are the subject of the SH APA. The AER was only advised after the completion of the SISP that the SH APA submitted by 227 Alberta represented the entirety of the debt owed to the debenture-holders of Bow River and that it was not reflective of the value of the assets being purchased, which is much lower than the amount of the bid.[30] The AER and the OWA had particular concerns regarding this information as this was not disclosed before or at the approval of the SISP.

46. This information is directly contradictory to the materials filed by Bow River in support of the SISP, which characterize the Stalking Horse Bid as a "baseline" or "minimum" bid to create competitive tension for the purchase of the Licensed Assets in the SISP, which is discussed in further detail below.

47. The AER and the OWA submit that the Court, in analyzing whether the process that was conducted to generate bids for a sale of assets or investment in Bow River was reasonable in the circumstances, is entitled to consider all of the foregoing.

Whether the monitor approved the process leading to the proposed sale or disposition

48. The Monitor did approve of the process leading to the proposed sale or disposition. The Monitor was also advised prior to approval of the SISP of the AER's concerns regarding

[30] AER Affidavit, at para. 22 and Exhibit "D".

the form of the SH APA and that it may object to the result if there would remain unfunded end-of-life obligations at the end of the SISP.

49. This factor does not override the Court's ability to consider or approve of any transaction brought forward as a result of the SISP.

Whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

50. The AER and the OWA are not aware of the Monitor's position in respect of this factor.

The extent to which the creditors were consulted

51. As outlined above and below, the AER and the OWA are not creditors of Bow River. However, Bow River and the Monitor did consult with the AER prior to the SISP Application. After that consultation the AER raised its concerns with both Bow River and the Monitor prior to approval of the SISP in respect of the structure of the SH APA and if the effect of the sales process is that 227 Alberta selectively bids on assets to reduce its debt while leaving unfunded liabilities behind.

52. The AER also raised those same concerns with the Court on July 24, 2020, including the fact that at the end of the sales process if the EOL Obligations of Bow River were not fully satisfied, then the AER may object to any transaction brought forward by Bow River.

The effects of the proposed sale or disposition on the creditors and other interested parties

53. It is relevant to consider at this stage the concerns of the AER and the OWA, as both entities qualify as interested parties who are acting for and on behalf of the Alberta public and other industry participants in ensuring that EOL Obligations of Bow River are satisfied through any proposed sale or disposition of the Licensed Assets.

54. If the SH APA is completed, it would result in significant unfunded estimated deemed liabilities of approximately $35,263,086 (the "**Remaining Liabilities**") remaining in the Bow River estate. Those Remaining Liabilities would have to be addressed by the OWA and the orphan fund at a significant cost to both other industry participants and, potentially, the Alberta public.

55. The OWA and the AER submit that the effect of the SH APA improperly favours the secured creditors of Bow River over the requirement that Bow River address its EOL Obligations prior to other creditors obtaining a benefit from the estate of Bow River. The SH APA provides a return of the entire amount outstanding to 227 Alberta as the secured creditor of Bow River while leaving behind Bow River's substantial EOL Obligations that will not be addressed through the proposed transaction being approved by the SAVO.

56. The AER and OWA submit that this effect on other interested parties is detrimental, significant and in these circumstances militates against granting the SAVO as presented to this Court by 227 Alberta. 227 Alberta, through the SAVO, is asking this Court to authorize Bow River to avoid complying with the law as set out in the decision of *Redwater*, complying with its EOL Obligations, and leaving such obligations to be addressed by the OWA.

57. The AER and the OWA seek to enforce the public duties of Bow River, which are not duties owed to the AER and OWA as a creditor. The AER's consistent position throughout this proceeding has been that it will not allow for the sale of assets to a creditor where there will remain any unfunded EOL Obligations of the insolvent entity.

58. None of the case law relied upon by 227 Alberta to support its position that SAVO should be granted involve circumstances where the proposed transaction would result in unsatisfied environmental or regulatory obligations contrary to the general law of the Province of Alberta.

59. Just because Bow River is in an insolvency proceeding and has conducted a SISP, does not relieve it from complying with its regulatory obligations. This was a key finding in the *Redwater* decision:

> The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licenses can be transferred only to other licensees nor that the Regulator retains authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's

> favour. Licensing requirements continue to exist during bankruptcy and there is no reason GTL cannot comply with them.[31] [emphasis added]

60. The AER and the OWA submit that there will be significant negative impacts on interested parties, including, but not limited to, the orphan fund, industry participants and, possibly, the public of Alberta if the SAVO is granted. This factor is a critical consideration of the Court in determining whether it should grant the SAVO. In the present circumstances, 227 Alberta has not provided any legal or factual basis to satisfy this factor and the Court should dismiss the SAVO Application.

Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value

61. The AER and the OWA submit that the consideration in this case, in the form of credit bid by 227 Alberta, is not reasonable and fair when all of the EOL Obligations of Bow River are not being satisfied through the SISP.

62. Approval of the credit bid by 227 Alberta contained in the SH APA would see a return of all of the amounts owed to 227 Alberta as the secured creditor of Bow River. As disclosed in the materials filed in the *CCAA*, 227 Alberta had common directors with Bow River and the debenture-holders who transferred their debt to 227 Alberta had been the secured lender for Bow River for a significant period of time. 227 Alberta knew at all times that prior to obtaining a return under its security, the EOL Obligations of Bow River would have to be addressed.

63. 227 Alberta, through the SH APA and the SISP is attempting to remove the most significant and valuable assets of Bow River from its estate while requiring the EOL Obligations of Bow River be satisfied and addressed by other parties, including other industry participants, the OWA and the orphan fund. The AER and the OWA submit that this transaction is not supportable at law and would result in a windfall to 227 Alberta if it were to obtain the 227 Assets without Bow River being required to address its EOL Obligations.

64. The inability of Bow River to continue its operations was not the result of actions taken by AER or the OWA. Rather, it is Bow River that determined to cease operations and 227 Alberta that refused to provide any more funding to Bow River.

---

[31] *Redwater*, para. 158, at **TAB "2"**.

65. In Confidential Exhibit 2 attached to the Affidavit of Rob Dumaine sworn on October 14, 2020, it is clear that the 227 Assets have value and the remaining deemed assets of Bow River will not be sufficient to satisfy Bow River's remaining EOL Obligations.[32] This is neither reasonable nor fair when taking into account the significant negative impact the consideration being paid for the 227 Assets will have on the estate of Bow River and its ability to satisfy its EOL Obligations.

66. The substantive findings of the SCC in *Redwater* were not unknown to 227 Alberta and ignorance of those findings does not assist it in any of its arguments that this Court must now grant the SAVO. The findings in *Redwater* support the position of the AER and OWA that it is a public duty of Bow River to fully satisfy its EOL Obligations and the value from the assets of the estate will not be transferred to creditors until those EOL obligations have been addressed.

67. This requirement was specifically addressed by the SCC in *Redwater* where it made the following comments in analyzing whether the AER and OWA, by enforcing the regulatory obligations associated with Redwater's assets, were acting as a creditor:

> Compliance with the LMR conditions prior to the transfer of licenses reflects the inherent value of the assets held by the bankrupt estate. Without licenses, Redwater's *profits `a prendre* are of limited value at best. All licenses held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities.[33]

68. Similarly, if this Court allows 227 Alberta to obtain a transfer of assets pursuant to the SAVO, this will result in both Bow River and 227 Alberta having received the benefit of the remaining Licensed Assets over their life-cycle, avoiding the payment of the Remaining Liabilities and requiring that third-parties and other industry participants bear those cost of abandoning and reclaiming any Licensed Assets remaining in the estate of Bow River.

69. 227 Alberta has provided no authority to this Court as to why it is not bound by the findings of the SCC in the *Redwater* decision on this point. There is also no authority

---

[32] AER Affidavit at para. 19.
[33] *Redwater*, para. 157, at **TAB "2"**.

provided for approving a stalking-horse bid for assets in a *CCAA* proceeding without satisfying the EOL Obligations of Bow River. As further noted by the SCC in *Redwater*:

> Accordingly, end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt effect by an environmental condition or damage in order to fund remediation (see s. 14.06(7). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by any environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that section 14.06(7) was unavailable to the Regulator, the Abandonment Orders and LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* – rather it facilitates them.[34] [emphasis added]

70. A critical part of this passage also highlights a flaw in the argument advanced by 227 Alberta in support of the SAVO Application. The Licensed Assets of Bow River are considered as a whole (both the Licensed Assets 227 Alberta is proposing to acquire and the Licensed Assets that will remain in the estate of Bow River). The submissions by 227 Alberta regarding the quantum of liabilities that will be removed from the estate of Bow River by the SH APA are irrelevant if Bow River is unable to satisfy the Remaining Liabilities.

71. All of the Licensed Assets are required to satisfy all of the EOL Obligations, and it is not correct to say that because 227 Alberta is prepared to assume the liabilities associated with the 227 Assets that the transaction proposed somehow complies with the determination made by the SCC in *Redwater*.

72. The AER and the OWA submits that the comments of the SCC in *Redwater*, as they pertain to the ability of an insolvent licensee to avoid its end-of-life obligations in favor of the creditors of its estate, are equally applicable to the present circumstances and

[34] *Redwater*, para. 159, at **TAB "2"**.

proceedings under the *CCAA*. These findings support the position of the AER and the OWA that the SAVO as presented to the Court should not be granted and the SAVO Application should be dismissed.

73. 227 Alberta is not able to satisfy the factors under section 36(3) of the *CCAA*. Based on the foregoing, the AER and OWA submit that it also does not satisfy the third *Soundair* principle in that granting the SAVO is not in the interests of all parties or stakeholders of Bow River.

Issue 2 - Whether it is appropriate to grant a Receivership Order over the Property of Bow River **Answer: Yes**

It is Just and Convenient to grant a Receivership Order

74. The Court has jurisdiction to grant a Receivership Order pursuant to section 13(2) of the *Judicature Act*, RSA 2000, c J-2:[35]

> An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

75. As an interested party, the Applicant also applies under section 99(a) of the *Business Corporations Act*, RSA 2000, c B-9:[36]

> On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> > (a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;

76. Further, the OWA relies on section 106.1 of the *Oil and Gas Conservation Act*, RSA 2000, c O-6:[37]

> The Regulator may, subject to the regulations, apply to the Court of Queen's Bench for the appointment of a receiver, receiver-manager, trustee or liquidator of the property of a licensee.

---

[35] *Judicature Act*, RSA 2000, c J-2, section 13(2), at **TAB "3"**.
[36] *Business Corporations Act*, RSA 2000, c B-9, section 99(a), at **TAB "4"**.
[37] *Oil and Gas Conservation Act*, RSA 2000, c O-6, section 106.1, at **TAB "5"**.

77. The OWA was specifically delegated with the AER's authority under section 106.1 to bring applications to appoint a receiver, receiver-manager, trustee or liquidator of the property of a licensee.[38]

78. Respecting the OWA's status to bring an Application to appoint a Receiver – being a creditor is not a prerequisite. This Honourable Court in *Alberta Health Services v. Networc Health* Inc. ("***Networc***"), held "there is nothing on the face of this legislation that requires such an application for an appointment of a receiver to be made by a creditor".[39]

79. In *Networc*, Alberta Health Services ("**AHS**") initially claimed to be a "contingent creditor" of Networc Health Inc. ("**Networc**") as it had filed a Statement of Claim seeking unquantified damages from Networc and claiming it had committed an act of insolvency. Romaine J. held:[40]

> In summary, although Alberta Health submitted when it originally applied for a receivership order that it had status to do so as a "contingent creditor", such standing was not required under section 46 of the BIA or under section 13(2) of the *Judicature Act* and the issue of whether or not Alberta Health was in fact a contingent creditor is not determinative of its status. Alberta Health is clearly a major stakeholder with respect to the operations and financial health of Networc ...

80. It is unnecessary to determine whether the OWA is a creditor of Bow River in the present case. The OWA acts for the benefit of, and on behalf of, the Alberta public and is a major stakeholder in seeing the EOL Obligations of Bow River satisfied to the fullest extent possible.

81. As such, the OWA submits that it has standing to bring an application for the Receivership Order. Receivership Orders have been granted in similar circumstances in a number of other matters.[41]

---

[38] *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, section 3, at **TAB "6"**.
[39] *Alberta Health Services v. Networc Health Inc.*, 2010 ABQB 373 ("***Networc***"), at paras. 7-8, 14, and 19, at **TAB "7"**.
[40] *Networc*, at paras. 19 and 60, at **TAB "7"**.
[41] Receivership Order of Lexin Resources Ltd., granted in Court of Queen's Bench Action No. 1701-03460, granted on March 20, 2017 and filed on March 22, 2017, at **TAB "8"**; Receivership Order of Houston Oil & Gas Ltd. granted in Court of Queen's Bench Action No. 1901-14615 granted and filed October 29, 2019, at **TAB "9"**.

Tripartite Test

82. In determining whether to grant relief pursuant to section 13(2) of the *Judicature Act*, the Court has adopted the same test used for granting interlocutory injunctive relief 14. The "tripartite test" for interlocutory injunctive relief was outlined by the Supreme Court of Canada decision in *RJR - MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 which was cited in *MTM Commercial Trust v. Statesman Riverside Quays Ltd*., 2010 ABQB 647 ("***MTM Commercial'***) as follows:[42]

a. a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;

b. it must be determined that the moving party would suffer "irreparable harm" if the motion is refused; and

c. an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience".

[42] *MTM Commercial Trust v. Statesman Riverside Quays Ltd.,* 2010 ABQB 647 ("***MTM Commercial***"), at para. 12, at **TAB "10"**.

Serious Issue to be Tried

83. As outlined in *MTM Commercial*, in determining whether there is a serious issue to be tried, the Court will look at "the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial".[43]

84. The OWA, supported by the AER, has established a strong prima facie case that Bow River is not able to exercise care and control of its Licensed Assets after October 29, 2020 (which is a breach of the *OGCA*) and has resulted in the issuance of the Suspension and Abandonment Order against Bow River. Bow River also has no ability (financially or operationally) to comply with the Suspension and Abandonment Order after October 29, 2020.

85. The AER And OWA have significant concerns regarding what will happen in respect of the Licensed Assets (especially those that are continuing to produce) of Bow River once it ceases operations, no longer has care and control of the Licensed Assets, and no longer has the protection of the *CCAA* proceedings.

86. The AER and OWA submit that there is no practical or legal basis for which to deny the Receivership Application as a result of all of these significant issues.

Irreparable Harm Test

87. When reviewing this factor, the OWA would have to show that failure to grant the Receivership Order would "give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured".[44]

88. It is submitted that failure to appoint a Receiver could have significant environmental risks if the Licensed Assets of Bow River are not properly transferred to a person who has proper funding to continue operations or, alternatively, shut in, seal and lock assets in the proper manner in accordance with Bow River's regulatory obligations. Additionally, if there is no stay of proceedings continued after expiry of the *CCAA* proceedings there are also concerns that other creditors will take steps to commence enforcement proceedings or terminate leases or other agreements associated with the

[43] *MTM Commercial*, at para. 52, at **TAB "10"**.
[44] *MTM Commercial*, at para. 56, at **TAB "10"**.

Licenses Assets. The harm cannot be quantified in monetary terms that could be paid by Bow River.

Balance of Convenience Test

89. This factor requires the Court to assess which of the parties would suffer greater harm from the granting or refusal of an interlocutory injunction, or in this case, which party would suffer greater harm in the granting or refusal of the Receivership Order.

90. In *BG International Ltd. v. Canadian Superior Energy Inc*., the Court of Appeal dealt with an appeal of a decision appointing an interim receiver to take control of an oil well operated by Canadian Superior Energy Inc. located off the coast of Trinidad and Tobago. The receivership order at issue was granted under the *Judicature Act* and the Court of Appeal provided the following commentary with respect to balancing the rights of the parties:[45]

> In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:
>
> > With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the Judicature Act, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

91. Bow River is not opposing the Receivership Application and has advised that it is working cooperatively with the AER to ensure that its Licensed Assets do not pose any health, safety or environmental risks[46].

---

[45] *BG International Ltd. v. Canadian Superior Energy Inc*., 2009 ABCA 127, at para. 17, at **TAB "11"**.
[46] Supplemental Affidavit of Daniel G. Below sworn on October 22, 2020 at para. 6

92. Bow River has also advised that it is ceasing operations, will not have any directors or officers and all of its employees and contractors will be terminated on October 29, 2020. Accordingly, the AER and the OWA do not believe that Bow River would be in a position to complete the transaction contemplated by the SH APA, even if this Court were to grant the SAVO.[47]

93. Bow River has also advised it no longer has the financial resources to operate its assets in accordance with the regulatory and legislative requirements after October 29, 2020.[48] This is a significant point of concern for the AER and the OWA especially as after October 29, 2020, if no Receiver is appointed, there does not appear to be any one who is a valid licensee and who will be able to have proper care and control of the Licensed Assets.

94. Bow River has also not filed an application seeking an extension of the stay of *CCAA* proceedings past October 30, 2019. Bow River has served the Discharge Application to repay the Interim Financing advanced by 227 Alberta from cash available on hand. This completely alleviates any prejudice that 227 Alberta may suffer as a result of Bow River being placed into receivership and necessitates that a Receiver be appointed over the Licensed Assets.

95. Finally, in the Discharge Application Bow River is also seeking the discharge of the Monitor. If the Monitor is discharged there can be no further *CCAA* proceedings to advance.

96. 227 Alberta has not addressed any of these concerns in its application materials or its Brief of Law and has not provided the AER, OWA or the Court with any basis as to how Bow River would continue to operate its Licensed Assets in compliance with its regulatory obligations after October 29, 2020, even if the SAVO Application is granted.

97. Further, this is not a situation where the loss of management control could have "devastating effects" on the Bow River's business, as the decision to cease operations has already been made by Bow River.

---

[47] OWA Affidavit, at para. 14 and Exhibit “D”; AER Affidavit, at para. 27 and Exhibit “I”.
[48] OWA Affidavit, at para. 14, and Exhibit “D”; AER Affidavit, at para. 27 and Exhibit “I”.

98. The position of 227 Alberta is that it will somehow be prejudiced if the SAVO is not approved by this Honourable Court and a SAVO granted. 227 Alberta has not provided any evidence of prejudice other than bald assertions.[49] 227 Alberta has failed to demonstrate why Bow River should not be required to fulfill its public duties in respect of the EOL Obligations or how requiring Bow River fulfill those public duties somehow prejudices 227 Alberta's position as a secured creditor.

99. The AER and the OWA are acting in their capacity to regulate the Alberta oil and gas sector, not as a creditor, and in a manner that has been held to be a valid and proper enforcement of valid provincial law. This activity by the AER and OWA simply cannot be found to cause prejudice to 227 Alberta. At all times, 227 Alberta was aware of the EOL Obligations, the position of the AER and the OWA that they would not support any offers that did not fully address all of the EOL Obligations and that Bow River had a public duty to comply with these obligations (even if the effect of complying with those obligations was to diminish the value of the estate over which 227 Alberta may be able to recover its secured claim).

100. The findings by the SCC in *Redwater* support this conclusion, including the following:

> Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing Abandonment Orders or maintaining the LMR requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.
>
> …
>
> These end-of-life obligations do not directly require Redwater to make payment to the Regulator. Rather they are obligations requiring Redwater to *do something*.
>
> …
>
> The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licenses. However, it is notable that, even apart from the LMR conditions, licenses are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator reserves the right to reject a proposed transfer where it determines the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.[50]

---

[49] Affidavit of Robert Dumaine, at paras. 22 and 27.
[50] *Redwater*, at paras. 135, 139, and 155, at **TAB "2"**.

101. If a Receiver is appointed, subject to 227 Alberta obtaining a BA Code, it would have the opportunity to participate in any sales process that is conducted by the Receiver in respect of the Licensed Assets. The security that 227 Alberta holds against the Licensed Assets will be treated in accordance with the priority afforded it and pursuant to the guidance provided by the SCC in *Redwater*. There is no prejudice in this to the secured position of 227 Alberta.

102. When weighing the position of the parties, it is respectfully submitted that any balancing of interests favors the position of the AER and the OWA: Bow River must satisfy its EOL Obligations prior to returning any value from its estate to creditors and a Receivership Order is warranted in the circumstances.

103. It is respectfully submitted that there are no appropriate remedies short of appointing Receiver over the Licensed Assets in the current case that would protect the interests of all of the stakeholders of Bow River.

Receivership is Appropriate in the Circumstances

104. The Ontario Supreme Court considered competing *CCAA* and Receivership Application in *Romspen Investment v. 6711162* and while this is not the exact circumstances in the present case, the rational in that case is equally applicable to the competing SAVO Application and Receivership Application:[51]

> In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:
>
> > The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed....
> >
> > While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument

[51] *Romspen Investment v. 6711162*, 2014 ONSC 2781, at paras. 59-60, at **TAB "12"**.

> permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager. [emphasis added]
>
> The CCAA Applicants seek the making of an initial order under CCAA s. 11.02. In broad terms, the purpose of the CCAA is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. [emphasis added]

105. Bow River has advised that it is no longer going to operate its business and it does not require the protection of the *CCAA* past October 30, 2020. There is at least some concern that if the stay of proceedings is allowed to expire under the *CCAA* and there is no corresponding stay of proceedings under a Receivership Order, this could significantly impact the Licensed Assets of Bow River by other parties attempting to take enforcement or termination steps in respect of those Licensed Assets.

106. This further makes it appropriate to appoint the Receiver and put in place a stay of proceedings under the terms of the proposed Receivership Order in order to allow an orderly liquidation of the assets of Bow River by the Receiver without resulting in all of the Licensed Assets being orphaned and with the liability and responsibility to address any of remaining Licensed Assets falling entirely on the OWA.

107. There is no evidence before this Court that the EOL Obligations of Bow River may not be satisfied through another insolvency proceeding or that the SH APA is the only way that the EOL Obligations associated with the 227 Assets will be addressed. There is a good chance that a Receiver may be able to sell the Licensed Assets of Bow River and deliver a significant reduction of the deemed liabilities associated with the EOL Obligations.

The Objection to the SAVO is not a Collateral Attack

108. 227 Alberta has alleged that the AER's decision to close 227 Alberta's application for a BA Code in order to be eligible to hold regulatory licenses and approvals constitutes a collateral attack and an end-run on the SISP Order.

109. The Supreme Court of Canada in *R. v. Wilson* defined collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgement." [emphasis added][52]

110. In *British Columbia (Workers' Compensation Board)*, the SCC also stated that,

> The rule against collateral attack simply attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings…[i]t prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route. [emphasis added][53]

111. The SCC clarified the doctrine of collateral attack in *Canada (Attorney General) v. TeleZone Inc.*, stating that,

> "the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it". [emphasis added][54]

112. The Alberta Court of Appeal in *Ernst & Young Inc. v. Central Guaranty Trust Co.* also described the purpose of the rule against collateral attack as seeking to ensure that,

> A judicial order pronounced by a court of competent jurisdiction is not brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it.[55]

113. Simply put, all court orders must be granted in the proper forum or else they will be subject to failure due to the doctrine of collateral attack.

---

[52] *R v. Wilson*, [1983] 2 SCR 594, at para. 8, at **TAB "13"**.
[53] *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, at para. 28, at **TAB "14"**.
[54] *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at para 61, at **TAB "15"**.
[55] *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337, at para. 48, at **TAB "16"**.

114. As set out above, the AER made its concerns clear from the outset and specifically advised the parties and the Court that the AER was reserving its rights in respect of the SAVO and may object to any result from the SISP that did not see all of the EOL Obligations satisfied.[56] Notwithstanding that no superior offers were received, the SH APA still violates the ratio of the SCC decision in *Redwater* and provides a return from the Licensed Assets to the secured creditors ahead of the satisfaction of the EOL Obligations by Bow River.

115. Additionally, 227 Alberta was aware at all time of the requirement that it obtain a BA Code in order to be able to hold any licenses or approvals from the AER (as is evidenced by the terms of the SH APA itself).

116. Directive 067, at section 4, outlines what constitutes unreasonable risk and allows the AER to consider a multitude of factors when determining whether to issue a BA Code, including, but not limited to: (i) the compliance history of the applicant, including its directors, officers, and shareholders, in Alberta and elsewhere, including in relation to any current or former AER licensees that are directly or indirectly associated or affiliated with the applicant or its principals; (ii) the compliance history of entities currently or previously associated or affiliated with the applicant or its directors, officers, and shareholders; (iii) outstanding non-compliances of current or former AER licensees that are directly or indirectly associated or affiliated with the applicant or its directors, officers or shareholders; and (iv) involvement of the applicant's directors, officers, or shareholders in entities that have initiated or are subject to bankruptcy or receivership proceedings or in current or former AER licensees that have outstanding non-compliances.[57]

117. On October 6, 2020, with respect to 227 Alberta's eligibility to obtain a BA Code, the AER properly concluded that the application was incomplete. The AER was unable to determine whether or not unreasonable risk existed as a result of the ongoing *CCAA* proceedings of Bow River and the inter-related nature of the management of Bow River and 227 Alberta.

[56] AER Affidavit, at para. 12 and Exhibit "C".
[57] AER Affidavit at Exhibit "G", Directive 067, at section 4

118. None of the foregoing steps taken by the AER amounts to a collateral attack on the SISP Order as alleged by 227 Alberta but is simply the result of the AER requiring Bow River to comply with its regulatory obligations associated with the Licensed Assets to satisfy the EOL Obligations and 227 Alberta being able to satisfy the eligibility criteria in order to obtain a BA Code.

The Approval of the SISP and the SH APA does not make SAVO Res Judicata

119. 227 Alberta alleges that the AER is barred from bringing its objection to the SAVO Application on the basis that the issues are *res judicata*.

120. This issue of *res judicata* was considered in *Forrest v. Vriend*, where the Court held:

> TD and Vriend point out that the doctrine of res judicata is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of res judicata was concisely explained by Cromwell J.A., as he then was, in Hoque v. Montreal Trust Co. of Canada (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:[58]
>
> > Res judicata is mainly concerned with two principles. First, there is a principle that "… prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "… prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": ibid at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.[emphasis added]

121. In considering estoppel, the doctrine of *res judicata*, and collateral attack, a Court "must retain a residual discretion to refuse to apply any form of estoppel when to do so would be contrary to the requirements of justice" and the Court must "balance the public interest in the finality of ligation with the public interest in ensuring that justice is done".[59]

122. It is important also to keep in mind the nature of the SISP process undertaken by Bow River and that approval of the SISP does not prevent the AER from objecting to the

[58] *Forrest v. Vriend*, 2015 BCSC 1878, at para. 25, at **TAB "17"**.
[59] *Royal Bank v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192, at para. 54, at **TAB "18"**.

SAVO. Put another way, the approval of the SISP and the SH APA by the Court does not automatically result in the SAVO being granted.

123. The AER specifically advised legal counsel for Bow River and the Monitor on July 21, 2020 that it would be reserving its position on the SISP and the stalking horse bid pending the outcome of the SISP. The AER also advised in that correspondence that it had concerns regarding the SISP if the effect of the sales process was that 227 Alberta selectively bids on assets to reduce its debt while leaving unfunded liabilities behind.[60]

124. At the time the AER raised these concerns on July 21, 2020, 227 Alberta and Bow River had common directors, namely Mr. Eresman who was a director of both entities as of July 21, 2020[61] and until August 7, 2020. It is difficult to accept the argument that 227 Alberta could not have been aware of the AER's concerns regarding 227 Alberta's stalking horse bid at this time and yet it proceeded with submitting its stalking-horse bid on only a portion of the Licensed Assets of Bow River.

125. The AER also specifically put its position on the record at the July 24, 2020 application before the Honourable Madam Justice Topolniski.[62] The Court explicitly acknowledged this in its determination when approving the SISP and the SH APA.[63] Both Bow River and 227 Alberta were in attendance at the SISP Application and made no submissions contrary to the AER's stated position that it was reserving its rights to object to any sale transaction generated from the SISP.

126. If 227 Alberta's position was that the AER could not object to the SH APA at the SAVO Application, that position should have been advanced before Madam Justice Topolniski at the SISP Application. 227 Alberta made no such submissions and now attempts to argue that AER is not able to object to the SAVO, approval of the transaction contemplated by the SH APA or that it somehow "waited in the weeds" on this issue. The evidence before this Court clearly demonstrates that this is not an accurate characterization of the AER's position or the steps it took to raise it concerns both with Bow River, the Monitor and the Court prior to and at the SISP Application.

---

[60] AER Affidavit, at para. 9 and Exhibit "B".
[61] AER Affidavit at Exhibit "D"
[62] AER Affidavit, at para. 12, Exhibit "C".
[63] AER Affidavit, at para. 12, Exhibit "C" at page 24, lines 33-35

127. The materials filed by Bow River in support of the SISP Application also make clear the following:[64]

a. that Bow River will otherwise market all of its assets for sale through the proposed SISP[65];

b. the inclusion of the SH APA in the SISP was to set a baseline for the bidding in that process and provide competitive tension to the process[66];

c. in the Brief of Argument presented to the Court, Bow River made the following statements to the Court in respect of the SISP:

i. the purchase price is intended to act as a baseline or minimum price for the bids received in the SISP (paragraph 93);

ii. Both the SH APA and the SISP provide for a further application before the Court for a vesting order in respect of 227 Alberta's purchase of the Stalking Horse Assets (paragraph 93);

iii. closing the transactions contemplated in the SH APA is conditional upon the Court issuing a vesting order (paragraph 93);

iv. an application before the Court will be required to fully implement and close a sale to 227 Alberta (paragraph 93);

v. the SISP provides flexibility to potential bidders to purchase all or substantially all of Bow River's assets, or a combination thereof, or to make an offer to restructure Bow River through a recapitalization, reorganization, or similar transaction (paragraph 100); and

vi. the SISP and the stalking horse process establish a sales process which can generate the best fair market offers and

[64] Affidavit of Daniel Belot, at para. 6 and Exhibit "E".
[65] Third Belot Affidavit at para. 39
[66] Third Belot Affidavit at para. 43

> provide the foundation for a sale that will satisfy the Court's subsequent assessment on an application for a vesting order (paragraph 102).

128. It is clear from the materials filed in respect of the SISP that the AER would have an opportunity to raise any concerns respecting the outcome of the SISP at the application to approve any transactions brought forward by Bow River and that the AER would be required to provide approval and authorizations to Bow River and 227 Alberta under the terms of the SH APA.

129. The SISP marketed all of the assets of Bow River and it was possible that Bow River may have received offers for the sale of all of its Licensed Assets or for an investment in its operations that would allow it to continue to operate and/or fully satisfy all of its EOL Obligations such that a transaction could be consummated under the SISP.

130. Until the AER and OWA were advised of the results of the SISP, including whether all of the EOL Obligations of Bow River would be satisfied through that process, the AER and OWA could not possibly have been prevented from objecting to any application to approve a transaction brought forward by Bow River or any other party.

131. In the cases of *Brainhunter Inc., Re* and *CCM Master Qualified Fund Ltd. v. Bultip Power Technologies Ltd.*, the Court made clear that the application for approval of a sales process is clearly distinct from the application for approval of an actual sale.[67]

132. The issue of whether the SH APA could be approved (or not) if all of the EOL Obligations were not addressed by Bow River was neither raised nor argued before Madam Justice Topolniski. The reservation of rights by the AER to Bow River prior to the SISP Application and on the Court record were raised at the relevant time and this is not a relitigating of any issues that were previously addressed. All parties were made aware of the AER's objection to the approval of any proposal which would leave any EOL Obligations in the estate of Bow River that would have to be addressed by the OWA from the orphan fund, other industry participants, or, potentially, the Alberta public.

---

[67] *Brainhunter* Inc., 2009 CarswellOnt 8207, 62 CBR (5th) 41 (OntSCJ), at TAB "9" of 227 Alberta's BOA and *CCM Master Qualified Fund Ltd. v. Bultip Power Technologies Ltd.*, 2012 ONSC 1750, at para. 6, at TAB "8" of 227 Alberta's BOA.

133. The AER and the OWA also submit that 227 Alberta cannot rely upon the concept of *res judicata* and issue estoppel to prevent the AER from carrying it out its regulatory duties and obligations. To allow the application of the legal principle on this basis would be contrary to the requirements of justice and contrary to the findings made by the SCC in *Redwater*[68].

134. Further, Bow River specifically advised the AER that additional assets may be transferred through the result of the SISP and there was no certainty on what the final proposal would be that would be subject of the SAVO[69].

135. The AER's position at the SISP Application was reasonable and permitted the parties to attempt a sales process to try and find sales for all of its Licensed Assets or investment in its business and it is clear that this issue is not barred by the doctrine of *res judicata*. Further, there would have been no reason for the AER to pursue an appeal of the Order approving the SH APA in the context of the SISP when that SH PSA may not have been the successful bidder and was contingent on obtaining approval of the Court through the form of a SAVO.

136. 227 Alberta alleges that the AER has supported stalking horse bids in the receivership of Traverse Energy Ltd. ("**Traverse**") and in the *CCAA* proceedings of Strategic Oil & Gas Ltd and Strategic Transmission Ltd. ("**Strategic**").

137. These matters are distinguishable from the current proceedings for a number of reasons, including, but not limited to: (i) the sales process for Strategic was developed in conjunction with the AER; (ii) the Strategic sales process contemplated significant involvement with the AER; (iii) the proposal in Traverse required final regulatory approval by the AER; (iv) in Strategic the AER ultimately opposed approval of the stalking-horse bid submitted in that proceeding as it did not address all of the end-of-life obligations of Strategic[70]; and (v) the Traverse bid did not involve issues with unfunded liability or environmental obligations that would be left to be addressed by the OWA from the orphan fund. These two separate insolvency proceedings are not relevant to any of

[68] *Redwater*, para. 122, at **TAB "2"**.
[69] AER Affidavit, at Exhibit "C", Transcript of July 24, 2020 Proceedings, page 23, lines 1-6.
[70] Fifth Report of KPMG Inc. filed on January 23, 2020, in its capacity as the Monitor in the Strategic *CCAA* proceedings at para. 14, at **TAB "19"**.

the considerations before the Court in respect of whether or not it should grant the SAVO in favour of 227 Alberta.

The AER has acted in Good Faith

138. 227 Alberta has brought an Application pursuant to section 18.6 of the *CCAA*, alleging that the AER has breached the good faith requirement of the *CCAA* for failing to raise issues concerning the SH APA; however, all concerns respecting the SH APA were made clear to 227 Alberta, Bow River and the Monitor, including at the July 24, 2020 SISP Application.

139. While this provision has recently been made an express requirement of the *CCAA*, it is a well established requirement that parties must act in good faith in insolvency proceedings. The good faith requirement does not mean the AER and OWA are prevented from pursuing regulatory compliance by Bow River. To interpret section 18.6 of the *CCAA* in that manner would be an absurd result and would not accord with the intention of that provision or the findings of the SCC in *Redwater*, including the following:

> …it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them[71].

The AER has not engaged in Improper Maneuvering

140. It has long been held that the purpose of the *CCAA* is, among other things, intended to: (i) maintain the status quo; (ii) prevent any manoeuvres for positioning among creditors; and (iii) protect creditors by ensuring a broad balancing of stakeholder interests.

141. The Court in *4519922 Alberta Inc., Re*, confirmed the *CCAA* is meant to prevent "any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors" and held that without a stay of proceedings, "such manoeuvres could give an aggressive creditor an advantage to the prejudice of others

[71] *Redwater*, para. 122, at **TAB "2"**.

who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed." [72]

142. Neither the AER nor the OWA is seeking to place themselves in a "preferred position compared to that of the other secured creditors". The AER and OWA are seeking to require that Bow River comply with its regulatory obligations and public duty owed to all of the Alberta public. Further, as outlined above, neither the AER nor OWA are a creditor which also makes this allegation completely unfounded.[73]

143. The AER's insistence on Bow River's compliance with its regulatory obligations and the Supreme Court of Canada's decision in *Redwater* cannot be described as "undue maneuvering" as alleged, including because the AER is not a creditor.

Interim Injunction

144. In response to the allegations by 227 Alberta that an interim injunction is necessary to require Bow River to transfer the Licensed Assets subject to the SH APA, it is our submission that 227 Alberta does not meet the test for an injunction, including because no irreparable harm will be suffered.

145. 227 Alberta is does not have a BA Code and is not eligible to be a licensee or obtain a transfer of any of the Licensed Assets from Bow River. Moreover, the AER cannot be required through an injunction to transfer Licensed Assets that would not be capable of being transferred by the licensee, Bow River. The AER retains its discretion under Directive 006 to determine if any of the Bow River licenses can or should be transferred to another party only if and when any transfer application for the Licensed Assets is submitted. At present no such transfer application has been made by Bow River and 227 Alberta cannot circumvent that process simply by seeking an injunction in respect of the Licensed Assets of Bow River.

146. 227 Alberta has not provided any evidence of prejudice or a true issue to be tried. Bald assertions have been made that if an injunction is not granted, and Bow River's Licenses Assets are transferred to the care and control of another party, 227 Alberta will suffer irreparable harm. There is no evidence to support this and, to the contrary, if the care

[72] *4519922 Alberta Inc., Re*, 2015 ONSC 124, at para. 54, at **TAB "20"**.
[73] *Boutiques San Francisco Inc., Re*, 2004 CarswellQue 300, 5 CBR (5th) 174, at paras. 21-22, at **TAB "21"**.

and control of the assets is transferred to another party there is absolutely no prejudice to 227 Alberta. 227 Alberta, even in those circumstances, will retain its security interest in the Licensed Assets with the same priority that such security interest had previously and which interest remains subject to the EOL Obligations of Bow River (as the Licensed Assets always have).

147. An interim injunction is an extraordinary remedy to which 227 Alberta is not entitled. 227 Alberta is requesting an Order for specific performance. Specific performance is a remedy for breach of contract and can therefore only be granted against parties to that contract. The AER is also not a party to the SH APA and cannot be directed to complete the SH APA, including because there remain significant terms of the SH APA (as outlined above) that are not capable of being satisfied.

148. The interim injunction being sought would also interfere with the Suspension and Abandonment Order which is a valid exercise of the AER's regulatory powers and there is no legal or equitable basis to provide such extraordinary relief to 227 Alberta.

RELIEF REQUESTED

149. The Applicants respectfully requests that this Honourable Court:

a. dismiss the SAVO Application for a sale approval and vesting Order;

b. grant an Order terminating the stay of proceedings under the *CCAA*; and

c. grant an Order appointing the Receiver over the assets, undertakings, and property of Bow River located in Alberta.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October 2020.

MLT AIKINS LLP

Ryan Zahara/Catrina Webster
Counsel for the Orphan Well Association and the Alberta Energy Regulator

LIST OF AUTHORITIES

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to October 5, 2020

Last amended on November 1, 2019

À jour au 5 octobre 2020

Dernière modification le 1 novembre 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de

TAB 2

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

Counsel: Ken Lenz, Q.C., Patricia Johnston, Q.C., Keely R. Cameron, Brad Gilmour, Michael W. Selnes, for Appellants
Kelly J. Bourassa, Jeffrey Oliver, Tom Cumming, Ryan Zahara, Danielle Maréchal, Brendan MacArthur-Stevens, Chris Nyberg, for Respondents
Josh Hunter, Hayley Pitcher, for Intervener the Attorney General of Ontario
Gareth Morley, Aaron Welch, Barbara Thomson, for Intervener, Attorney General of British Columbia
Richard James Fyfe, for Intervener, Attorney General of Saskatchewan
Robert Normey, Vivienne Ball, for Intervener, Attorney General of Alberta
Adrian Scotchmer, for Intervener, Ecojustice Canada Society
Lewis Manning, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers
Nader R. Hasan, Lindsay Board, for Intervener, Greenpeace Canada
Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
Caireen E. Hanert, Adam Maerov, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Natural resources --- Oil and gas — Constitutional issues — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

"licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Natural resources --- Oil and gas — Statutory regulation — General principles

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

» en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA was in operational conflict with the provisions of the BIA that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.

Held: The appeal was allowed.

Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): There is no conflict between Alberta's regulatory regime and the BIA requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although G Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

BIA as encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. Only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en état des titulaires

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), s. 1(ddd), and ***Oil and Gas Conservation Act***, R.S.A. 2000, c. O-6 ("OGCA"), s. 1(1)(a)).

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

3 The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

4 Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the *BIA* empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

5 The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88 (Alta. Q.B.)) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171 (Alta. C.A.)) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

6 Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the *BIA* did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

7 For the reasons that follow, I would allow the appeal. Although my analysis differs from hers in some respects, I agree with Martin J.A. that the Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. The Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's regulatory regime can coexist with and apply alongside the *BIA*.

II. Background

A. Alberta's Regulatory Regime

8 The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

9 In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land. About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

10 A company's property interest in the oil or gas it seeks to exploit typically takes the form of a mineral lease with the Crown (but occasionally with a private owner). The company also needs surface rights so it can access and occupy the physical land located above the oil and gas and place the equipment needed to pump, store and haul away the oil and gas. Surface rights may be obtained through a lease with the landowner, who is often a farmer or rancher (but is occasionally the Crown). Where a landowner does not voluntarily grant surface rights, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

11 Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

12 The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by the Regulator. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The *Pipeline Act*, R.S.A. 2000, c. P-15, similarly prohibits the construction of pipelines without a licence (s. 6(1)). The *profit à prendre* in an oil and gas deposit may be bought and sold without regulatory approval. However, it is of little practical use on its own, as, without the licence associated with a well, the purchaser cannot "continue any drilling operations, any producing operations or any injecting operations" (*OGCA*, s. 11(1)), and, without the licence associated with a facility, the purchaser cannot "continue any construction or operation" (*OGCA*, s. 12(1)).

13 The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, *inter alia*, as "an orifice in the ground completed or being drilled ... for the production of oil or gas" (*OGCA*, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (*Pipeline Act*, s. 1(1)(t)).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

14 The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("*REDA*"). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

15 The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (*OGCA*, s. 18(1); *Pipeline Act*, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.

16 "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 (Alta. C.A.) ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation ... in the manner prescribed by the rules" (*Pipeline Act*, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings ... land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (*EPEA*, s. 1(ddd)). A further duty binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

17 A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

18 The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12, 2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

19 Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online). For the purposes of this appeal, I will be referring to the regulatory regime as it existed at the time of Redwater's insolvency.

20 As discussed in greater detail below, if either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator would refuse to approve the licence transfer. In such a situation, the Regulator would insist on certain remedial steps being taken to ensure that neither LMR would drop below 1.0. Although Directive 006, as it was in the 2013 version, required both the transferee and transferor to have a post transfer LMR of at least 1.0, during this litigation, the Regulator stated that, when licensees are in receivership or bankruptcy, its working rule is to approve transfers as long as they do not cause a deterioration in the transferor's LMR, even where its LMR will remain below 1.0 following the transfer. The explanation for this working rule is that it helps to facilitate purchases. The Regulator's position is that the Licensee Liability Rating Program continues to apply to the transfer of licences as part of insolvency proceedings.

21 The *OGCA*, the *Pipeline Act* and the *EPEA* all contemplate that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings. The *EPEA* achieves this by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim (s. 134(b)(vi)). The *EPEA* also specifically provides that an order to perform reclamation work (known as an "environmental protection order") may be issued to a trustee (ss. 140 and 142(1)(a)(ii)). The *EPEA* imposes responsibility for carrying out the terms of an environmental protection order on the person to whom the order is directed (ss. 240 and 245). However, absent gross negligence or wilful misconduct, a trustee's liability in relation to such an order is expressly limited to the value of the assets in the bankrupt estate (s. 240(3)). The *OGCA* and the *Pipeline Act* take a more generic approach to applying the various obligations of licensees to trustees in the insolvency context: they simply include trustees in the definition of "licensee" (*OGCA*, s. 1(1)(cc); *Pipeline Act*, s. 1(1)(n)). As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee.

22 Despite this, Alberta's regulatory regime does contemplate the possibility that some of a licensee's end-of-life obligations will remain unfulfilled when the insolvency process has run its course. The Regulator may designate wells, facilities, and their sites as "orphans" (*OGCA*, s. 70(2)(a)). A pipeline is defined as a "facility" for the purposes of the orphan regime (*OGCA*, s. 68(d)). Directive 006 stated that "a well, facility, or pipeline in the LLR program is eligible to be declared an orphan where the licensee of that licence becomes insolvent or defunct" (s. 7.1). An "orphan fund" has been established for the purpose of paying for, *inter alia*, the abandonment and reclamation of orphans (*OGCA*, s. 70(1)). The orphan fund is financed by an annual industry-wide levy paid by licensees of wells, facilities and unreclaimed sites (s. 73(1)). The amount of the levy is prescribed by the Regulator based on the estimated cost of abandoning and reclaiming orphans in a given fiscal year (s. 73(2)).

23 The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (*Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001), a non-profit organization overseen by an independent board of directors. It is funded almost entirely through the industry-wide levy described above, 100 percent of which is remitted to it by the Regulator. The OWA has no power to seek reimbursement of its costs. However, once it has completed its environmental work, it may be reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans. In recent years, the number of orphans in Alberta has increased rapidly. For example, the number of new orphan wells increased from 80 in the 2013-14 years to 591 in the 2014-15 years.

24 At issue in this appeal is the applicability during bankruptcy of two powers conferred on the Regulator by the provincial legislation. Both are designed to ensure that licensees satisfy their end-of-life obligations.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

25 The first power at issue in this appeal is the Regulator's power to order a licensee to abandon licensed assets, which is accompanied by statutory powers for the enforcement of such orders. Where a well or facility has not been abandoned in accordance with a direction of the Regulator or the rules or regulations, the Regulator may authorize any person to abandon the well or facility or may do so itself (*OGCA*, s. 28). Where the Regulator or the person it has designated performs the abandonment, the costs of doing so constitute a debt payable to the Regulator. An order of the Regulator showing these costs may be filed with and entered as a judgment of the Alberta Court of Queen's Bench and then enforced according to the ordinary procedure for enforcement of judgments of that court (*OGCA*, s. 30(6)). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 23 to 26).

26 A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (*OGCA*, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (*OGCA*, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator, or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (*OGCA*, ss. 108 and 110). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (*EPEA*, ss. 227 to 230, 240 and 245).

27 The second power at issue in this appeal is the Regulator's power to impose conditions on a licensee's transfer of its licence(s). As when it initially grants a licence, the Regulator has broad powers to consent to the transfer of a licence subject to any conditions, restrictions and stipulations or to reject the transfer (*OGCA*, s. 24(2)). Under Directive 006 and its 2016 replacement, the Regulator can reject a transfer even where both parties would have the required LMR after the transfer or where a security deposit is available to be posted in compliance with LMR requirements. In particular, the Regulator may determine that it is not in the public interest to approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

28 Where a proposed transaction would cause the transferor's LMR to deteriorate below 1.0 (or simply to deteriorate, in the case of an insolvent transferor), the Regulator insists that one of the following conditions be met before it will approve the transaction: (i) that the transferor perform abandonment, reclamation, or both, thus reducing its deemed liabilities, or (ii) that the transferor post a security deposit, thus increasing its deemed assets. Alternatively, the transaction may be structured to avoid any deterioration of the transferor's LMR by "bundling" the licences for spent wells with the licences for producing wells. A transaction in which the licenses for spent wells are retained while the licences for producing wells are transferred will almost always cause a considerable deterioration in a company's LMR.

29 During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.) , at para. 24). The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

30 Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources ... in

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the province" (*Constitution Act, 1867*, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.

31 However, the insolvency of an oil and gas company licensed to operate in Alberta also engages the *BIA*. The *BIA* is federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. It is validly enacted pursuant to Parliament's constitutional authority over bankruptcy and insolvency (*Constitution Act, 1867*, s. 91(21)). Just as Alberta's regulatory regime reflects its considered choice about how to address the important policy questions raised by the environmental risks of oil and gas extraction, the *BIA* reflects Parliament's considered choice about how to balance important policy objectives when a bankrupt's assets are, by definition, insufficient to meet all of its various obligations. To the extent that there is an operational conflict between the Alberta regulatory regime and the *BIA*, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

B. The Relevant Provisions of the BIA

32 Here, I simply wish to note the sections of the *BIA* at issue in this appeal. These sections will determine whether the doctrine of paramountcy applies. I will discuss the purposes of the *BIA* and the various issues raised by s. 14.06 in greater detail below.

33 The central concept of the *BIA* is that of a "claim provable in bankruptcy". Several provisions of the *BIA* form the basis for delineating the scope of provable claims. The first is the definition provided in s. 2:

> ***claim provable in bankruptcy, provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor...

34 "Creditor" is defined in s. 2 as "a person having a claim provable as a claim under this Act".

35 The definition of "claim provable" is completed by s. 121(1):

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

36 A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A "contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'" (*Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273 (Alta. C.A.), at para. 23, quoting *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.) , at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

> **121 (2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> . . . . .
>
> **135 (1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

37 In *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) ("*Abitibi*"), at para. 26, this Court interpreted the foregoing provisions of the *BIA* and articulated a three-part test for determining when an environmental obligation imposed by a regulator will be a provable claim for the purposes of the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"):

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]

38 I will address the *Abitibi* test in greater detail below.

39 Once bankruptcy has been declared, creditors of the bankrupt must participate in one collective bankruptcy proceeding if they wish to enforce their provable claims. Section 69.3(1) of the *BIA* thus provides for an automatic stay of enforcement of provable claims outside the bankruptcy proceeding, effective as of the first day of bankruptcy.

40 The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at paras. 32-35).

41 Essential to this appeal is s. 14.06 of the *BIA*, which deals with various environmental matters in the bankruptcy context. I will now reproduce s. 14.06(2) and s. 14.06(4), the two portions of the s. 14.06 scheme that are directly implicated in this appeal. The balance of s. 14.06 can be found in the appendix at the conclusion of these reasons.

42 Section 14.06(2) reads as follows:

> **(2)** Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment; or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

43 Section 14.06(4) reads as follows:

> **(4)** Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,
>
> (a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee
>
> (i) complies with the order, or
>
> (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;
>
> (b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

44 As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the *BIA*. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property". The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

45 I turn now to a brief discussion of the events of the Redwater bankruptcy.

C. The Events of the Redwater Bankruptcy

46 Redwater was a publicly traded oil and gas company. It was first granted licences by the Regulator in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with its assets. In mid-2014, Redwater began to experience financial difficulties. Upon application by ATB, GTL was appointed receiver for Redwater on May 12, 2015. At that time, Redwater owed ATB approximately $5.1 million.

47 Upon being advised of the receivership, the Regulator sent GTL a letter dated May 14, 2015, setting out its position. The Regulator noted that the *OGCA* and the *Pipeline Act* included both receivers and trustees in the definition of "licensee". The Regulator stated that it was not a creditor of Redwater and that it was not asserting a "provable claim in the receivership". Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The Regulator stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations. It requested confirmation that GTL had taken possession of Redwater's licensed properties and that it was taking steps to comply with all of Redwater's regulatory obligations.

48 At the time it ran into financial difficulties, Redwater was licensed by the Regulator for 84 wells, 7 facilities and 36 pipelines, all in central Alberta. The vast majority of its assets were these oil and gas assets. At the time GTL was appointed receiver, 19 of the wells and facilities were producing and the remaining 72 were inactive or spent. There were working interest participants in several of the wells and facilities. Redwater's LMR did not drop below 1.0 until after it went into receivership, so it never paid any security deposits to the Regulator.

49 By September 2015, Redwater's LMR had dropped to 0.93. The net value of its deemed assets and its deemed liabilities was negative $553,000. The 19 producing wells and facilities for which Redwater was the licensee would have had an LMR of 2.85 and a deemed net value of $4.152 million. The remaining 72 wells and facilities for which Redwater was the licensee would have had an LMR of 0.30 and a deemed net value of negative $4.705 million. Given that Redwater was in receivership, the Regulator's position was that it would approve the transfer of Redwater's licences only if the transfer did not cause a deterioration in its LMR.

50 In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

51 In response, on July 15, 2015, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The orders required abandonment to be carried out immediately where there were no other working interest participants and, by September 18, 2015, where there were other working interest participants. The Regulator stated that it considered the Renounced Assets an environmental and safety hazard and that s. 3.012(d) of the *Oil and Gas Conservation Rules* required a licensee to abandon wells or facilities so considered. In issuing the Abandonment Orders, the Regulator also relied on ss. 27 to 30 of the *OGCA* and ss. 23 to 26 of the *Pipeline Act*. If the Abandonment Orders were not complied with, the Regulator threatened to abandon the assets itself and to sanction Redwater through the use of s. 106 of the *OGCA*. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the *EPEA*.

52 On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

53 A bankruptcy order was issued for Redwater on October 28, 2015, and GTL was appointed as trustee. GTL sent another letter to the Regulator on November 2, 2015, this time invoking s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets. The Abandonment Orders remain outstanding.

D. Judicial History

(1) Court of Queen's Bench of Alberta

54 The chambers judge concluded that s. 14.06 of the *BIA* was designed to permit trustees to disclaim property where this was a rational economic decision in light of the environmental condition affecting the property. Personal liability of the trustee was not a condition precedent to the power to disclaim. The chambers judge accordingly found an operational conflict between s. 14.06 of the *BIA* and the definition of "licensee" in the *OGCA* and the *Pipeline Act*. Under s. 14.06 of the *BIA*, GTL could renounce assets and not be responsible for the associated environmental obligations. However, under the *OGCA* and the *Pipeline Act*, GTL could not renounce licensed assets because the definition of "licensee" included receivers and trustees, so GTL remained liable for environmental obligations.

55 Applying the test from *Abitibi*, the chambers judge concluded that, although in a "technical sense" it was not sufficiently certain that the Regulator or the OWA would carry out the Abandonment Orders and assert a monetary claim to have its costs reimbursed, the situation met what was intended by the Court in *Abitibi* because the Abandonment Orders were "intrinsically financial" (para. 173). Forcing GTL, as a "licensee", to comply with the Abandonment Orders would therefore frustrate the *BIA*'s overall purpose of equitable distribution of the bankrupt's assets, as the Regulator's claim would be given a super priority to which it was not entitled, ahead of the claims of secured creditors. It would also frustrate the purpose of s. 14.06, by which Parliament had legislated as to environmental claims in bankruptcy and had specifically chosen not to give them a super priority.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

The conditions imposed by the Regulator on transfers of the licences for the Retained Assets further frustrated s. 14.06 by including the Renounced Assets in the calculation for determining the approval of a sale.

56 The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline Act* were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the *BIA*. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) Majority Reasons

57 Slatter J.A., for the majority, dismissed the appeals. He stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the *BIA*. Section 14.06 did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7), which would rarely, if ever, have any application to oil and gas wells. Section 14.06(4) did not "limit the power of the trustee to renounce ... properties to those circumstances where it might be exposed to personal liability" (para. 68). Additionally, the word "order" in s. 14.06(4) had to be given a wide meaning.

58 Slatter J.A. identified the essential issue as "whether the environmental obligations of Redwater meet the test for a provable claim" (para. 73). He agreed with the chambers judge that the third branch of the *Abitibi* test was met, but concluded that that test had been met "in both a technical and substantive way" (para. 76). The Regulator's policies essentially stripped away from the bankrupt estate enough value to meet environmental obligations. Requiring the depositing of security, or diverting value from the bankrupt estate, clearly met the standard of "certainty". The Regulator's policies required that the full value of the bankrupt's assets be applied first to environmental liabilities, creating a super priority for environmental claims. Slatter J.A. concluded that, "[n]otwithstanding their intended effect as conditions of licensing, the Regulator's policies [had] a direct effect on property, priorities, and the Trustee's right to renounce assets, all of which [were] governed by the *BIA*" (para. 86).

59 In terms of constitutional analysis, Slatter J.A. concluded that the role of GTL as a "licensee" under the *OGCA* and the *Pipeline Act* was "in operational conflict with the provisions of the *BIA*" that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims (para. 89). It also frustrated the *BIA*'s purpose of "managing the winding up of insolvent corporations and settling the priority of claims against them" (para. 89). As such, the Regulator could not "insist that the Trustee devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor" (para. 91).

(b) Dissenting Reasons

60 Martin J.A. dissented. In contrast to the majority, she stressed the constitutional dimensions of the case, in particular the need for co-operative federalism in the area of the environment, and noted that the doctrine of paramountcy should be applied with restraint. She concluded that the Regulator was not asserting a provable claim within the meaning of the *Abitibi* test. It was not enough for a regulatory order to be "intrinsically financial" for it to be a claim provable in bankruptcy (para. 185, quoting the chambers judge's reasons, at para. 173). There was not sufficient certainty that the ordered abandonment work would be done, either by the Regulator or by the OWA, and there was "no certainty at all that a claim for reimbursement would be made" (para. 184). Martin J.A. was also of the view that the Regulator was not a creditor of Redwater — or, if it was a creditor in issuing the Abandonment Orders, it was at least not one in enforcing the conditions for the transfer of licences. The Regulator had to be able to maintain control over the transfer of licences during a bankruptcy, and there was no reason why such regulatory requirements could not coexist with the distribution of the bankrupt's estate.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

61 With regard to s. 14.06, Martin J.A. accepted the Regulator's argument that s. 14.06(4) allowed a trustee to renounce real property in order to avoid personal liability but did not prevent the assets of the bankrupt estate from being used to comply with environmental obligations. However, she went beyond this. In her view, s. 14.06(4) to (8) were enacted together as a statutory compromise. Martin J.A. concluded that a trustee's power to disclaim assets under s. 14.06 simply had no applicability to Alberta's regulatory regime. The ability to renounce under s. 14.06(4) had to be read in conjunction with the other half of the compromise — the Crown's super priority over the debtor's real property established by s. 14.06(7). Licence conditions were not the sort of "order" contemplated by s. 14.06(4), nor were licences the kind of "real property" contemplated by that provision. The balance struck by s. 14.06 was not effective when there was no "real property of the debtor" in which the Crown could take a super priority (para. 210).

62 As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

III. Analysis

A. The Doctrine of Paramountcy

63 As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

64 The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 3).

65 Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) , at para. 66).

66 Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

67 The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, *Lemare*, at para. 45.

68 GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

69 The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

70 The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

71 I will consider each alleged conflict in turn.

B. Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

72 As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

73 At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the *BIA*, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline Act*, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the *BIA* based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the *BIA*. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

75 In my view, s. 14.06(4) sets out the result of a trustee's "disclaimer" of real property when there is an order to remedy any environmental condition or damage affecting that property. Regardless of whether "disclaimer" is understood as a common law power or as a power deriving from some other statutory source, the result of a trustee's "disclaimer" of real property where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected. The interpretation of s. 14.06(4) as being concerned with the personal liability of the trustee and not with the liability of the bankrupt estate is supported not only by the plain language of the section, but also by the Hansard evidence, a previous decision of this Court and the French version of the section. Furthermore, not only is the plain meaning of the words "personally liable" clear, but the same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which specifically state that the trustee is not personally liable. In particular, in my view, it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

76 Given that s. 14.06(4) dictates that "disclaimer" only protects trustees from personal liability, then, even assuming that GTL successfully "disclaimed" in this case, no operational conflict or frustration of purpose results from the fact that the Regulator requires GTL, as a "licensee", to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict is caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a "licensee" for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

77 In what follows, I will begin by interpreting s. 14.06(4) and explaining why, based on its plain wording and other relevant considerations, the provision is concerned solely with the personal liability of the trustee, and not with the liability of the bankrupt estate. I will then explain how, despite their superficial similarity, s. 14.06(4) and s. 14.06(2) have different rationales, and I will demonstrate that, on a proper understanding of the scheme crafted by Parliament, s. 14.06(4) does not affect the liability of the bankrupt estate. To conclude, I will demonstrate that there is no operational conflict or frustration of purpose between the Alberta legislation and s. 14.06 of the BIA in this case, with particular reference to the question of GTL's protection from personal liability.

(1) The Correct Interpretation of Section 14.06(4)

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(a) Section 14.06(4) Is Concerned With the Personal Liability of Trustees

78 I have concluded that s. 14.06(4) is concerned with the personal liability of trustees, and not with the liability of the bankrupt estate. I emphasize here the well-established principle that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Canadian Western Bank*, at para. 75, quoting *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356).

79 Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

80 The Hansard evidence leads to the same conclusion. Jacques Hains, Director, Corporate Law Policy Directorate, Department of Industry Canada, noted the following during the 1996 debates preceding the enactment of s. 14.06(4) in 1997:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.
>
> (Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners ... because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."
>
> (*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave no indication that the focus had somehow shifted away from a trustee's "personal liability".

81 Prior to the enactment of the 1997 amendments, G. Marantz, Legal Advisor to the Department of Industry Canada, noted that they were intended to "provide the trustee with protection from being chased with deep-pocket liability" (Standing Committee on Industry, *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996, at 17:15, as cited in C.A. reasons, at para. 198). I agree with the Regulator that the legislative debates give no hint of any intention by Parliament to immunize bankrupt estates from environmental liabilities. The notion that s. 14.06(4) was aimed at encouraging trustees in bankruptcy to accept mandates, and not at limiting estate liability, is further supported by the fact that the provision was inserted under the general heading "Appointment and Substitution of Trustees".

82 Furthermore, in drafting s. 14.06(4), Parliament chose to use exactly the same concept it had used earlier in s. 14.06(2): by their express wording, where either provision applies, a trustee is not "personally liable". This cannot have been an oversight given that s. 14.06(4) was added to the *BIA* some five years after the enactment of s. 14.06(2). Since both provisions deal

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

expressly with the protection of trustees from being "personally liable", it is very difficult to accept that they could be concerned with different kinds of liability. By their wording, s. 14.06(2) and s. 14.06(4) are clearly both concerned with the same concept. Indeed, if one interprets s. 14.06(4) as extending to estate liability, then there is no principled reason not to interpret s. 14.06(2) in the same way. However, it is undisputed that this was not Parliament's intention in enacting s. 14.06(2).

83 Similarly, Parliament has also chosen to use the same concept found in both s. 14.06(4) and s. 14.06(2) in a third part of the 14.06 scheme, namely s. 14.06(1.2). This provision states that a trustee carrying on the business of a debtor or continuing the employment of a debtor's employees is not "personally liable" in respect of certain enumerated liabilities, including as a successor employer. Although this provision is not directly raised in this litigation, by its own terms, it clearly does not and cannot refer to the liability of the bankrupt estate. Again, it is difficult to conceive of how Parliament could have specified that a trustee is not "personally liable", using the ordinary, grammatical sense of that phrase, in both s. 14.06(1.2) and s. 14.06(2), but then intended the phrase to be read in a completely different and illogical manner in s. 14.06(4). All three provisions refer to the personal liability of a trustee, and all three must be interpreted consistently. Indeed, I note that the concept of a trustee being "not personally liable" is also used consistently in other parts of the *BIA* unrelated to the s. 14.06 scheme — see, for example, s. 80 and s. 197(3).

84 This interpretation of s. 14.06(4) is also bolstered by the French wording of s. 14.06. The French versions of both s. 14.06(2) and s. 14.06(4) refer to a trustee's protection from personal liability "*ès qualités*". This French expression is defined by *Le Grand Robert de la langue française* (2nd ed. 2001) dictionary as referring to someone acting "à cause d'un titre, d'une fonction particulière", which, in English, would mean acting by virtue of a title or specific role. The *Robert & Collins* dictionary (online) translates "*ès qualités*" as in "one's official capacity". In using this expression in s. 14.06(4), Parliament is therefore stating that, where "disclaimer" properly occurs, a trustee, is not personally liable, in its capacity as trustee, for orders to remedy any environmental condition or damage affecting the "disclaimed" property. These provisions are clearly not concerned with the concept of estate liability. The French versions of s. 14.06(2) and s. 14.06(4) thus utilize identical language to describe the limitation of liability they offer trustees. It is almost impossible to conceive of Parliament using identical language in two such closely related provisions and yet intending different meanings. Accordingly, a trustee is not personally liable in its official capacity as representative of the bankrupt estate where it invokes s. 14.06(4).

85 Prior to this litigation, the case law on s. 14.06 was somewhat scarce. However, this Court has considered the s. 14.06 scheme once before, in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) . In that case, comments made by both the majority and the dissenting judge support my conclusion that s. 14.06(4) is concerned only with the personal liability of trustees. Abella J., writing for the majority, explained that "where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly" (para. 67). As examples of this principle, she referred to 14.06(1.2) and, most notably for our purposes, to s. 14.06(4), which she described as follows: "trustee immune in certain circumstances from environmental liabilities" (para. 67). In her dissent, Deschamps J. explained that a "trustee is not personally bound by the bankrupt's obligations" (para. 91). She noted that trustees are protected by the provisions that confer immunity upon them, including s. 14.06 (1.2), (2) and (4).

86 Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made, the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

87 Additionally, as I have mentioned, s. 14.06(4)'s scope is not narrowed to a "disclaimer" in its formal sense. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

releases any interest in any real property". This appeal does not, however, require us to decide what constitutes abandoning, disposing of or otherwise releasing real property for the purpose of s. 14.06(4), and I therefore leave the resolution of this question for another day. Nor does this appeal require us to decide the effects of a successful divestiture under s. 20 of the *BIA*. Section 20 of the *BIA* was not raised or relied upon by GTL as providing it with the authority to walk away from all responsibility, obligation or liability regarding the Renounced Assets.

88 The dissenting reasons argue that certain other parts of the s. 14.06 scheme make the most sense if s. 14.06(4) limits estate liability. Other than s. 14.06(2), none of these provisions is in issue in this litigation, and none of them was relied on by GTL. Regardless, in view of the clear and unambiguous wording of s. 14.06(4), less weight should be given to its statutory context. This is particularly so given that the proposed alternative interpretation would require the Court to read words such as "personally" out of the subsection. As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) , at para. 10). Ultimately, the consequences of a trustee's "disclaimer" are clear — protection from personal liability, not from estate liability. There is no ambiguity on the face of s. 14.06(4). This Court has no option other than to accede to the clear intention of Parliament.

89 I turn now to the relationship between s. 14.06(2) and (4).

(b) How Section 14.06(4) Is Distinguishable From Section 14.06(2)

90 In this case, GTL relied solely on s. 14.06(4) in purporting to "disclaim" the Renounced Assets. However, as I will explain, GTL is fully protected from personal liability for the environmental liabilities associated with those assets whether it is understood as having "disclaimed" the Renounced Assets or not. However, it cannot simply "walk away" from the Renounced Assets in either case.

91 Regardless of whether GTL can access s. 14.06(4) (in other words, regardless of whether it has "disclaimed"), it is already fully protected from personal liability in respect of environmental matters by s. 14.06(2). Section 14.06(2) protects trustees from personal liability for "any environmental condition that arose or environmental damage that occurred", unless it is established that the condition arose or the damage occurred after the trustee's appointment and as a result of their gross negligence or wilful misconduct. In this case, it is not disputed that the environmental condition or damage leading to the Abandonment Orders arose or occurred prior to GTL's appointment. Section 14.06(2) provides trustees with protection from personal liability as broad as that provided by s. 14.06(4). Although, on the face of the provisions, there are two ways in which s. 14.06(4) may appear to offer broader protection, neither of them withstands closer examination.

92 First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage (purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

93 It follows that s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2). Despite this, in my view, Parliament had good reasons for enacting s. 14.06(4) in 1997. The first was to make it clear to trustees that they had complete protection from personal liability in respect of environmental conditions and damage (absent wilful misconduct or gross negligence), especially in situations where they have "disclaimed". The Hansard evidence shows that one of the impetuses for the 1997 reforms was the desire of trustees for further certainty. The second was

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

to clarify the effect of a trustee's "disclaimer", on the liability of the *bankrupt estate* for orders to remedy an environmental condition or damage. In other words, s. 14.06(4) makes it clear not just that a trustee who "disclaims" real property is exempt from personal liability under environmental orders applicable to that property, but also that the liability of the bankrupt estate is unaffected by such "disclaimer".

94 In 1992, Parliament turned its attention to the potential liability of trustees in the environmental context and enacted s. 14.06(2). The provision originally stated that trustees were protected from personal liability for any environmental condition that arose or any environmental damage that occurred "(a) before [their] appointment ... or (b) after their appointment except where the condition arose or the damage occurred as a result of their failure to exercise due diligence". The Hansard evidence demonstrates that trustees were unhappy with the original language of s. 14.06(2). As Mr. Hains explained, they complained that the due diligence standard was "too vague. No one knows what it does and it may vary from one case to another. With the vagueness of the standard and what may be required to satisfy it, and with the risk of personal liability, the trustees were not even interested in investigating how they might exercise due diligence" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at pp. 15-16).

95 As a result, Parliament made reforms to the *BIA* in 1997. These reforms not only changed the standard of protection offered to trustees by s. 14.06(2) by adopting the current language, but also introduced s. 14.06(4). As is evident from their shared language, the provisions were intended to work together to clarify a trustee's protection from personal liability for any environmental condition or damage. Section 14.06(4) provided the certainty that trustees had been seeking in the years prior to 1997. For the first time, it explicitly linked the concept of "disclaimer" to the scheme protecting trustees from environmental liability. Whether it is understood as a common law power or as a reference to other statutory provisions, the concept of "disclaimer" predates s. 14.06(4) itself, as well as the 1992 version of s. 14.06(2). "Disclaimer" is also applicable in other contexts, such as in relation to executory contracts, as discussed in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.).

96 Prior to 1997, the effects of a "disclaimer" of real property on environmental liability was unclear. In particular, it was unclear what effect "disclaimer" might have on the liability of the bankrupt estate, given that environmental legislation imposed liability based on the achievement of the status of owner, party in control or licensee (see J. Klimek, *Insolvency and Environment Liability* (1994), at p. 4-19). By enacting s. 14.06(4), Parliament clarified that the effect of the "disclaimer" of real property was to limit the personal liability of the trustee for orders to remedy any environmental condition or damage, but not to limit the liability of the bankrupt estate. Parliament could have merely updated the language of s. 14.06(2) in 1997, but this would have left the question of "disclaimer" and estate liability unaddressed. Knowledge of the impact of "disclaimer" could be important to a trustee who is deciding whether to accept a mandate. Section 14.06(4) thus went a considerable way towards resolving the vagueness of which trustees had complained prior to 1997.

97 A notable aspect of the scheme crafted by Parliament is that s. 14.06(4) applies "[n]otwithstanding anything in any federal or provincial law". In enacting s. 14.06(4), Parliament specified the effect of the "disclaimer" of real property solely in the context of *environmental orders*. The effect of "disclaimer" on liability in other contexts was not addressed. Parliament was concerned with orders to remedy any environmental condition or damage, where, liability frequently attaches based on the status of owner, party in control, or licensee. Parliament did not want trustees to think that they could avoid the estate's environmental liability through the act of "disclaiming". Accordingly, it used specific language indicating that the effect of the "disclaimer" of real property on orders to remedy an environmental condition or damage is merely that the trustee is not personally liable. It is possible that the effect of "disclaimer" on the liability of the bankrupt estate might be different in other contexts.

98 Section 14.06(4) thus makes it clear that "disclaimer" by the trustee has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage. The liability of the bankrupt estate is, of course, an issue with which s. 14.06(2) is absolutely unconcerned. Thus, it can be seen that s. 14.06(4) and s. 14.06(2) are not in fact the same — they may provide trustees with the same protection from personal liability, but only the former has any relevance to the question of estate liability. Section 14.06(2) protects trustees without having to be invoked by them — it does not speak to the results of a trustee's "disclaimer".

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

99 Where a trustee has "disclaimed" real property, it is not personally liable under an environmental order applicable to that property, but the bankrupt estate itself remains liable. Of course, the fact that the bankrupt estate remains liable even where a trustee invokes s. 14.06(4) does not necessarily mean that the trustee must comply with environmental obligations in priority to all other claims. The priority of an environmental claim depends on the proper application of the *Abitibi* test, as I will discuss below.

100 Accordingly, regardless of whether GTL is properly understood as having "disclaimed", the result is the same. Given that the environmental condition or damage arose or occurred prior to GTL's appointment, it is fully protected from personal liability by s. 14.06(2). However, "disclaimer" does not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate has been ordered to remedy any environmental condition or damage. The environmental liability of the bankrupt estate remains unaffected.

101 I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme. In my view, this is not a reason to ignore the plain meaning of s. 14.06(4). No principle of statutory interpretation requires that the plain meaning of a provision be contorted to make its scheme more coherent. This Court has been tasked with interpreting s. 14.06(4), and, in my view, the wording of s. 14.06(4) admits of only one interpretation.

(2) There Is No Operational Conflict or Frustration of Purpose Between Section 14.06(2) and Section 14.06(4) of the BIA and the Alberta Regulatory Scheme

102 The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets. Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

103 Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline Act*, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

104 There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline Act*. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

105 I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act* should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

106 Importantly, the situation in this case is completely different from the one before the Court in *Moloney* . In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in *Moloney* , at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

107 According to the evidence in this case, the *OGCA* and the *Pipeline Act* have included trustees in the definition of "licensee" for 20 years now, and, in that time, the Regulator has never attempted to hold a trustee personally liable. The Regulator does not look beyond the assets remaining in the bankrupt estate in seeking compliance with the bankrupt's environmental obligations. If the Regulator were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict. As it stands, however, GTL can both be protected from personal liability by s. 14.06(2) and comply with the Alberta regime in administering the Redwater estate as a "licensee".

108 The suggestion, in the dissenting reasons, that the Regulator is seeking to hold GTL personally liable is untrue. No one disputes that significant value remains in the Redwater estate. Although the Regulator's entitlement is, of course, dependent on the priorities established by the *BIA*, the history of this regulatory system demonstrates that there are ways for the Regulator to access that value without holding GTL personally liable. It is not this Court's role to mandate a particular mechanism for the Regulator to achieve that end. Even if this was not the case, the fact that Redwater's assets have already been sold and are currently being held in trust means that personal liability is no longer a concern. There is no operational conflict.

109 I turn now to frustration of purpose. The chambers judge identified a number of purposes of s. 14.06 in his reasons. GTL relies on three of them, namely: "limit[ing] the liability of insolvency professionals, so that they will accept mandates despite environmental issues"; "reduc[ing] the number of abandoned sites in the country"; and "permit[ing] receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, and giv[ing] receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions" (chambers judge's reasons, at paras. 128-29).

110 The burden is on GTL to establish the specific purposes of s. 14.06(2) and s. 14.06(4) if it wishes to demonstrate a conflict. This has been described as a "high" burden, requiring "[c]lear proof of purpose" (*Lemare*, at para. 26). In my view, based on the plain wording of s. 14.06(2) and s. 14.06(4) (a "trustee is not personally liable") and the Hansard evidence, it is evident that the purpose of these provisions is to protect trustees from personal liability in respect of environmental matters affecting the estates they are administering.

111 This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the *BIA*.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

112 In arguing that s. 14.06 has the broader goals of reducing the number of abandoned sites (in the non-technical sense of "abandoned") and encouraging trustees to accept mandates, GTL relies on what it calls "the available extrinsic evidence and the actual words and structure of that section" (GTL's factum, at para. 91). In my view, the arguments it advances are insufficient for GTL to meet its high burden and demonstrate that the purpose of s. 14.06(2) and s. 14.06(4) should be defined as including these broader objectives. Reducing the number of unaddressed sites and encouraging trustees to accept mandates may be positive side effects of s. 14.06(2) and s. 14.06(4), but it is a stretch to see them as the purpose of the provisions. Like the provision at issue in *Lemare*, it is more plausible that they serve a "simple and narrow purpose" (para. 45).

113 Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least *Northern Badger* that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

(3) Conclusion on Section 14.06 of the BIA

114 There is no conflict between the Alberta legislation and s. 14.06 of the *BIA* that makes the definition of "licensee" in the former inapplicable insofar as it includes GTL. GTL continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the Redwater estate. Nonetheless, GTL submits that, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4), the environmental obligations associated with those assets are unsecured claims of the Regulator for the purposes of the *BIA*. GTL says that the order of priorities in the *BIA* requires it to satisfy the claims of Redwater's secured creditors before the Regulator's claims, which rank equally with the claims of other unsecured creditors. According to GTL, the Regulator's attempts to use its statutory powers to prioritize its environmental claims conflict with the *BIA*. I will now consider this alleged conflict, which turns on the *Abitibi* test.

C. The Abitibi Test: Is the Regulator Asserting Claims Provable in Bankruptcy?

115 The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. This model avoids inefficiency and chaos, thus maximizing global recovery for all creditors. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.

116 It is well established that a provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the *BIA*. Both Martin J.A. and the chambers judge dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the *BIA* — such was the conclusion in *Husky Oil* , at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the *BIA*.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

117 GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the *BIA* does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the *BIA*. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

118 However, only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In *Abitibi*, this Court clearly stated that not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. As a matter of principle, bankruptcy does not amount to a licence to disregard rules. The Regulator says that it is not asserting any claims provable in the bankruptcy, so the Redwater estate must comply with its environmental obligations, to the extent that assets are available to do so.

119 The resolution of this issue turns on the proper application of the *Abitibi* test for determining whether a particular regulatory obligation amounts to a claim provable in bankruptcy. To reiterate:

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original; para. 26.]

120 There is no dispute that in this appeal, the second part of the test is met. Accordingly, I will discuss only the first and the third parts of the test.

121 In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (Ont. C.A.) ("*Nortel* CA"), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

122 In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

(1) The Regulator Is Not a Creditor of Redwater

123 The Regulator and the supporting interveners are not the first to raise issues with the "creditor" step of the *Abitibi* test. In the six years since *Abitibi* was decided, concerns about the "creditor" step and the fact that, as it is commonly understood, it will

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

seemingly be satisfied in all — or nearly all — cases have also been expressed by academic commentators, such as A. J. Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80 *Sask. L. Rev.* 157, at p. 178, and Stewart. This Court has not had an opportunity to comment on *Abitibi* since it was decided. However, the interpretation of the "creditor" step adopted by lower courts, including the majority of the Court of Appeal in this case, has focused on certain comments found at para. 27 of *Abitibi*, and the "creditor" step has accordingly been found to be satisfied whenever a regulator exercises its enforcement powers against a debtor (see, for example, C.A. reasons, at para. 60; *Nortel* CA, at para. 16).

124 GTL submits that these lower courts have correctly interpreted and applied the "creditor" step. It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the "creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met... but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

125 Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.) , at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.) , at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) , at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24 (S.C.C.) , at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

126 First, in a letter to GTL dated May 14, 2015, the Regulator advanced the position that it was "not a creditor of [Redwater]", but, rather, had a "statutory mandate to regulate the oil and gas industry in Alberta" (GTL's Record, vol. 1, at p. 78). I note that this was the initial communication between the Regulator and GTL, only two days after the latter's appointment as receiver of Redwater's property. Second, the issue of whether the Regulator is a creditor was discussed in the parties' factums. Third, during oral arguments before this Court, the Regulator was questioned about its concession. Counsel made the undisputed point that higher courts are not bound by such concessions and took the position that, on the correct interpretation of *Abitibi*, the Regulator was not a creditor. Fourth, when the Regulator's status as a creditor was raised as an issue before this Court, opposing counsel did not argue that they would have adduced further evidence on the issue had it been raised in the courts below. Finally, a proper understanding of the "creditor" step of the *Abitibi* test is of fundamental importance to the proper functioning of the national bankruptcy scheme and of provincial environmental schemes throughout Canada. I conclude that this case is one in which it is appropriate to disregard the Regulator's concession in the courts below.

127 Returning to the analysis, I note that the unique factual matrix of*Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently, AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("EPA"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

128 In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in*Abitibi*. The distinction between the facts of this appeal and those of*Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in *Abitibi*. The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

> ... the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.
>
> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.
>
> From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.
>
> (*AbitibiBowater inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.))

129 This Court recognized in *Abitibi* that the Province "easily satisfied" the creditor requirement (para 49). It was therefore not necessary to consider at any length how the "creditor" step should be understood or how it would apply in other factual situations. However, even at para. 27 of *Abitibi*, the paragraph relied on by the majority of the Court of Appeal, Deschamps J. made a point of noting that "[m]ost environmental regulatory bodies *can be* creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes" (emphasis added). The interpretation of the "creditor" step adopted by the majority of the Court of Appeal and urged upon this Court by GTL leaves no room for a regulator that enforces obligations not to be a creditor, though this possibility was clearly contemplated by para. 27 of*Abitibi*. As noted above, GTL's interpretation leaves the "creditor" step with no independent work to perform.

130 *Northern Badger* established that a regulator enforcing a public duty by way of non-monetary order is not a creditor. I reject the claim in the dissenting reasons that*Northern Badger* should be interpreted differently. First, I note that whether the Regulator has a contingent claim is relevant to the sufficient certainty test, which presupposes that the Regulator is a creditor. I cannot accept the proposition in the dissenting reasons that *Northern Badger* was concerned with what would become the third prong of the *Abitibi* test. In *Northern Badger*, Laycraft C.J.A. accepted that abandonment was a liability and identified the issue as "whether that liability is to the board so that it is the board which is the creditor" (para. 32). Second, the underlying scenario here with regards to Redwater's end-of-life obligations is exactly the same as in *Northern Badger* — a regulator is ordering an entity to comply with its legal obligations in furtherance of the public good. This reasoning from *Northern Badger* was subsequently adopted in cases such as *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221 (Alta. Q.B.), at paras. 23-25, and *Lamford Forest Products Ltd., Re* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.).

131 I cannot agree with the suggestion by the majority of the Court of Appeal in this case that *Northern Badger* "is of limited assistance" in the application of the *Abitibi* test (para. 63). Rather, I agree with Martin J.A. that *Abitibi* did not overturn the reasoning in *Northern Badger*, but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy" (para. 164). As Martin J.A. noted, even following *Abitibi*, the law continues to be that "public obligations are not provable claims that can be counted or compromised in the bankruptcy" (para. 174).*Abitibi* clarified the scope of *Northern Badger* by confirming that a regulator's environmental claims will be provable claims under

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

certain circumstances. It does not stand for the proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

132 In *Abitibi*, Deschamps J. noted that insolvency legislation had evolved in the years since *Northern Badger*. That legislative evolution did not, however, change the meaning to be ascribed to the term "creditor". In this regard, I agree with the conclusion in *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536 (Alta. Q.B.), that the amendments to the *BIA* dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. As should be clear from the earlier discussion of s. 14.06, the amendments to the *BIA* do not speak to when a regulator enforcing an environmental claim is a creditor.

133 The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while *Abitibi* discussed *Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

134 For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life ... But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

135 Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in *Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

136 I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed *Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained, *Abitibi* clearly contemplates a place for regulators who are not creditors.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

137 Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test.

(2) There Is No Sufficient Certainty That the Regulator Will Perform the Environmental Work and Advance a Claim for Reimbursement

138 The "sufficient certainty" test articulated in paras. 30 and 36 in*Abitibi* essentially does no more than reorganize and restate the requirements of the relevant provisions of the *BIA*. Section 121(2) provides that contingent claims may be provable claims. In other words, contingent debts or liabilities owed by a bankrupt to a creditor may be, but are not necessarily, provable claims. Section 135(1.1) provides for the valuation of such a claim. A contingent claim must be capable of valuation under s. 135(1.1) — it cannot be too remote or speculative — in order to be a provable claim under s. 121(2).

139 Before the third step of the *Abitibi* test can even be reached, a regulator must already have been shown to be a creditor. I have concluded that, on the facts of this case, the Regulator is not a creditor of Redwater. However, for the purpose of explaining how I differ from the chambers judge on the "sufficient certainty" analysis, I will proceed as if the Regulator were, in fact, a creditor of Redwater in respect of the Abandonment Orders and LMR requirements. These end-of-life obligations do not directly require Redwater to make a payment to the Regulator. Rather, they are obligations requiring Redwater to *do something*. As discussed in *Abitibi*, if the Regulator were in fact a creditor, end-of-life obligations would be its contingent claims.

140 What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

141 I will now discuss the Abandonment Orders and the LMR requirements in turn and demonstrate how they fail to satisfy the "sufficient certainty" step of the *Abitibi* test.

(a) The Abandonment Orders

142 The Regulator has issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to abandon the Renounced Assets. Even if the Regulator were a creditor of Redwater, the Abandonment Orders would still have to be capable of valuation in order to be included in the bankruptcy process. In my view, it is not established either by the chambers judge's factual findings or by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process.

143 The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a "technical sense" — the situation met what had been intended in*Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

144 In my view, the chambers judge did not make a finding of fact that the Regulator would carry out the abandonments *itself*. As noted, he acknowledged that it was "unclear" whether the Regulator would perform the abandonments. This can hardly be deemed a finding of fact deserving of deference. In my view, considered as a whole, the evidence in this case leads to the conclusion that the Regulator will not abandon the Renounced Assets itself.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

145 The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator's affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy. The affiant stated that the Regulator had no intention of abandoning Redwater's licensed assets. As noted by the chambers judge, it is true that, in its letter to GTL dated July 15, 2015, the Regulator threatened to perform the abandonments itself, but the Regulator subsequently took no steps to follow up on that threat. Even if this letter should be accorded any weight, the contradiction between it and the Regulator's subsequent affidavits at the very least makes it difficult to say with anything approaching sufficient certainty that the Regulator intends to carry out the abandonments. These facts distinguish this case from *Abitibi*, in which the restructuring judge's findings were based on the premise that the province would most likely perform the remediation work itself.

146 Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

> As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.
>
> The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

147 As the chambers judge correctly acknowledged, the fact that the Regulator would not conduct the abandonments itself does not mean that it would wash its hands of the Renounced Assets. Rather, if necessary, it would designate them as orphans pursuant to the *OGCA* and leave them for the OWA. I am not suggesting that a regulator can strategically avoid the "sufficient certainty" test simply by delegating environmental work to an arm's length organization. I would not decide, as the Regulator urges, that the *Abitibi* test *always* requires that the environmental work be performed by the regulator itself. However, the OWA's true nature must be emphasized. There are strong grounds to conclude that, given the particular features of this regulatory context, the OWA is not the regulator.

148 The creation of the OWA was not an attempt by the Regulator to avoid the *BIA* order of priorities in bankruptcy. It is a non-profit organization with its own mandate and independent board of directors, and it operates as a financially independent entity pursuant to legally delegated authority. Although the OWA's board includes a representative of the Regulator and a representative of Alberta Environment and Parks, its independence is not in question. The OWA's 2014-2015 annual report indicates that five out of six voting directors represent industry. The OWA uses a risk assessment tool to prioritize when and how it will perform environmental work on the many hundreds of orphans in Alberta. There is no suggestion that the Regulator has any say in the order in which the OWA chooses to perform environmental work. The 2014-2015 annual report also states that, since 1992, 87 percent of the money collected and invested to fund OWA activities has been provided by industry via the orphan levy. The Regulator, at para. 99 of its factum, hints obliquely that additional provincial or federal funding may be forthcoming in the future, but even if it materializes, it will be almost entirely in the form of loans. I cannot accept the suggestion in the dissenting reasons that the Regulator and the OWA are "inextricably intertwined" (para. 273).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

149 Even assuming that the OWA's abandonment of Redwater's licensed assets could satisfy the "sufficient certainty" test, I agree with Martin J.A. that it is difficult to conclude that there is sufficient certainty that the OWA will in fact perform the abandonments. I also agree with her view that there is no certainty that a claim for reimbursement will be advanced should the OWA ultimately abandon the assets.

150 The dissenting reasons suggest that the facts of this appeal are more akin to those of *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), than to those of *Nortel* CA, arguing that the "sufficient certainty" test is satisfied because, as in *Northstar*, there is no purchaser to take on Redwater's assets and the debtor itself is insolvent, so only the OWA can perform the work. In my view, *Northstar* is easily distinguishable. In that case, the bankrupt had been voluntarily carrying out remediation prior to its bankruptcy. After it made its assignment into bankruptcy, the Ministry of the Environment ("MOE") took over the remediation activities itself, purporting to do so on a without prejudice basis. Jurianz J.A. found that the fact that the MOE had already undertaken remediation activities made it sufficiently certain that it would do so. As I will now demonstrate, the facts here are very different.

151 At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

152 The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

153 Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the *OGCA*, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

154 Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) The Conditions for the Transfer of Licenses

155 I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney* , at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

163 Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37 (Alta. C.A.), Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

164 As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

165 Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

166 However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

167 The evidence reveals that none of these options is economically viable. The net value of Redwater's 127 licensed properties is negative, so no rational purchaser would ever agree to buy them as a package. This is precisely why GTL opted to disclaim the burdensome properties in the first place. As to the remaining options, GTL cannot undertake or guarantee the abandonment and reclamation work because the environmental liabilities attached to the disclaimed assets exceed the estate's realizable value — and in any event, GTL could not access the funds necessary to satisfy these commitments until after a sale of the estate's valuable assets was completed. The effect of the AER's position, then, is to hamper GTL in its administration of

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the estate, preventing it from realizing *any* value for *any* of Redwater's creditors, including the AER. And the AER's position effectively leaves the valuable and producing wells in limbo, creating a real risk that they, too, will become "orphans" — assets that are unable to be sold to another company and are left entirely unrealized.

168 According to Wagner C.J., GTL is without recourse because federal law enables it only to protect itself from personal liability and because the AER was entitled to assert its environmental liability claims outside of the bankruptcy process. I disagree on both points. In my view, two aspects of Alberta's regulatory regime conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). This result flows from a proper and accurate understanding of fundamental principles of constitutional and insolvency law.

169 First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition is that insolvency professionals are subject to the same obligations and liabilities as Redwater itself — including the obligation to comply with the AER's Abandonment Orders and the risk of personal liability for failing to do so. The *BIA*, however, permits a trustee in bankruptcy to disclaim assets encumbered by environmental liabilities. This power was available to GTL in the circumstances of this case, and GTL validly disclaimed the non-productive assets. The result is that it is no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime does not recognize these disclaimers as lawful (by virtue of the fact that receivers and trustees are regulated as licensees, who cannot disclaim assets), there is an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

170 Second, the AER has required that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts, which contravenes the *BIA*'s priority scheme. Because the Abandonment Orders are "claims provable in bankruptcy" under the three-part test outlined by this Court in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) — from which this Court should not depart either explicitly or implicitly — the AER cannot assert those claims outside the bankruptcy process. To do so would frustrate an essential purpose of the *BIA*: distributing the estate's value in accordance with the statutory priority scheme. Nor can the AER achieve the same result indirectly by imposing conditions on the sale of Redwater's valuable assets. The province's licensing scheme effectively operates as a debt collection mechanism in relation to a bankrupt company: it prevents GTL from discharging its duties as trustee unless the AER's environmental claims are satisfied. As such, it should be held inoperative as applied to Redwater under the second prong of the paramountcy test, frustration of purpose.

II. Background

171 Redwater was a publicly traded oil and gas company that operated wells, pipelines and other facilities in central Alberta. In mid-2014, it suffered a number of financial setbacks following a series of acquisitions and unsuccessful drilling initiatives. As a result, it became unable to meet its obligations to its largest secured creditor, ATB Financial, which commenced enforcement proceedings.

172 GTL was appointed as Redwater's receiver on May 12, 2015. Upon its appointment, but before taking possession of any AER-licensed properties, GTL carried out an analysis of the economic viability and marketability of Redwater's assets. It determined that only a portion of the company's properties was actually saleable and that it would not be in Redwater's best interests — or in the interests of its creditors — for GTL, as receiver, to take possession of the non-producing properties. It therefore informed the AER on July 3, 2015, that it would take possession of only 20 of Redwater's 127 licensed wells and facilities. On November 2, 2015, shortly after its appointment as trustee, GTL again disclaimed the same non-producing properties it had previously renounced in its capacity as receiver.

173 According to GTL's assessment, Redwater's valuable assets were worth $4.152 million and would generate significant value for the estate's creditors if they were sold at auction. On the other hand, the net value of the non-producing properties was -$4.705 million, reflecting the extensive abandonment and reclamation liabilities owed to the AER. The net value of the estate as a whole was -$0.553 million. This was why, in GTL's business judgment, a sale of all the estate's assets together was simply not realistic.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

174 The AER responded to GTL's first disclaimer notice by issuing the Abandonment Orders which required Redwater to carry out environmental work on the non-producing properties that GTL had disclaimed. But the AER's enforcement efforts were not limited to the debtor's estate itself. In its initial application that spurred this litigation, the AER filed suit against GTL seeking three principal remedies: (1) a declaration that GTL's disclaimers were void and unenforceable; (2) an order compelling GTL, in its capacity as receiver, to comply with the Abandonment Orders issued in relation to a portion of Redwater's assets; and (3) an order compelling GTL to fulfill its obligations as licensee under Alberta's legislation, specifically in relation to the abandonment, reclamation and remediation of Redwater's licensed properties.

175 The genesis of this litigation, then, was a clear and forceful effort by the AER to require GTL to satisfy Redwater's environmental obligations. To understand why the AER took that approach, it is important to note that it had provincial law on its side. Under the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*") and the *Pipeline Act*, R.S.A. 2000, c. P-15 ("*PLA*"), the term "licensee" is defined to include receivers and trustees in bankruptcy (*OGCA*, s. 1(1)(cc); *PLA*, s. 1(1)(n)). As a result, insolvency professionals become subject to the same regulatory obligations as the insolvent debtor itself by effectively stepping into its shoes. They can therefore be compelled to carry out abandonment and reclamation work on the direction of the AER (*OGCA*, s. 27; *PLA*, s. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 ("*OGCA Rules*"), s. 3.012); to reimburse anyone else who does abandonment work (*OGCA*, ss. 29 and 30; *PLA*, s. 25); to pay the orphan fund levy for any of the debtor's assets (*OGCA*, s. 74); to provide a security deposit, under certain circumstances, at the AER's request (*OGCA Rules*, s. 1.100(2)); and to pay a fine for failing to comply with an order made by the AER (*OGCA*, ss. 108 and 110(1); *PLA*, ss. 52(2) and 54(1)). These liabilities are all personal in nature. Other comparable legislation expressly limits the liability of insolvency professionals. For example, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, states that the liability of a receiver or trustee under an environmental protection order "is limited to the value of the assets that the person is administering", absent "gross negligence or wilful misconduct" (s. 240(3)). Alberta's oil and gas statutory regime, however, does not include such a clause protecting receivers and trustees. And as the AER's initial application makes clear, the AER itself viewed these obligations as personal. This was why it sued GTL to compel it, among other things, to comply with its obligations as a licensee under provincial law.

176 The AER also exercised its enforcement power in another capacity. In addition to issuing the Abandonment Orders, the AER imposed restrictions and conditions on the sale of Redwater's assets — conditions that effectively required GTL to satisfy those same obligations before a sale could be approved. Thus, even if GTL defied the AER's request to abandon the non-producing properties, it would still be unable to discharge its duties as receiver and trustee.

177 Both the chambers judge and the majority of the Court of Appeal found in favour of GTL on each prong of the paramountcy test, concluding that there is an operational conflict and a frustration of purpose (2016 ABQB 278, 33 Alta. L.R. (6th) 221 (Alta. Q.B.); 2017 ABCA 124, 50 Alta. L.R. (6th) 1 (Alta. C.A.)). They agreed with GTL and ATB Financial that the provisions of Alberta's statutory regime permitting the AER to enforce compliance with Redwater's environmental abandonment and reclamation obligations were constitutionally inoperative during bankruptcy. The AER and the Orphan Well Association ("OWA") then appealed to this Court.

III. Analysis

178 The *Constitution Act, 1867*, grants the federal government exclusive jurisdiction to regulate matters relating to bankruptcy and insolvency (s. 91(21)). In the exercise of that jurisdiction, Parliament enacted the *BIA*, "a complete code governing bankruptcy" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 85). The *BIA* outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims that fall within the bankruptcy process (see *BIA*, ss. 16 to 38 and 121 to 154).

179 Although the operation of the *BIA* "depends upon the survival of various provincial rights" (*Moloney* , at para. 40), this is true only to the extent that "substantive provisions of any [provincial] law or statute relating to property ... are not in conflict with [the *BIA*]" (*BIA*, s. 72(1)). When a conflict arises, the *BIA* necessarily prevails (*Moloney* , at paras. 16 and 29;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.) , at para. 16). This reflects the constitutional principle that federal laws are paramount (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 32).

180 The respondents in this appeal — GTL and ATB Financial — posit two distinct conflicts between the federal and provincial legislation. First, they argue that the *BIA* grants receivers and trustees the power to disclaim any interest in any real property, even where they are not at risk of personal liability by virtue of their possession of the property. This disclaimer power enables trustees to renounce valueless and liability-laden property of a bankrupt in pursuit of their primary goal, which is to maximize global recovery for all creditors. The respondents argue that GTL validly disclaimed the non-producing assets and therefore cannot be held responsible for carrying out the Abandonment Orders; nor can the AER make any sale of Redwater's assets conditional on the fulfillment of obligations with respect to the disclaimed properties.

181 Second, they argue that the AER's Abandonment Orders constitute "claims provable in bankruptcy". In their view, it would undermine the *BIA*'s priority scheme if the AER could assert those claims outside the bankruptcy process — and ahead of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

182 In my view, GTL and ATB Financial have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. In what follows, I first discuss the operational conflict that arises between Alberta's regulatory regime and s. 14.06(4) of the *BIA*. I then turn to the second branch of the paramountcy analysis, frustration of purpose.

A. Operational Conflict

183 The first branch of the paramountcy test is operational conflict. An operational conflict arises where "it is impossible to comply with both laws" (*Moloney* , at para. 18) — "where one enactment says 'yes' and the other says 'no'", or where "the same citizens are being told to do inconsistent things" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191; see also *Lemare Lake*, at para. 18).

184 In essence, an operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. Although this interpretation exercise takes place within the guiding confines of cooperative federalism, a concept that allows for some interplay and overlap between federal and provincial legislation, this Court recently set out the limits to this concept:

> [C]ooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Châteauguay (City)*, [2016 SCC 23, [2016] 1 S.C.R. 467] at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, [2015 SCC 14, [2015] 1 S.C.R. 693] at para. 19; *Reference re Securities Act*, [2011 SCC 66, [2011] 3 S.C.R. 837] at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).
>
> (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 (S.C.C.), at para. 18)

185 Properly understood, cooperative federalism operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. This Court recognized as much in *Moloney* , where Gascon J. wrote that courts should "favour an interpretation of the federal legislation that allows the concurrent operation of both laws" on the basis of a presumption "that Parliament intends its laws to co-exist with provincial laws" (*Moloney* (para. 27). But where "the proper meaning of the provision" — one that is not limited to "a mere literal reading of the provisions at issue" — cannot support a harmonious interpretation, it is beyond this Court's power to create harmony where Parliament did

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

not intend it (*Moloney* (para. 23; see also *Pan-Canadian Securities Regulation*, at para. 18; *Lemare Lake*, at paras. 78-79, per Côté J., dissenting, but not on this point).

186 In my view, my colleague places undue reliance on the principle of cooperative federalism to narrow the scope of federal law and find a harmonious interpretation where no plausible one exists. Courts must be especially careful about using cooperative federalism to interpret legislative provisions narrowly in a case like this where Parliament expressly envisioned that the disclaimer right could come into conflict with provincial law. This is evident from the very first line of s. 14.06(4), which states that the disclaimer power applies "[n]otwithstanding *anything* in *any* federal or *provincial law*". The notion that judicial restraint should compel a different interpretation is therefore belied by the fact that Parliament considered, acknowledged and *accepted* the potential for conflict. To rely on judicial restraint, then, to avoid a conflict between federal and provincial law is to disregard Parliament's express instruction. Simply put, this is not a case where a drastic power is to be assumed from the statute; it is one where such a power is clearly provided for. In my view, reliance on cooperative federalism must never result in an interpretation of s. 14.06(4) that is inconsonant with its language, context and purpose.

187 It is undisputed in this appeal that Alberta law does not recognize GTL's disclaimers of assets licensed by the AER as enforceable to the extent that they relieve GTL of the obligation to satisfy the environmental liabilities associated with the assets. As receiver and trustee, GTL steps into Redwater's shoes as a "licensee" under provincial law; and, GTL submits, it can therefore, without the disclaimers, be held liable for the debtor's abandonment and reclamation obligations in the same manner as Redwater itself. The question, then, is whether the *BIA* permits GTL to disclaim these properties and what legal effect results from such disclaimer.

188 Section 14.06 of the *BIA*, reproduced in full in the appendix, outlines a trustee's powers and duties with respect to environmental liabilities and the disclaimer of property. Specifically, s. 14.06(4) states that the trustee is "not personally liable for failure to comply" with an order requiring it to "remedy any environmental condition or environmental damage affecting property involved in a bankruptcy", provided that the trustee "abandons, disposes of or otherwise releases any interest in any real property... affected by the condition or damage" within the statutory timeframes. The timing of GTL's disclaimers is not at issue here.

189 My colleague concludes that, regardless of whether GTL could have properly invoked the disclaimer power in this case, the effect of any such disclaimer would simply be to protect it from personal liability. He states that, in any event, the exercise of the disclaimer power was unnecessary in this case because GTL was already fully protected from personal liability through the operation of s. 14.06(2). Further, he argues, because the AER has not sought to hold GTL personally liable, there is no conflict between federal and provincial law on the facts of this case. With respect, I disagree with this approach to the language of the *BIA*, which does not properly account for fundamental principles of constitutional and insolvency law. I will begin by addressing the proper scope of the disclaimer power provided to trustees, explaining that the actual existence of a risk of personal liability is not a necessary condition for the exercise of this power and that, while protection from personal liability is one effect of a valid disclaimer, it is not the only one. In my view, this interpretation makes s. 14.06(4) consistent with the remainder of the section and is therefore to be preferred. With respect, I do not accept that Parliament intended s. 14.06(4) simply to protect trustees from the exact same liability that it had already addressed through s. 14.06(2). Subsection (4) must have a meaningful role to play within Parliament's bankruptcy and insolvency regime; I reject the suggestion that Parliament crafted a superfluous provision. I will also deal briefly with the AER's argument that the disclaimer power is not available at all in the context of Alberta's oil and gas statutory regime. In my view, it is available in this context.

(1) The Power to Disclaim Under Section 14.06(4)

190 The "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.) , at p. 735) is that s. 14.06(4) assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency (see L. Silverstein, "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 *U. Chi. L. Rev.* 467, at pp. 468-72; *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.), at paras. 24-31; *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.), at p. 1008). This right is in keeping with the fundamental objective of court officers in insolvencies: the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

maximization of recovery for creditors as a whole by realizing the estate's valuable assets. By allowing trustees to disclaim assets with substantial liabilities, this power enables them to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4) recognizes and supports this foundational principle of insolvency law.

191 This reading offers the clearest and most obvious explanation for the manner in which the provision is drafted, in that it plainly describes a result or legal effect of disclaimer: a trustee "is not personally liable for failure to comply" with an environmental order "*if* ... the trustee ... abandons, disposes of or otherwise releases any interest in any real property" (s. 14.06(4)). We should interpret s. 14.06(4) as authorizing the act of disclaimer in light of the principle that "[t]he legislator does not speak in vain" (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) , at para. 37, citing *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.) , at p. 838). If a trustee did not have the power to disclaim property, and if that power were not recognized and provided for in the statute, a provision describing the effect of such a disclaimer would serve no purpose.

192 The AER submits that property may be disclaimed only where it is necessary for a trustee to avoid personal liability with respect to an environmental order. This interpretation entirely inverts the language of the provision, turning a stated *effect* of disclaimer into a necessary condition that circumscribes the exercise of the power. The operative clauses are neither written nor ordered in this manner. Rather, s. 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. If Parliament truly intended to condition the right to disclaim property on the actual existence of a risk of personal liability, "it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms" (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) , at p. 124).

193 My colleague adopts a slightly different approach. Rather than accepting the argument that the risk of personal liability is a necessary condition to the exercise of the disclaimer power in s. 14.06(4), he concludes that protection from personal liability for non-compliance with environmental orders is the only consequence of a valid disclaimer. Therefore, he says, the bankrupt's estate is not relieved of its obligations under the environmental orders and the trustee can be compelled to expend the entirety of the estate's assets on compliance. With respect, this also cannot be the correct reading of the subsection. Nor do I believe that the brief references to s. 14.06(4) in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) — a case in which this subsection was not directly in issue and this Court was not tasked with interpreting it in any meaningful way — provide much assistance in this case.

194 I accept that the opening words of s. 14.06(4) refer to the personal liability of the trustee. However, when the words of the subsection are read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament", as the courts are required to do (see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) ; *Bell ExpressVu* , at para. 26, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87), their meaning becomes apparent.

195 Section 14.06(4) both assumes and relies on the common law power of trustees to disclaim assets, a power that the majority of the Court of Appeal described as "commonplace" (para. 47). Even my colleague appears to accept that this disclaimer power "predates" s. 14.06(4) itself (at para. 95). Indeed, the majority of the Court of Appeal recognized that "[s]ection 14.06 does not appear to create a right in a trustee to abandon properties without value, but rather assumes that one exists upon bankruptcy" (para. 63). This is the only rational explanation for why Parliament made the effects of s. 14.06(4) available when the trustee "abandons, disposes of or otherwise releases any interest in any real property". While avoiding personal liability is one effect of the appropriate exercise of this power, it is not the only effect. Disclaimer operates to "determine, as from the date of the disclaimer, the rights, interests and liabilities" in the disclaimed property (R. Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), at p. 202). By properly disclaiming certain assets, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell the property for the benefit of the estate. The author Frank Bennett, writing about the administration of the bankrupt's real property, explains that "[w]here the trustee disclaims its interest, the disclaimer releases and disclaims any and all right, title and interest to the property" (*Bennett on Creditors' and Debtors' Rights and Remedies* (5th ed. 2006), at p. 482 (footnote omitted)).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

196 The majority asserts that s. 14.06(4) does not allow a trustee to "walk away" from assets and the environmental liabilities associated with them (paras. 86, 100 and 102). However, *disclaiming* property does have precisely this effect. It permits the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's fundamental objective. A recognized purpose of the disclaimer power is to "avoid the continuance of liabilities in respect of onerous property which would be payable as expenses of the liquidation, to the detriment of unsecured creditors" (Goode, at p. 200 (footnote omitted)). These principles are no less valid in relation to valueless real property than they are in relation to unprofitable and burdensome executory contracts. Indeed, there has been no suggestion in this appeal, including from the AER and the OWA, that trustees can never disclaim onerous real property.

197 This explanation of the disclaimer power is borne out by GTL's actions in the instant case. After assessing the economic viability and marketability of Redwater's assets, GTL determined that it would be most beneficial to Redwater's creditors as a whole if it disclaimed the non-producing, liability-laden assets.

198 Parliament's recognition of this common law disclaimer power in s. 14.06(4) is not new. The power is also referred to in another section, albeit in a broader context. Section 20(1) of the *BIA*, provides trustees with the ability to "divest" themselves of "any real property or immovable of the bankrupt" generally. However, the disclaimer power itself does not derive from this section. Nor is a trustee required to invoke s. 20(1) in order to exercise the disclaimer power described in s. 14.06(4), which incorporates that power and spells out the particular effects of its exercise in the specific context of environmental remediation orders. In any event, this Court is not required in this appeal to comment on the full effects of s. 20(1).

199 Under my colleague's interpretation, it is unclear why Parliament chose to enact the disclaimer mechanism. It is surely true that Parliament could have achieved the same outcome through the use of simpler language. Had it merely intended to protect trustees from personal liability for failure to comply with environmental orders, it could have easily done so directly — in fact, it had already done so in s. 14.06(2). There is no reason why Parliament would have attempted to achieve this relatively straightforward result through the convoluted mechanism of requiring trustees to disclaim property while at the same time not intending such disclaimer to have its "commonplace" common law effects. There is a reason why Parliament has referred to the power to disclaim in s. 14.06(4); we must give effect to this choice and to the words that Parliament has used.

200 It follows, then, that I respectfully disagree that s. 14.06(4) only protects trustees from specific types of personal liability. But it does not follow that the *estate* is relieved of its liabilities once a trustee exercises the disclaimer power — a misconception that is pervasive in the AER's submissions and the majority's analysis. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets (see *BIA*, s. 40; see also Bennett, at p. 528). The estate remains liable for the remediation obligations attached to the land. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability. In any case, the regulatory scheme continues to apply with respect to the retained assets. In referring repeatedly to the idea that disclaimer does not "immunize bankrupt estates from environmental liabilities" (para. 81), the majority misunderstands the impact and purpose of the disclaimer power. The estate itself is not relieved of environmental obligations. As I have noted, the trustee does not take possession of the bankrupt's assets in order to continue the life of the bankrupt indefinitely. The trustee's function is to realize on the estate's valuable assets and maximize global recovery for all creditors. Allowing the trustee to deal only with the value-positive assets to achieve this goal does not relieve the *estate* of its environmental obligations. As a result, the disclaimer power, and its incorporation into s. 14.06(4), is entirely consistent with the foundational principles of insolvency law.

201 In s. 14.06(4), Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purposes.

202 My interpretation of s. 14.06(4) finds ample support in the Hansard evidence. In the debates preceding the enactment of s. 14.06(4) in 1997, Jacques Hains, a director in the Department of Industry Canada who had been involved in drafting the amendments to the *BIA*, discussed the new options being provided to trustees when faced with an environmental remediation order:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> First, he could decide to carry out the order and remedy the environmental damage, the costs to be charged as costs of administration from the bankrupt's assets.
>
> The second option would be to challenge this order to remedy before the appropriate courts; these two options are already to be found in environmental legislation.
>
> The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.
>
> As a fourth option, if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies. [Emphasis added.]
>
> (Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:45 to 15:50)

The above passage makes no reference to the personal liability of a trustee who is considering whether to invoke the "fourth option" and disclaim the property. Mr. Hains was clear that the decision to disclaim is based on the "economic viability" of complying with the remediation orders, specifically "whether the assets are sufficient to cover the clean up costs". This makes sense only in the context of the trustee's obligation to maximize economic recovery for creditors.

203 Several months later, Mr. Hains reiterated this fourth option, explaining that, after assessing the economic viability of complying with the order and "knowing that the bill will be too expensive and will not be economically viable, *the trustees are then out of it and can abandon that piece of property* subject to the order" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 13:68 (emphasis added)). This description plainly reflects the function of the disclaimer power, which does indeed allow trustees to "walk away" from liability-laden assets that will not contribute to maximizing creditor recovery.

204 Mr. Hains' answers to questions from the House of Commons Standing Committee further confirms this interpretation of the disclaimer power. The following exchange is very telling:

> **Mr. Lebel [Member of Parliament for Chambly]**: When a trustee decides to give up the land and realize[s] assets elsewhere, for example by making a profit from the sale of assets, having released himself from the obligation to clean up the land, he would be sharing a dividend realized from other profitable assets and telling the creditors to manage as best they can with the real property. If the creditors are not willing to touch it, he will then tell the government to clean it up. In such a case, each of the bankruptcy creditors would also ... stand to earn a small dividend, as it is referred to in Bankruptcy Law.
>
> Do you not think that your bill should require the trustee to carry out a clean-up from the assets of the bankruptcy before the dividends are distributed?
>
> **Mr. Hains**: It's an excellent question that was put to me only three weeks ago by colleagues from the Department of the Environment of Quebec, whom I was meeting to discuss this subject. There were a number of matters of interest to them, particularly the one raised by Mr. Lebel. [Emphasis added.]
>
> (Standing Committee on Industry, June 11, 1996, at 16:55)

Mr. Hains went on to reference various other features of the scheme to assuage Mr. Lebel's concerns and noted that provincial environmental agencies would be responsible for performing the remediation work. Significantly, at no point did Mr. Hains contradict Mr. Lebel's understanding of the bill's provisions. Nor did he take issue with the premise underlying the question: that the new legislation does not "require the trustee to carry out a clean-up from the assets of the bankruptcy" before they are distributed to creditors. Mr. Hains did not claim that provincial regulators might still enforce such a requirement.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

205 This exchange between Mr. Lebel and Mr. Hains clearly demonstrates the collective understanding of all parties that the proposed amendments, containing what would become s. 14.06(4), specifically *did not* require the trustee to expend the estate's assets to comply with environmental remediation orders. The drafters of s. 14.06(4) thus turned their minds directly to this issue, and their understanding of the provision's effects was contrary to that proposed by the majority.

206 Based on these references to Hansard, I cannot agree with the majority's statement that the legislative debates provide "no hint" of a parliamentary intention to relieve trustees of the obligation to expend estate assets on environmental remediation (para. 81). This intention was clearly expressed on multiple occasions.

207 As courts must read statutory provisions in their entire context, and as Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole, it is important to carefully examine the other subsections of s. 14.06. This is true regardless of whether a party to litigation seeks to apply them or to put them directly in issue (majority reasons, at paras. 88 and 101). Significantly, the immediate statutory context surrounding s. 14.06(4) confirms that a trustee's right to disclaim property is not limited in the manner suggested by the AER or my colleague. Four provisions adjacent to s. 14.06(4) support this conclusion.

208 First, s. 14.06(5) provides that a court may stay an environmental order "for the purpose of enabling the trustee to assess the economic viability of complying with the order". Assessing "economic viability" is, on its face, broader than assessing the risk of personal liability. This provision indicates that a trustee is entitled to disclaim assets based on a rational economic analysis geared toward maximizing the value of the estate, and not merely in order to protect itself from personal liability. Otherwise, there would be no reason for Parliament to permit a court to grant a stay for the purpose of assessing economic viability. This understanding is consistent with the fundamental principles of insolvency law and with the Hansard evidence, as noted above, as well as with one of the recognized justifications for the disclaimer power more generally: to allow a trustee "to complete the administration of the liquidation without being held up by continuing obligations on the company under ... continued ownership and possession of assets which are of no value to the estate" (Goode, at p. 200).

209 Second, s. 14.06(7) grants the government a super priority for environmental claims in cases where it has already taken action to remedy the condition or damage. This provision would serve little purpose if a government regulator could assert a super priority for *all* environmental claims, as the AER effectively purports to do here by refusing to recognize GTL's disclaimers as lawful. It also suggests that Parliament specifically envisioned that the government could obtain a super priority and leapfrog other creditors, but *only* where the government itself has already remediated the environmental damage. An analogous argument was central to the reasoning in *Abitibi*, where this Court observed that the existence of a Crown priority limited to the contaminated property and certain related property under s. 11.8(8) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, undercut the argument that Parliament "intended that the debtor always satisfy all remediation costs" in circumstances where that express priority was inapplicable and where the Crown had no further priority with respect to the totality of the estate's assets (para. 33).

210 Third, s. 14.06(6) provides that claims for costs of remedying an environmental condition or environmental damage cannot rank as costs of administration if the trustee has disclaimed the property in question. Again, if the AER could effectively assert a super priority by compelling GTL to use all of Redwater's assets to satisfy its outstanding environmental liabilities, this provision would be unnecessary, because the costs of environmental remediation would rank *ahead* of administrative costs in the priority structure. Moreover, s. 14.06(6) highlights the potential for a direct conflict between federal and provincial law. A trustee cannot comply with the AER's instruction to pay environmental costs as part of its administration of the estate while simultaneously complying with the *BIA*'s requirement that such costs *not* be included in the trustee's administrative costs. This further raises the spectre of bankruptcy professionals being forced to expend their own funds under Alberta's regulatory regime — a notion that Parliament clearly rejected by amending the *BIA* in response to *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (Alta. C.A.) (see C.A. reasons, at para. 63). This is a risk that is not adequately addressed under my colleague's interpretation.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

211 Fourth, s. 14.06(2) already deals with the circumstances in which a trustee can be held personally liable for a bankrupt's environmental liabilities. Under this provision, personal liability can arise only where environmental damage occurs as a result of the trustee's gross negligence or wilful misconduct. If a risk of personal liability is, in fact, a necessary condition to disclaim under s. 14.06(4), or if protection from personal liability is the only effect of disclaimer, this would mean that the disclaimer power is available or useful only in cases where the underlying environmental condition arises after the trustee's appointment and the trustee is responsible for gross negligence or wilful misconduct.

212 This obvious absurdity cannot be sidestepped by trying to distinguish between liability for environmental *damage* (purportedly covered by s. 14.06(2)) and liability for *a failure to comply with an order* to remedy such damage (purportedly covered by s. 14.06(4)). This distinction is entirely artificial. If the AER issues an abandonment order in relation to a licensed property, it effectively creates liability for the underlying condition itself — liability that would still be encompassed by s. 14.06(2). This is evident from the marginal note for s. 14.06(2), "[l]iability in respect of environmental *matters*", which is capacious enough to include liability that flows from a failure to comply with an environmental order. In any event, it is difficult to imagine why Parliament would intend to immunize a trustee from personal liability for an environmental *condition*, but still hold the trustee liable for a failure to comply with an *order* to remedy that exact same condition — and then further, permit the trustee to avoid that very liability by disclaiming the property, but either not permit the trustee to disclaim that property in any other circumstance or make it pointless to do so. This convoluted reasoning not only misreads s. 14.06(4), but also rewrites s. 14.06(2) in the process. It effectively creates a sector specific exemption from bankruptcy law that would prohibit many receivers and trustees that operate in the oil and gas industry from disclaiming assets (see N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online)).

213 I also cannot accept that Parliament enacted s. 14.06(4) simply to protect trustees from personal liability in the narrow subset of circumstances not already covered by s. 14.06(2) — namely where an environmental condition or environmental damage arises after a trustee's appointment and as a result of the trustee's gross negligence or wilful misconduct — for two main reasons. Firstly, the terms of the provision itself belie this theory. The opening lines of s. 14.06(4) expressly make the limitation of liability "subject to subsection (2)". This indicates that Parliament deliberately intended subs. (2) to supersede subs. (4) in the determination of liability. Thus, where a trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee *will still be personally liable*, despite any valid disclaimer under subs. (4). Secondly, there is no evidence, or indeed any rationale, to explain why Parliament would have drafted s. 14.06(4) to protect trustees in such narrow circumstances, through the method of disclaiming property, and to shield them from liability where they cause environmental issues through their own wrongdoing.

214 The majority of this Court accepts that, on its interpretation, no meaningful distinction can be drawn between the protection from personal liability provided by subs. (2) and that provided by subs. (4). Indeed, the majority appears to believe that such a distinction is not even necessary, accepting that "s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2)" (para. 93). However, the effect of this interpretation is to render subs. (4) entirely meaningless and redundant. Trustees would have no reason to exercise their power to disclaim assets, as the only effect of doing so would be to protect them from personal liability from which they are already fully shielded by subs. (2). Section 14.06(4) would therefore serve no purpose whatsoever within Parliament's bankruptcy regime. I cannot understand the logic of Parliament explicitly referring to, and incorporating, the ability of trustees to disclaim assets — and specifically outlining one consequence of that power — simply to mandate that such an action has no meaningful effect. We must presume that Parliament does not speak in vain and did not craft a pointless provision (*J.T.I. MacDonald Corp. c. Canada (Procureure générale)*, 2007 SCC 30, [2007] 2 S.C.R. 610 (S.C.C.) , at para. 87). It is a trite principle of statutory interpretation that every provision of a statute should be given meaning:

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; ... it does not make the same point twice.
>
> (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43)

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

215 This evident absurdity cannot be avoided by suggesting that s. 14.06(4) was created to clarify to trustees that they may be required to expend the entire value of a bankrupt estate to comply with environmental orders, despite valid disclaimers. If Parliament's intent was truly to undermine the disclaimer power in this way, it is difficult to conceive of a more convoluted, tortuous and unclear method to achieve this result than s. 14.06(4). Had Parliament simply sought to make clear to trustees that disclaimer would not allow them to relieve themselves from satisfying environmental liabilities, it could easily have done so directly rather than enacting a provision that describes protection from personal liability they do not actually face.

216 Section 14.06, when read as a whole, indicates that subs. (4) does more than merely protect trustees from personal liability. My colleague has declined to even consider the remaining subsections of s. 14.06 that I have discussed, other than subs. (2). Nonetheless, he says that the plain meaning of a provision cannot be "contorted to make its scheme more coherent" (para. 101). The conclusion that would result from such an approach would be that Parliament simply intended to craft a largely incoherent framework. I disagree that we should reach this conclusion here. As Dickson J. (as he then was) stated in *R. v. Morgentaler* (1975), [1976] 1 S.C.R. 616 (S.C.C.) , at p. 676: "We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities." A determination that Parliament designed s. 14.06 as an incoherent whole is inconsistent with the role of the courts in statutory interpretation, which is to read the words of a statute in their entire context, harmoniously with the scheme of the statute. As Ruth Sullivan has noted:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. [Footnote omitted.]
>
> (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337; see also *R. v. H. (L.)*, 2008 SCC 49, [2008] 2 S.C.R. 739 (S.C.C.), at para. 47.)

217 Where it is possible to read the provisions of a statute — especially the various subsections of a single section — in a consistent manner, that interpretation is to be preferred over one that results in internal inconsistency. In my view, as I have set out above, it is possible to read s. 14.06(4) coherently with the remainder of the section. This is the interpretation that Parliament is presumed to have intended. In this case, I see no compelling reason to depart from this presumption.

218 My colleague's analysis is reminiscent of the strictly textual or literal approach to statutory interpretation — the "plain meaning rule" — that this Court squarely rejected in *Rizzo*. This is apparent from the fact that he relies strictly on what he alleges to be the "clear and unambiguous" wording of s. 14.06(4), while discounting the context of the provision. With respect, I am of the view that the Court should rely on the predominant and well-established modern approach to statutory interpretation: the words of an Act must be "'read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (*Rizzo*, at para. 21; *Bell ExpressVu* , at para. 26, both quoting Driedger, at p. 87).

219 In *Rizzo*, Iaccobucci J. explained that "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21). The Court of Appeal in *Rizzo*, which had adopted the plain meaning interpretation, "did not pay sufficient attention to the scheme of the [Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized" (para. 23).

220 In interpreting s. 14.06(4) of the *BIA*, the majority similarly relies on the supposed plain meaning of the words of the provision but does not pay sufficient attention to the scheme of s. 14.06 as a whole; nor does it appropriately recognize the context of the words.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

221 Even if we were to leave aside the wording of the provision itself and its immediate statutory context, a purposive interpretation would lead to the same result. Consider the consequences of the analysis of the AER or the analysis of my colleague in other cases like this, where an oil company's environmental liabilities exceed the value of its realizable assets. Insolvency professionals, knowing in advance that they can be compelled to funnel all of the estate's remaining assets toward those environmental liabilities (either because they cannot disclaim value-negative assets absent a risk of personal liability or because their disclaimer will be ineffective to prevent this), will never accept mandates in the first place. This is sensible business practice: if the estate's entire realizable value must go toward its environmental liabilities, leaving nothing behind to cover administrative costs, insolvency professionals will have nothing to gain — and much to lose — by stepping in to serve as receivers and trustees, irrespective of whether they are protected from personal liability. Debtors and creditors alike, knowing that this is the case, will have no reason to even petition for bankruptcy. The result is that *none* of a bankrupt estate's assets will be sold — not even an oil company's valuable wells — and the number of orphaned properties will increase. This is a far cry from the objectives of the 1997 amendments to the *BIA* as discussed in Parliament, which were to "encourage [insolvency professionals] to accept mandates" and to "reduce the number of abandoned sites" (Standing Committee on Industry, June 11, 1996, at 15:49). It is difficult to imagine that Parliament would have intended a construction of s. 14.06(4) that explicitly undermines its stated purposes.

222 The majority appears to accept that the purposes of s. 14.06(4) of the *BIA* included encouraging insolvency professionals to accept mandates in cases where there may be environmental liabilities (paras. 80-81). However, merely protecting trustees from personal liability in such cases will fail to achieve Parliament's desired result. As I have explained, even where prospective trustees face no risk of personal liability, they will be reluctant to accept mandates if provincial entities can require the entire value of a bankrupt's realizable estate to be applied to satisfy environmental obligations.

223 Since I have explained that s. 14.06(4) provides trustees with the power to disclaim assets even where there is no risk of personal liability, it is now necessary to briefly consider whether this power was available to GTL on the facts of this case. Here, the statutory conditions to the exercise of this power were met. The Abandonment Orders clearly relate to the remediation of an "environmental condition" (or "tout fait ... lié à l'environnement" in the French version of the *BIA*, which can be translated literally as "any fact ... related to the environment"). Indeed, even the AER and the OWA have never contested this point. In response to such orders, GTL was therefore entitled to exercise the disclaimer power provided for in s. 14.06(4).

(2) Section 14.06(4) Applies to Alberta's Oil and Gas Industry

224 The AER raised an additional argument that the right of disclaimer is entirely inapplicable in the context of the statutory regime governing the oil and gas industry due to the role played by third-party surface landowners and the nature of the property interests involved which rendered the Crown's super priority under s. 14.06(7) impractical. Martin J.A. (as she then was), writing in dissent at the Alberta Court of Appeal, reached the same conclusion. With respect, I cannot agree. Parliament did not make the disclaimer power in s. 14.06(4) conditional on the availability of the Crown's super priority.

225 In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language. The trustee is permitted to disclaim "any interest" in "any real property". While Redwater's AER-issued licences may not be real property, all of the parties accept that *profits à prendre* and surface leases can be characterized as real property interests. In the context of this case, it is these interests that GTL truly sought to disclaim. The AER argued that s. 14.06(4) permits the disclaimer only of "true real property", meaning land currently or previously owned by the bankrupt, without any third-party landowners. This interpretation is not consistent with the actual language used by Parliament. Had Parliament intended to restrict the disclaimer power solely to fee simple interests, it could have stated this, rather than referring to "any interest in any real property".

226 Further, the Alberta oil and gas industry is far from the only natural resource sector in which companies traditionally operate on the land of third parties, whether the Crown or private landowners. The potential liability of trustees would explode if the mere presence of these third-party landowners rendered the disclaimer power in s. 14.06(4) entirely inapplicable. The language of the section is clearly broad enough to capture the statutory regime governing Alberta's oil and gas sector.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(3) Conclusion on Operational Conflict

227 In light of this interpretation of s. 14.06(4), I agree with both courts below that there is an operational conflict to the extent that Alberta's statutory regime holds receivers and trustees liable as "licensees" in relation to the disclaimed assets (see chambers judge reasons, at para. 181; C.A. reasons, at para. 57). This conflict is far from hypothetical. Under federal law, GTL is entitled to disclaim the bankrupt's assets affected by the Abandonment Orders. Under the *BIA*, GTL cannot be compelled to take action with respect to properties it has validly disclaimed, since the act of disclaimer relieves it of any rights, interests and liabilities in respect of the disclaimed properties. But under provincial law, the AER can order GTL to abandon the disclaimed assets, among other things (see para. 11). This is exactly what happened here. Not only did the AER order GTL to complete the work, but it also made the sale of Redwater's valuable assets conditional on GTL either abandoning the non-producing properties itself or packaging those properties with the estate's valuable assets for the purposes of any sale. In doing so, the AER impermissibly disregarded the effect of GTL's disclaimers. This remains the case, irrespective of whether GTL could (or would) ever be held personally liable for the costs of abandoning the properties above and beyond the entire value of the estate.

228 My colleague claims that the AER "has never attempted to hold a trustee personally liable" (para. 107). What is clear is that, on the facts of this case, the AER directly sought to require GTL to perform or pay for the abandonment work itself, whether this is referred to as personal liability or not. It is critical to observe that this litigation began when the AER filed an application seeking to compel GTL to comply with its obligations as a licensee, including the obligation to abandon the non-producing properties. Practically speaking, this amounted to an effort to hold GTL personally liable. Where else would the money required to abandon the disclaimed properties have come from? The value of the estate as a whole was negative, and the AER refused to permit GTL to sell the valuable properties on their own. No purchaser would have agreed to buy all of the assets together. Therefore, GTL had no way to recoup any value from the estate, as Redwater was bankrupt and no longer generating income. The *only* source of funds, in this scenario, was GTL itself. This is why the AER filed suit to compel GTL to carry out Redwater's abandonment obligations. As this makes clear, I cannot agree with the suggestion that the provincial regime has never been utilized to hold trustees personally liable in contravention of federal law. That is precisely what happened in this very case.

229 This conclusion cannot be avoided by referring to the fact that, pursuant to orders of the Alberta courts, GTL has already sold the valuable Redwater assets and the proceeds are being held in trust pending the outcome of this appeal (see majority reasons, at para. 108). This is precisely the result the AER sought to prevent by precluding GTL from selling only the valuable properties, without the disclaimed ones. GTL was able to do so only as a direct result of this litigation.

230 My colleague states that, if the AER "were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict" (para. 107). Thus, even on my colleague's interpretation of s. 14.06 — which I do not accept — an operational conflict does exist on the facts of this case, specifically as a result of the AER's application to the Alberta Court of Queen's Bench seeking to have GTL personally satisfy the environmental obligations associated with the disclaimed assets.

231 All of that being said, creditors with provable claims can still seek payment in accordance with the *BIA*'s priority scheme (*Abitibi*, at para. 98). As I discuss below, the AER's environmental claims remain valid as against the Redwater estate, and it may pursue those claims through the normal bankruptcy process. Thus, even if s. 14.06(4) does not permit GTL to disclaim the non-producing wells and relieve itself of the environmental obligations associated with them, it is nevertheless the case that the AER cannot compel GTL to satisfy its claims ahead of those of Redwater's secured creditors.

B. Frustration of Purpose

232 The second branch of the paramountcy test is frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will nevertheless be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose (*Moloney* , at para. 25; *Bank of Montreal v.*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Hall, [1990] 1 S.C.R. 121 (S.C.C.) , at pp. 154-55; *Canadian Western Bank* , at para. 73). The focus of the analysis is on the effect of the provincial legislation or provisions, not its purpose (*Moloney* , at para. 28; *Husky Oil* , at para. 39).

233 This Court has repeatedly recognized that one of the purposes of the *BIA* is "the equitable distribution of the bankrupt's assets among his or her creditors" (*Moloney* , at para. 32; *Husky Oil* , at para. 7). It achieves this goal through a collective proceeding model — one that maximizes creditors' total recovery and promotes order and efficiency by distributing the estate's assets in accordance with a designated priority scheme (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) , at para. 22). All claims that are "provable in bankruptcy" are subject to this priority scheme. Exercises of provincial power that have the effect of altering bankruptcy priorities are therefore inoperative because they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime (*Abitibi*, at para. 19; *Husky Oil* , at para. 32).

234 The question here is whether the environmental claims asserted by the AER (i.e., the Abandonment Orders) are provable in bankruptcy. If they are, then the AER is not permitted to assert those claims outside of the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme. Rather, it must abide by the *BIA* and seek recovery from the estate through the normal bankruptcy procedures (*Abitibi*, at para. 40).

235 In *Abitibi*, this Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy: "First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation" (para. 26 (emphasis in original)). Since there is no dispute that Redwater's environmental obligations arose before it became bankrupt, I limit my analysis below to the first and third prongs of the *Abitibi* test: whether the liability is owed to a creditor, and whether it is possible to attach a monetary value to that liability.

236 The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. Deschamps J., writing for a majority of the Court, suggested that this is not an exacting requirement: "The *only determination* that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied" (para. 27 (emphasis added)). Though I would not go so far as to suggest that the analysis under the first prong is merely perfunctory or pro forma, and circumstances may well exist where it is not satisfied, Deschamps J. made clear in *Abitibi* that "*[m]ost* environmental regulatory bodies can be creditors", again stressing that government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties (para. 27 (emphasis added)). Even Martin J.A., writing in dissent at the Court of Appeal in this case, acknowledged that "*Abitibi* cast[s] the creditor net widely" (para. 186). The language of *Abitibi* admits of no ambiguity, uncertainty or doubt in this regard.

237 The majority suggests that applying *Abitibi* on its own terms will make it "impossible for a regulator *not* to be a creditor" (para. 136 (emphasis in original)). Without seeking to speculate on all possible scenarios, I would simply note that there will be many obvious circumstances in which regulators are not even exercising enforcement powers against particular debtors and the analysis from*Abitibi* can be concluded at a very early stage. Provincial regulators do many things that do not qualify as enforcement mechanisms against specific parties. For example, a regulatory agency may publish guidelines for the benefit of all actors in a certain industry or it may issue a license or permit to an individual. In such cases, any discussion of frustrating federal purposes will not go far. However, as Deschamps J. expressly acknowledged, the first prong of the test will have very broad application. This Court should not feel compelled to limit its scope when*Abitibi* employed clear language in full recognition of its wide-ranging effects.

238 Here, there is no doubt that the AER exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. The reasoning is simple: Redwater owes a debt to the AER, and the AER has attempted to enforce that debt by issuing the Abandonment Orders, which require Redwater to make good on its obligation. If Redwater (or GTL, as the receiver and trustee) does not abide by those orders — to the detriment of the estate's other creditors — it can be held liable under provincial law. This is, by any definition, an exercise of enforcement power, which is precisely what *Abitibi* describes. In fact, the AER itself conceded this point *twice* — first before the Court of Queen's Bench, and again at the Court of Appeal (chambers judge reasons, at para. 164; C.A. reasons, at para. 73).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

239 The conclusion that I reach with respect to the AER's status as a creditor follows from a straightforward application of *Abitibi*. My colleague, however, seeks to reformulate this prong of the test. He suggests that a regulator is acting as a creditor only where it is not acting in the public interest and where the regulator itself, or the general revenue fund, is the beneficiary of the environmental obligation. He endorses the holding allegedly made in *Northern Badger* that "a regulator enforcing a public duty by way of non-monetary order is not a creditor" (para. 130).

240 In my view, it is neither appropriate nor necessary in this case to attempt to redefine this prong of *Abitibi* and narrow the broad definition of "creditor" provided by Deschamps J. This Court should leave her clear description of the provable claim standard to stand on its own terms. Respectfully, I disagree with the manner in which the majority is attempting to reformulate the "creditor" analysis, for a number of reasons.

241 Firstly, I do not believe that this case represents an appropriate opportunity to revisit the "creditor" stage of the *Abitibi* test. The AER conceded in both of the courts below that it was in fact a creditor of GTL. As a direct result of these concessions, neither the Alberta Court of Queen's Bench nor the majority of the Court of Appeal directly addressed this issue; instead, they merely provided cursory comments. This issue appears to have been raised for the first time by Martin J.A. in her dissenting judgment. However, even her analysis is relatively brief, comprising only three paragraphs and consisting mainly of the statement that the costs of abandonment are "not owed to the Regulator, or to the province" (para. 185). While it is true that the parties briefly addressed this issue in their written and oral submissions to this Court, it was clearly not a substantial focus of their arguments. Without the benefit of considered reasons from the lower courts or thorough submissions on the continued application of the first prong of the test formulated in *Abitibi*, this Court should not attempt to significantly alter it.

242 Secondly, the majority states that no fairness concerns are raised by disregarding the AER's concessions below. It makes this point predominantly because the issue was raised and argued before this Court and because of the AER's unilateral assertion in its letter to GTL in May 2015. However, it is important to note that the effect of the AER's concessions was that GTL and ATB Financial were no longer required to adduce any evidence on this issue (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (5th ed. 2018), at p. 1387). This point is important given that the majority's reformulation of the "creditor" requirement under the first prong of the test is highly fact-specific and dependent on the circumstances of the particular case. As a direct result of the AER's concession in the Alberta Court of Queen's Bench, we cannot know what evidence GTL or ATB Financial could have adduced on this issue. Therefore, there may indeed be real prejudice occasioned to these parties by disregarding the AER's concession at this point in time.

243 Thirdly, my colleague relies on the fact that the chambers judge in*Abitibi* found that the Province had already expropriated three of the five sites for which it issued remediation orders and was likely using the orders as a means to offset AbitibiBowater's NAFTA claims. While the chambers judge did in fact make these findings, they were inconsequential to Deschamps J.'s analysis on the "creditor" prong of the test. When applying the test to the facts of*Abitibi*, she explained that the first prong was "easily satisfied" because "the Province had identified itself as a creditor by resorting to [*Environmental Protection Act*, S.N.L. 2002, c. E-14.2] enforcement mechanisms" (*Abitibi*, at para. 49). She placed no reliance on the fact that the Province might itself derive a financial benefit from its actions and was not enforcing a purely public duty. Her analysis was in no way based on a finding that the Province's actions were a "colourable attempt" to recover a debt or that they demonstrated an "ulterior motive" (majority reasons, at para. 128).

244 Fourthly, in my view, it is incorrect to rely on *Northern Badger* in this case. That decision does not support my colleague's position in the manner he alleges. The issue in *Northern Badger* was also whether environmental remediation orders could be considered claims provable in bankruptcy. However, the crux of the dispute was whether "enforcing the requirement for the proper abandonment of oil and gas wells" (p. 57) gave rise to a provable claim because it would require the receiver to expend funds. Laycraft C.J.A. never addressed the question of whether the regulator could be said to have a contingent claim because it would complete the abandonment work itself and assert a claim for reimbursement. It was in the context of the regulator requiring the receiver to fulfill the abandonment obligations *itself* that the Alberta Court of Appeal discussed the enforcement of a public duty. It is important to carefully examine what the Court of Appeal actually said in this regard:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
>
> It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under Sections 91(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta. [Emphasis added; paras. 33-34.]

245 As is evident from para. 34 of *Northern Badger*, quoted above, the Court of Appeal never stated in that case that a regulator is not — or cannot be — a creditor when it is acting to enforce a public duty. In *Abitibi*, when referring to *Northern Badger*, Deschamps J. explained that the Alberta Court of Appeal "found that the duty to undertake remediation work is owed to the public at large *until the regulator exercises its power to assert a monetary claim*" (*Abitibi*, at para. 44 (emphasis added)). Laycraft C.J.A. accepted that when the regulator fulfills an environmental obligation itself and asserts a claim for reimbursement, it does indeed "become a creditor for the sums expended". Even in this situation, the public is still the ultimate beneficiary of the remediation work. This is largely consistent with Deschamps J.'s formulation of the test for a provable claim. In fact, this Court simply extended this principle in *Abitibi*, concluding that a regulator may also be a creditor with a provable contingent claim when it is sufficiently certain that the regulator will perform the remediation work and advance a claim for reimbursement. This is precisely the situation with the AER and the OWA here, as I will explain in more detail below. The Alberta Court of Appeal did not frame the issue in terms of the three-part test that would later be developed in *Abitibi*; it did not divide its analysis of whether a provable claim existed. However, viewed properly, Deschamps J. dealt with the concerns raised in *Northern Badger* under the third prong of the *Abitibi* test. It is not appropriate to duplicate these principles under the first prong as well, as the majority proposes. For this reason, it is misguided to rely on *Northern Badger* in this appeal to conclude that the AER is not a creditor.

246 However, even if the majority were correct about the reasoning in *Northern Badger* with respect to whether regulators enforcing public duties can be creditors — which I do not concede — I do not accept its conclusion that *Abitibi* did not overturn that reasoning. The Court was well aware of the decision in *Northern Badger* and cited it directly. Despite this, Deschamps J., when formulating the first prong of the test, made no distinction between regulators acting in the public interest and regulators acting for their own benefit. Instead, she stated that "the only determination that has to be made" (para. 27) is whether the regulator is exercising its enforcement powers against a debtor. In referring to *Northern Badger*, she expressly noted that "*[t]he real question is not to whom the obligation is owed*, as this question is answered by the statute, which determines who can require that it be discharged" (paras. 27 and 46 (emphasis added)).

247 Finally, and perhaps most importantly, suggesting that a regulator is not acting as a creditor where its environmental enforcement activities are aimed at the public good and are for the benefit of the public effectively overrules the first prong of the *Abitibi* test. Under my colleague's approach, it is no longer the case that the *only* determination that has to be made at the creditor stage of the analysis is "whether the regulatory body has exercised its enforcement power against a debtor" (*Abitibi*, at para. 27). Instead, the court must consider whether the regulatory body is enforcing a public duty and whether it stands to benefit financially from the fulfillment of the obligation in question.

248 Provincial regulators, in exercising their statutory environmental powers, will, in some sense, virtually always be acting in some public interest or for the benefit of some segment of the public. Under my colleague's reformulation of the first prong of the *Abitibi* test, it will be nearly impossible to find that regulators acting to protect environmental interests are ever creditors, outside the facts of *Abitibi* itself. As a result, provincial entities will be able to completely disregard the *BIA*'s priority scheme as

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

long as they can plausibly point to some public interest that is furthered by their actions. Such a result strips *Abitibi* of its central holding and entitles provincial regulators to easily upend Parliament's purpose of providing an equitable recovery scheme in bankruptcy for all creditors.

249 In my view, it is insufficient to simply note that the facts of *Abitibi* differ from those of the present appeal (majority reasons, at para. 136). Deschamps J.'s broad articulation of the first prong of the test was in no way made dependent upon the particular facts of *Abitibi*. She sought to provide a clear general framework for determining when a regulator will be classified as a creditor — a framework that the majority's reasons effectively rewrite.

250 Further, it is worth noting that this Court in *Moloney* followed *Abitibi* in applying the broad definition of "creditor". In *Moloney* , this Court concluded that the Province of Alberta was acting as a creditor even though the debt it was collecting was reimbursement for compensating a third party who had been injured by the debtor in a car accident (para. 55). I fail to see how any meaningful distinction can be drawn between that situation and a situation in which a regulator seeks reimbursement for the costs incurred to remedy environmental damage caused to the land of third parties by the debtor.

251 "[G]reat care should be taken" before this Court overturns or overrules one of its prior decisions (*Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317 (S.C.C.) , at para. 65). It is "a step not to be lightly undertaken" (*Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.) , at para. 24). In order to do so, "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Craig* , at para. 25; see also *Teva* , at para. 65). The reasons for exercising such caution are clear and sound, namely to ensure "certainty, consistency and institutional legitimacy" and to recognize that "the public relies on our disciplined ability to respect precedent" (*Teva* , at para. 65). When this Court decides that it is necessary to depart from one of its past decision, it should be clear about what it is doing and why.

252 Despite these clear admonitions against this Court too easily overturning its own precedents, that is precisely what the majority proposes to do in this case. Its approach effectively overrules the unequivocal definition of "creditor" provided in *Abitibi* — a considered decision rendered by a majority of this Court a mere six years ago. Not only does the majority fail to provide compelling reasons why Deschamps J.'s clear definition is wrong, but it also does not acknowledge that it is overturning a recent decision of this Court, rejecting the suggestion that this is the impact of its reasoning (para. 136). Further, this is being done without complete and robust submissions on the issue. Such an approach to our own precedents does not serve the goals of certainty, consistency or institutional legitimacy.

253 This Court should continue to apply the "creditor" prong of the test as it was clearly articulated in *Abitibi*. Deschamps J.'s definition ensures that provincial regulators are not able to easily appropriate for themselves a higher priority in bankruptcy and undermine Parliament's priority scheme. It advances the goals of orderliness and fairness in insolvency proceedings. Under that broad standard, the AER plainly acted as a creditor with respect to the Redwater estate. That is likely why it conceded this point in both of the courts below.

254 Since there is no dispute that the second prong of the *Abitibi* test is satisfied, I turn next to the third prong, which asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. As explained in *Abitibi* in the context of an environmental order:

> With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.
>
> . . . . .
>
> The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process. [Emphasis added; paras. 30 and 36.]

255 In my view, it is sufficiently certain that either the AER or the OWA will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers judge made three critical findings of fact — each of which is entitled to deference on appeal (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) , at para. 10) — that easily support this conclusion.

256 First, Wittmann C.J. found that GTL was not in possession of the disclaimed properties and, in any event, "has no ability to perform any kind of work on these assets" because the environmental liabilities exceeded the value of the estate itself (para. 170; see also *Abitibi*, at para. 53 where the Court stated that: "Abitibi had no means to perform the remediation work"). He discounted the possibility that any of Redwater's working interest participants would step in to perform the work, even for the small number of Redwater's licensed assets for which such partners existed (chambers judge reasons, at para. 171). In sum, he concluded that "there is no other party who could be compelled to carry out the abandonment work" (para. 172).

257 Two decisions of the Ontario Court of Appeal highlight why this is important. In *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard was *not* satisfied in respect of certain sites because those sites had already been sold so the purchasers could be compelled to carry out the work on the basis that they were jointly and severally liable for the remediation obligations (paras. 39-40). But in *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard *was* satisfied because there was no purchaser that could be compelled by the regulator to complete the work. While it is true that fresh evidence on appeal revealed that the Ministry of the Environment had commenced the remediation work, Juriansz J.A. found that the fact that there were no subsequent purchasers had grounded the application judge's implicit conclusion regarding sufficient certainty (paras. 16-17). The present case is like *Northstar*, which is perfectly applicable to the facts of this case: there is no purchaser to take on Redwater's assets, and the debtor itself is insolvent. The chambers judge in this case concluded that there was no other party who could be compelled to carry out the work.

258 Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, Wittmann C.J. found as a fact that "the AER will ultimately be responsible for [the abandonment] costs" (para. 171). He concluded that "the AER has the power [to seek recovery of abandonment costs] and has actually performed the work on occasion" (para. 168). In fact, in this very case, "the AER has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets" (para. 172). This conclusion finds ample support in the record. In a cover letter sent with the Abandonment Orders on July 15, 2015, the AER unambiguously stated that if Redwater failed to abandon the disclaimed properties in accordance with its instructions, "the AER *will, without further notice, use its process to have the properties abandoned*" (GTL's Record, vol. I, at p. 102 (emphasis added)). The letter further stated that "[t]he AER *will exercise all remedies available to it to recover the costs from the liable parties*" (p. 102 (emphasis added)). The chambers judge did not err in relying on these unequivocal statements from the AER itself — to the effect that it *will* have the abandonment work performed and seek reimbursement — to conclude that sufficient certainty existed in this case.

259 Although there is some contrary evidence in the record — principally, the remarks of an AER affiant, who stated that the AER would not abandon the properties — Wittmann C.J. did not commit any palpable and overriding error by giving more weight to the letter that the AER sent contemporaneously with the Abandonment Orders. Likewise, to the extent that the AER sent other correspondence stating that it was not a creditor and that it was not asserting a provable claim, Wittmann C.J. did not err in discounting these self-serving statements as insufficiently probative on the ultimate legal questions. There is therefore no basis to disturb these factual findings or to reweigh this evidence on appeal.

260 Even if the AER's admission that it would abandon the properties itself is not sufficient on its own, Wittmann C.J. made a third critical finding of fact: the AER's only "realistic alternativ[e] to performing the remediation work itself" was to deem the renounced assets to be orphan wells (para. 172). In this circumstance, he found that "the legislation and evidence shows that if the AER deems a well an orphan, *then the OWA will perform the work*" (para. 166 (emphasis added)).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

261 In light of these factual determinations, Wittmann C.J. rightly concluded that the "sufficient certainty" standard of *Abitibi* was satisfied. He elaborated on the legal basis for that conclusion as follows:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform the work, although not necessarily within a definite timeframe. However, the situation does meet, in my opinion, what was intended by the majority of the Court in *AbitibiBowater*. ... In the result, I find that although not expressed in monetary terms, the AER orders are in this case intrinsically financial. [para. 173]

262 My colleague does not specify the standard of review he applies in overturning Wittmann C.J.'s application of the third prong of the *Abitibi* test to this case. Nevertheless, he disagrees with the chambers judge and holds that the "sufficient certainty" standard is not satisfied. He offers two reasons for overruling Wittmann C.J.'s finding; but in doing so, he does not identify any palpable and overriding error (or, even under the non-deferential standard of correctness, *any* true error) in the chambers judge's ultimate conclusion.

263 The first reason — the purported legal error of determining that the Abandonment Orders are "intrinsically financial" — is little more than a distraction. Even if this is an erroneous application of *Abitibi*, it is evident that Wittmann C.J. was of the view, *at a minimum*, that either the AER or the OWA would complete the abandonment work. And as I describe below, this alone is enough to satisfy the "sufficient certainty" standard. My colleague overemphasizes the import of this stray comment in the context of a thorough set of reasons that otherwise faithfully applies the correct standard. Any legal error on this basis, to the extent that one exists, does not displace the result that the chambers judge reached.

264 The second reason is more substantial. According to Wagner C.J., whether the AER will perform the abandonment work itself or delegate that task to the OWA is dispositive, since it was the Province itself that undertook the reclamation work in*Abitibi*. Here, he suggests, "the OWA is not the regulator" (para. 147) and thus the involvement of the OWA "is insufficient to satisfy the 'sufficient certainty' test" (para. 146).

265 Accepting, for a moment, the potential relevance of this distinction, I am of the view that any uncertainty as to whether the AER *would* delegate the reclamation work to the OWA is questionable. My colleague's emphasis on the self-serving remarks of an AER affiant and the fact that the AER took no immediate steps to perform the abandonment work itself amounts to little more than *post hoc* appellate fact finding, especially in light of the AER's own statement. Although Wittmann C.J. suggested that it was "unclear" whether the AER would complete this work itself, his other findings of fact and law — that the AER has the statutory power to perform the work, that it has actually done so in the past, and that it expressly stated its intention to seek reimbursement here — suggest otherwise. Regardless, Wittmann C.J.'s remark that the "sufficient certainty" standard was not satisfied "in a narrow and technical sense" must be read in this context: he was simply suggesting that there was some uncertainty as to "whether the AER will perform the work itself" as opposed to delegating the work to the OWA (para. 173). He was *not* implying — let alone concluding as a matter of law — that GTL had failed to prove the third prong of the *Abitibi* test. That reading would vastly overstate, and completely decontextualize, the meaning of a few isolated words in his reasons.

266 The more important problem, though, is that any distinction between the performance of the abandonment work by the AER and its performance by the OWA is meaningless. Form is elevated over substance if it is concluded that the "sufficient certainty" standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. And despite my colleague's suggestion that a regulatory body cannot act strategically to evade*Abitibi*, that is precisely what his analysis permits.

267 We are told that the "OWA's true nature" (majority reasons, at para. 147) — and therefore what purports to distinguish this case from impermissible examples of strategic delegation — rests on four factors: (1) the OWA is a non-profit organization; (2) it has an independent board of directors; (3) it has its own mandate and determines "when and how it will perform environmental

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

work" (para. 148); and (4) it is "financially independent" (para. 148) as it is funded "almost entirely" by a tax on the oil and gas industry (para. 23).

268 The first point is true, but irrelevant. Why does an organization's non-profit status have any bearing on whether it is being used as a vehicle to avoid the "sufficient certainty" standard under *Abitibi*?

269 The second point is not accurate. The AER appoints members of the OWA's board of directors, as does another provincial body, Alberta Environment and Parks — underscoring the extent to which the provincial government can influence the OWA's activities.

270 The third point overstates the OWA's level of independence. The *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, gives the AER substantial power to influence the OWA's decision making. Section 3(2)(b) of the regulation expressly states that, in fulfilling its delegated powers, duties and functions, the OWA must act in accordance with "applicable requirements, guidelines, directions and orders of the [AER]". The regulation also mandates that the OWA provide information to the AER on request and regularly submit reports indicating or containing its budget, "goals, strategies and performance measures", activities for the previous year and financial statements (s. 6). The AER appears to be able to exercise substantial control and oversight over the OWA if it so chooses, including over the manner in which the OWA carries out its environmental work.

271 The fourth point is also inaccurate and would probably be irrelevant even if it were accurate. The Province has provided funding to the OWA in the past, including a $30 million contribution in 2009 and an additional $50,000 in 2012, and it has announced that it will loan the OWA an additional $230 million (see A.F., at para. 99 (alluding to this loan); recall *Abitibi*, at para. 58 where the Court stated that: "Earmarking money may be a strong indicator that a province will perform remediation work").

272 In any event, it is important to note the more salient features of the OWA and its relationship with the AER (and, more generally, with the provincial government). The OWA operates under legal authority delegated to it by the AER and in accordance with a Memorandum of Understanding it has signed with both the AER and Alberta Environment and Parks. The orphan fund itself is administered by the AER, which prescribes and collects industry contributions and remits the funds to the OWA. The OWA cannot increase the industry levy without first obtaining approval from the Alberta Treasury Board. In addition, the *OGCA* makes clear that abandonment costs incurred by any person authorized by the AER — which would include the OWA — constitute a debt payable to the AER (*OGCA*, s. 30(5)). The record shows that the AER has remitted abandonment costs to the OWA in the past, in the form of security deposits and amounts recovered through successful enforcement action against licensees.

273 The AER and the OWA are therefore inextricably intertwined. We should see this arrangement for what it is: when the AER exercises its statutory powers to declare a property an "orphan" under s. 70(2) of the *OGCA*, it effectively delegates the abandonment work to the OWA. Treating the OWA's work as meaningfully different from abandonment activities carried out by the AER turns a blind eye to this reality and does nothing to further the underlying principles of paramountcy. To the contrary, it provides provincial regulators with an easy way to evade the test of *Abitibi* through strategic behaviour, thereby undermining the legitimate federal interest in enforcing the *BIA*'s priority scheme. It should not matter which body carries out the work (see C.A. reasons, at para. 78; *OGCA*, s. 70(1)(a)(ii)).

274 The majority faults the chambers judge for "failing to consider whether the OWA can be treated as the regulator" (para. 153). However, the chambers judge cannot have erred by failing to appreciate a level of independence that simply does not exist.

275 The majority also offers an alternative conclusion: it is not sufficiently certain that even the OWA will perform the abandonment work (para. 149). Whether the chambers judge's conclusion to the contrary amounts to a palpable and overriding error, or something else, we are not told.

276 Again, such an approach would permit the AER to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets. This arbitrary line-drawing exercise,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

in which a period of 10 years before the wells are abandoned is too long (but presumably some shorter time line would not be), has no basis in law. As Slatter J.A. convincingly observed in his reasons, the AER

> cannot insist that security be posted to cover environmental costs, but at the same time argue that it may be a long time before the Orphan Well Association actually does the remediation. If the Regulator takes security for remediating Redwater's orphan wells, those funds cannot be used for any other purpose. If security is taken, it is no answer that the security might be held for an indefinite period of time; the consequences to the insolvency proceedings and distribution of funds to the creditors are immediate and certain. Further, if security is taken, the environmental obligation has clearly been reduced to monetary terms. [Emphasis added; para. 79.]

277 Moreover, the OWA's estimate of 10 to 12 years was put forward at the start of this litigation more than 3 years ago. Whether that estimate remains accurate after the province's proposed infusion of nearly a quarter of a billion dollars into the orphan fund (A.F., at para. 99) [1] — money that will undoubtedly speed up the OWA's abandonment efforts — is an open question. In any case, the changing factual context highlights the essential problem with the majority's approach: pinning the constitutional analysis on the timing of the OWA's intervention is arbitrary and irrational, as it causes the result to shift based on decisions made by the very actor that stands to benefit from a finding that the "sufficient certainty" standard is not satisfied.

278 All that aside, the chambers judge's recognition that the OWA will "probably" abandon the properties should be enough (chambers judge reasons, at para. 173). Concluding otherwise is not justified, since it would mean applying a stricter certainty requirement than is called for by *Abitibi* itself. Deschamps J. expressly rejected an alternative standard — a "likelihood approaching certainty" — adopted by McLachlin C.J. in dissent (*Abitibi*, at para. 60). But here, dismissing as insufficient the chambers judge's conclusion that the OWA would "probably" complete the work essentially means requiring a "likelihood approaching certainty". Since *Abitibi*does not require absolute certainty, or even a likelihood approaching certainty, Wittmann C.J. did not err in concluding that the third prong was satisfied (see the *Oxford English Dictionary* (online), which defines "probably" as "with likelihood (though not with certainty)"; "almost certainly; as far as one knows or can tell; in all probability; most likely" (online)).

279 After concluding that it is not sufficiently certain that the AER will abandon the sites, the majority goes on to find that the AER's licence transfer restrictions similarly do not satisfy the *Abitibi* test. This is so, it says, because the AER's refusal to approve a licence transfer does not give it a monetary claim against Redwater and because compliance with the Licensee Management Ratio ("LMR") conditions "reflects the inherent value of the assets held by the bankrupt estate" (para. 157). At the outset, I wish to make clear that I have already concluded that, since GTL lawfully disclaimed the non-producing properties under s. 14.06(4) of the *BIA*, an operational conflict arises to the extent that the AER included those disclaimed properties in calculating Redwater's LMR for the purpose of imposing conditions on the sale of Redwater's assets. In the analysis that follows, I reach that same conclusion under the frustration of purpose aspect of the paramountcy test as well.

280 I take issue with the majority's conclusion regarding the LMR conditions for two reasons. First, this approach elevates form over substance, disregarding Gascon J.'s admonition in *Moloney* that "[t]he province cannot do indirectly what it is precluded from doing directly" (para. 28; see also *Husky Oil* , at para. 41). Refusing to approve a sale of Redwater's assets unless GTL satisfies Redwater's environmental liabilities is no different, in substance, from directly ordering Redwater or GTL to undertake that work. This is because the AER achieves the exact same thing — the fulfillment of Redwater's environmental obligations — by making any sale conditional on GTL completing the work itself, posting security or packaging the non-producing assets into the sale, which reduces the sale price by the exact amount of those liabilities and ensures that the purchaser can be compelled, as the subsequent "licensee" under provincial law, to comply with the Abandonment Orders.

281 The only difference between these two exercises of provincial power is the means by which the AER has opted to enforce the underlying obligations. The Abandonment Orders carry a threat of liability for non-compliance; imposing conditions on the sale of Redwater's assets, on the other hand, does not create a liability in a formal sense, but it does preclude any sale from occurring unless and until those obligations are satisfied. Since the trustee must sell the assets in order to carry out its mandate, the *effect* of imposing conditions on the sale of Redwater's assets is the same as that of issuing abandonment orders — and, as my colleague acknowledges, it is the effect of provincial action, not its intent or its form, that is central to the paramountcy analysis

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(para. 116; see also *Husky Oil* , at para. 40). In either case, then, the effect of the AER's action is to create a debt enforcement scheme — one that requires the environmental obligations owed to the AER to be discharged ahead of the bankrupt's other debts.

282 Second, it is irrelevant to this analysis that the licensing requirements predate Redwater's bankruptcy and apply to all licensees. This is no different from*Abitibi*, where the obligation to close down and remediate the properties predated AbitibiBowater's bankruptcy and could also have been said to constitute an "inherent" limitation on the value of the regulatory licence. Yet the obligations at issue there were provable claims. So too here. Alberta is, of course, free to affect the priority of claims in non-bankruptcy contexts. For example, it can leverage its licensing power to condition the sale of assets by *solvent* corporations on the payment of outstanding debts to the province. But "once bankruptcy has occurred [the *BIA*] determines the status and priority of the claims" (*Husky Oil* , at para. 32, quoting A. J. Roman and M. J. Sweatman, "The Conflict between Canadian Provincial Personal Property Security Acts and The Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. B. Rev.* 77, at p. 79).

283 In this case, imposing conditions on the sale of Redwater's valuable assets *does* result in a monetary debt in the AER's favour, whether in the form of: (1) the posting of security; (2) actual completion of the environmental work; or (3) the sale of the non-producing properties to another entity that is then regulated as a "licensee" and, as such, can be compelled under provincial law to complete the work. In each case, the result is the same: the AER is conditioning any sale of Redwater's assets on its ability to recover a pre-existing debt owed to it by the bankrupt.

284 An approach which artificially separates the Abandonment Orders and the transfer requirements in order to treat them as analytically distinct under the *Abitibi* test would cause the paramountcy analysis to turn on irrelevant subtleties in the manner or form in which the province has chosen to exercise its power. The two measures must be seen in tandem as the AER's means of enforcing a debt against the Redwater estate. As I have described, there is no meaningful difference in the bankruptcy context between a formal abandonment order directing a trustee to engage in remediation work and a rigid licensing system that imposes the exact same obligations as a condition of sale — a sale that, if the trustee is to carry out its mandate, *must* occur. The only effect of the majority's analysis is to encourage regulators to collect on their debts in more creative ways. None of this serves the purposes of paramountcy; and, more critically, nothing in that analysis offers insolvency professionals (or regulators, for that matter) clear guidance as to the types of obligations that will or will not satisfy the *Abitibi* test.

285 Since it is sufficiently certain that the AER (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Abandonment Orders are provable claims, and therefore the AER may not compel Redwater or its trustee to fulfill the obligations in question outside of the *BIA*'s priority scheme. Likewise, the AER may not condition the sale of Redwater's valuable assets on the performance of those same obligations.

286 Towards the end of its analysis, the majority makes the point that the AER's enforcement actions in this case facilitate, rather than frustrate, Parliament's intentions behind the *BIA* priority scheme due to the super priority for environmental remediation costs set out in s. 14.06(7) (para. 159). Respectfully, I completely reject this contention. No party attempted to argue that the super priority in subs. (7) was applicable on the facts of this case. Indeed, it is clear that it is not, as the majority itself acknowledges. I cannot accept that where Parliament has set out a particular super priority for the Crown for environmental remediation costs, secured against specific real property assets of the bankrupt, and where certain conditions are met, it somehow "facilitates" Parliament's priority scheme to, in effect, impose that super priority over other assets, in the absence of those statutory conditions being satisfied. It is wrong to rely on s. 14.06(7) to recognize an effective super priority for the AER in circumstances where the terms of that subsection are inapplicable. Doing so clearly undermines the detailed and comprehensive priority scheme that Parliament set out in the *BIA* to achieve its purposes. Had Parliament wished to extend a Crown super priority for environmental remediation costs beyond the circumstances in s. 14.06(7), it could have done so.

287 As a final note, GTL and ATB Financial advance alternative arguments that some aspects of Alberta's statutory regime, including the definition of "licensee", frustrate the purposes of the 1997 amendments to the *BIA* — purposes that, they say, include protecting insolvency professionals from liability and reducing the number of orphaned sites.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

288 It is not strictly necessary for me to address these arguments, since I have already found that there is an operational conflict (the Alberta regime's failure to recognize the lawfulness of GTL's disclaimers) as well as a frustration of purpose on other grounds (interference with the *BIA*'s priority scheme). I would note, however, that GTL has stated that it would immediately seek a discharge if it were required to carry out the abandonment work, which would result in the remaining Redwater assets being surrendered to the OWA. The result in this circumstance, which does not appear to be acknowledged, or which appears to be ignored, in my colleague's reasons, would be *more* orphaned oil wells. To the extent, then, that the 1997 amendments were intended to reduce the number of orphaned properties, that purpose is also frustrated by preventing a receiver or trustee from disclaiming value-negative assets.

IV. Conclusion

289 There is much to be said in the context of this appeal about which outcome will optimally balance environmental protection and economic development. On the one hand, enforcing the AER's remediation orders would effectively wipe out the estate's remaining value and leave all of its creditors (except the AER) without any recovery. It would also likely discourage insolvency professionals from accepting mandates in cases such as this one — potentially resulting in more orphaned properties across the province. On the other hand, permitting GTL to disclaim the non-producing wells and preventing the AER from enforcing environmental obligations before the estate's value is depleted would leave open the question of who, exactly, should foot the bill for remediating the affected land.

290 Whatever the merits of these competing positions, in matters of statutory interpretation this Court is one of law, not of policy. As the majority recognizes, at para. 30, "it is not the role of this Court to decide the best regulatory approach to the oil and gas industry"; decisions on these matters are made — indeed, they *have been made* — by legislators, not judges. And the law in this case supports only one outcome. But this does not mean that the AER is without options to protect the public from bearing the costs of abandoning oil wells. It could adjust its LMR requirements to prevent other oil companies from reaching the point of bankruptcy with unfunded abandonment obligations (as it has already done since this litigation began). It could adopt strategies used in other jurisdictions, such as requiring the posting of security up-front so that abandonment costs are not borne entirely at the end of an oil well's life cycle. One of the interveners, the Canadian Bankers' Association, noted that such systems of up-front bonding are prevalent in American jurisdictions. The AER could work with industry to increase levies so that the orphan fund has sufficient resources to respond to the recent increase in the number of orphaned properties. It could seek judicial intervention in cases where it suspects that a company is strategically using insolvency as a voluntary step to avoid its environmental liabilities (*Sydco Energy Inc (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156 (Alta. Q.B.), at para. 84). And, as I have noted, it can continue to apply the province's statutory regime to all assets of an insolvent or bankrupt debtor that are retained by a receiver or trustee, including wells and facilities that the receiver or trustee seeks to operate rather than sell.

291 The AER may not, however, disregard federal bankruptcy law in the pursuit of otherwise valid statutory objectives. Yet that is precisely what it has done here by effectively displacing the "polluter-pays" principle enacted by Parliament in favour of a "lender-pays" regime, in which responsibility for the bankrupt's environmental liabilities is transferred to the estate's creditors. Our paramountcy jurisprudence does not permit that result.

292 For the foregoing reasons, I would dismiss the appeal and affirm the orders made by the chambers judge.

Appeal allowed.

Pourvoi accueilli.

Appendix

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

. . . . .

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Footnotes

1 I am assuming that the AER's factum is accurate in referring to the existence and amount of this loan (which no other party contested).

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 3

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

TAB 4

Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of December 11, 2018

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Functions of receiver-manager

94 A receiver of a corporation may, if the receiver is also appointed receiver-manager of the corporation, carry on any business of the corporation to protect the security interest of those on behalf of whom the receiver is appointed.

1981 cB-15 s90

Directors' powers during receivership

95 If a receiver-manager is appointed by the Court or under an instrument, the powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged.

1981 cB-15 s91

Court-appointed receiver or receiver-manager

96 A receiver or receiver-manager appointed by the Court shall act in accordance with the directions of the Court.

1981 cB-15 s92

Duty under debt obligation

97 A receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument and any direction of the Court made under section 99.

1981 cB-15 s93

Duty of care

98 A receiver or receiver-manager of a corporation appointed under an instrument shall

(a) act honestly and in good faith, and

(b) deal with any property of the corporation in the receiver's or receiver-manager's possession or control in a commercially reasonable manner.

1981 cB-15 s94

Powers of the Court

99 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(e) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of the receiver's or receiver-manager's administration that the Court specifies;

(f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

1981 cB-15 s95;1987 c15 s9

Duties of receiver and receiver-manager

100 A receiver or receiver-manager shall

(a) immediately notify the Registrar of the receiver's or receiver-manager's appointment or discharge,

(b) take into the receiver's or receiver-manager's custody and control the property of the corporation in accordance with the Court order or instrument under which the receiver or receiver-manager is appointed,

(c) open and maintain a bank account in the receiver's or receiver-manager's name as receiver or receiver-manager of the corporation for the money of the corporation coming under the receiver's or receiver-manager's control,

(d) keep detailed accounts of all transactions carried out by the receiver or receiver-manager as receiver or receiver-manager,

(e) keep accounts of the receiver's or receiver-manager's administration that must be available during usual business hours for inspection by the directors of the corporation,

TAB 5

Province of Alberta

OIL AND GAS CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter O-6

Current as of June 15, 2020

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(a) suspend any operations of a licensee or approval holder under this Act or a licensee under the *Pipeline Act*,

(b) refuse to consider an application for an identification code, licence or approval from an applicant under this Act or the *Pipeline Act*,

(c) refuse to consider an application to transfer a licence or approval under this Act or a licence under the *Pipeline Act*,

(d) require the submission of deposits or other forms of security for the purposes of abandonment, remediation and reclamation in an amount determined by the Regulator prior to granting any licence, approval or transfer to an applicant, transferor or transferee under this Act, or

(e) require the submission of deposits or other forms of security for the purposes of abandonment, remediation and reclamation in an amount determined by the Regulator for any wells or facilities of any licensee or approval holder,

where the person named in the declaration is the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e) or is a director, officer, agent or other person who, in the Regulator's opinion, is directly or indirectly in control of the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e).

(4) This section applies in respect of a contravention, failure to comply or debt whether the contravention, failure to comply or debt arose before or after the coming into force of this section.

RSA 2000 cO-6 s106;2012 cR-17.3 s97(31),(32);2020 c4 s1(19)

Appointment of receiver, receiver-manager, trustee, liquidator

106.1 The Regulator may, subject to the regulations, apply to the Court of Queen's Bench for the appointment of a receiver, receiver-manager, trustee or liquidator of the property of a licensee.

2020 c4 s1(20)

Offences and Penalties

Waste prohibited

107(1) Waste is prohibited and any person who commits waste is guilty of an offence.

(2) No prosecution may be instituted under subsection (1) without the consent in writing of the Regulator.

TAB 6

Province of Alberta

OIL AND GAS CONSERVATION ACT

ORPHAN FUND DELEGATED ADMINISTRATION REGULATION

Alberta Regulation 45/2001

With amendments up to and including Alberta Regulation 88/2020

Current as of June 15, 2020

Office Consolidation

© Published by Alberta Queen's Printer

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(Consolidated up to 88/2020)

ALBERTA REGULATION 45/2001

Oil and Gas Conservation Act

ORPHAN FUND DELEGATED ADMINISTRATION REGULATION

Table of Contents

Definitions

1(1) In this Regulation,

(a) "Act" means the *Oil and Gas Conservation Act*;

(b) "Association" means the Alberta Oil and Gas Orphan Abandonment and Reclamation Association;

(c) repealed AR 89/2013 s21;

(d) "facility" has the same meaning as set out in section 68(d) of the Act;

(e) "facility site" has the same meaning as set out in section 68(e) of the Act;

(e.1) "mineral" means a mineral as defined in the *Mines and Minerals Act*;

(f) "Minister" means the Minister of Energy;

(g) "orphan fund" means the orphan fund continued under section 69(1) of the Act;

(g.1) "Regulator" means the Alberta Energy Regulator;

(g.2) "third party account" means any amount of money payable but not yet paid by a person other than the Association related to a well, facility, well site or facility site;

(h) "well site" has the same meaning as set out in section 68(h) of the Act.

(2) For the purposes of sections 11(2.1) and 12(2.1) of the Act,

(a) "holder of the mineral rights" means a person to whom the owner of mineral rights has given the right to win, work and recover a mineral pursuant to an agreement;

(b) "person who has the right to win, work and recover a mineral" means a person to whom the holder of mineral rights has given the right to win, work and recover a mineral.

AR 45/2001 s1;251/2001;254/2007;89/2013;88/2020

Establishment of delegated authority

2 The Alberta Oil and Gas Orphan Abandonment and Reclamation Association incorporated under the *Societies Act* is hereby designated as a delegated authority for the purposes of Part 11 of the Act.

AR 45/2001 s2;251/2001

Delegation

3(1) The following powers, duties and functions of the Regulator are delegated to the Association:

(a) all of the powers, duties and functions of the Regulator for the purpose of administering the payment of money for the purposes set out in section 70(1) of the Act;

(b) the powers, duties and functions of the Regulator under sections 28(b), 41, 102(1), 104(1)(b) and (2)(b) and 106.1 of the Act and, for the purposes of the enforcement of an order made by the Regulator, section 105(1)(a), (c), (d) and (e) and (3) of the Act, subject to the following terms and conditions:

(i) the Association shall act under section 28(b) of the Act and, for the purposes of the enforcement of an

TAB 7

2010 ABQB 373
Alberta Court of Queen's Bench

Alberta Health Services v. Networc Health Inc.

2010 CarswellAlta 1017, 2010 ABQB 373, [2010] 11 W.W.R. 730, [2010] A.W.L.D. 4119, [2010] A.W.L.D. 4120, [2010] A.W.L.D. 4121, [2010] A.W.L.D. 4122, [2010] A.J. No. 627, 118 Alta. L.R. (5th) 118, 189 A.C.W.S. (3d) 939, 28 Alta. L.R. (5th) 118

Alberta Health Services (Applicant) and Networc Health Inc. (Respondent)

B.E. Romaine J.

Heard: May 3, 11, 2010
Judgment: June 1, 2010
Docket: Calgary BK01-094004

Counsel: Josef G.A, Krüger, Q.C., R.J. Daniel Gilborn, Rahim N. Punjani for Applicant, Alberta Health Services
C. Michael Smith, Smith Mack LaMarsh, Richard Dixon for Cambrian Group
David LeGeyt, David G. Loader for Respondent, Networc Health Inc.
Howard A. Gorman, Anne L. Kirker for Interim Receiver, PricewaterhouseCoopers
J. Alexander Kotkas, John Grieve for Healthcare Property Holdings Ltd.
Darren R. Bieganek for Clark Builders

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Status to apply — N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. and applied to continue receivership — AHS submitted that it was contingent creditor of N Inc. due to filing of Statement of Claim against N Inc. alleging it breached its agreement with AHS by committing act of insolvency and claiming unquantified damages — AHS's applications granted on other grounds — Although AHS submitted that it had status to apply for receivership order as "contingent creditor," such standing was not required under s. 46 or s. 13(2) — Whether AHS was contingent creditor was not determinative of its status — AHS was major stakeholder with respect to operations and financial health of N Inc. — AHS's interest in ensuring that citizens of province who required surgical services performed in facility provided by N Inc. were not deprived of those services gave it an interest far greater than that of mere customer of goods or services.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Withdrawal of petition

N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. — Creditor applied for leave to withdraw bankruptcy application — AHS applied to continue interim receivership, and opposed creditor's application for leave to withdraw bankruptcy application — AHS's applications granted; receivership order granted and continued — Creditor's application dismissed — Creditor did not establish that its application to withdraw petition for receiving order should be allowed — Creditor did not prove solvency of N Inc., lack of prejudice to other creditors or that withdrawal would not undermine integrity of process.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Stay of petition — Miscellaneous

N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — AHS brought application under s. 46(1) of Bankruptcy and Insolvency Act (BIA) and s. 13(2) of Judicature Act for appointment of interim receiver of financial records and accounts of N Inc. — N Inc.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

filed affidavit denying its indebtedness to creditor — Creditor brought application for leave to withdraw its petition — AHS applied to continue interim receivership and opposed creditor's application to withdraw — AHS's applications granted; creditor's application dismissed — Applying tri-partite test for injunctive relief, it was established that there were several serious issues to be tried — There might be irreparable harm to public interest if existing application was terminated and AHS was required to reapply under different provision of BIA — Balance of convenience favoured AHS's interest in having creditor's application remain in place and be stayed as opposed to creditor's application to have it withdrawn.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous

N Inc. provided surgical services for public, paid for by Alberta Health Services (AHS) pursuant to contract — N Inc. was petitioned into bankruptcy by creditor company — Fact of receivership gave rise to default under N Inc.'s lease with its landlord which, but for stay created by receivership order, would entitle landlord to terminate lease — AHS brought application for appointment of interim receiver of financial records and accounts of N Inc. — Interim receiver was appointed — N Inc. filed affidavit denying indebtedness to creditor — Creditor sought to withdraw its bankruptcy application — AHS applied to continue interim receivership and opposed creditor's application for leave to withdraw its application — Landlord brought application to require interim receiver to adopt remainder of lease with N Inc. or abandon premises or allow landlord to terminate lease — AHS's applications granted and creditor's application dismissed on other grounds — Landlord's application to lift stay to allow termination of lease dismissed; application to compel receiver to affirm or disclaim lease dismissed — Landlord was not prejudiced, except to extent that its right to terminate lease for breach of covenant not to be insolvent was stayed during course of receivership — Rent would continue to be paid — Allowing landlord to terminate lease and evict N Inc. would destroy purpose of receivership: to ensure that surgical services provided by N Inc. to public in Alberta were not interrupted — Strong public policy issues were involved in present receivership.

APPLICATIONS by Alberta Health Services for appointment of interim receiver and continuation of receivership; COUNTER-APPLICATIONS by various interested parties.

***B.E. Romaine J.*:**

Introduction

1 On May 3, 2010 Alberta Health Services applied for the appointment of an interim receiver of the financial records and accounts of Networc Health Inc. ("Networc"). On May 11, 2010, Alberta Health applied to continue the receivership. Various interested parties opposed these applications and brought counter-applications. I granted a receivership order on May 3, 2010 and continued it on May 11, 2010. These are my reasons.

Facts

2 Networc operates an accredited non-hospital surgical facility in Calgary under the name of the Health Resource Centre. In December, 2006, Networc and the Calgary Health Region (now Alberta Health Services) entered into an agreement whereby Networc would provide orthopaedic surgical services to the public in Alberta, the cost of which would be covered by Alberta Health. This agreement expires on March 31, 2012. Alberta Health submits that this arrangement was intended as an interim measure to assist it in dealing with capacity constraints until a new Alberta Health-owned surgical facility could be constructed. Currently, it is expected that this new facility will be operational in January, 2011. The agreement between Networc and Alberta Health limits the maximum annual number of procedures that can be performed at the Health Resource Centre, but Alberta Health has no obligation to fund any minimum number of procedures.

3 Networc also performs surgeries for the Alberta Workers' Compensation Board and out-of-province or federal insurers, but Alberta Health is its primary source of income. According to the first report of the Interim Receiver, the surgeons and anaesthetists who perform the procedures are not employees of Networc and bill Alberta Health directly for their services, but the Health Resource Centre employs about one hundred other staff members.

4 Networc planned to expand its surgical capacity and in 2008 and 2009 entered into various lease and construction agreements related to two new facilities which are not yet completely constructed.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

5 On April 1, 2010, 4040 Properties Corp., Cambrian (Foothills) I Properties Corp. and Cambrian Wellness I Development Corp. (the "Cambrian Group") applied for a bankruptcy order against Networc. The Cambrian Group alleged that Networc was indebted to them in the amount of approximately $636,000.00 pursuant to two lease agreements. They alleged that Networc had admitted that it was no longer capable of meeting its obligations under the leases, relying on a letter from Networc that stated that, as Networc had received only partial commitment from Alberta Health with respect to business volumes for the budget year commencing April 1, 2010, Networc did not have the ability to pay lease costs on the two buildings that were the subject of the leases. The letter also suggested the renegotiation of one of the leases. Networc denied these allegations in a Notice of Dispute and was directed by court order to provide an affidavit setting out details of its position by Friday, April 30, 2010.

6 Alberta Health says that it followed the status of this application carefully, and on April 30, 2010, it applied for the appointment of an interim receiver of Networc and an order staying the bankruptcy proceedings commenced by the Cambrian Group by way of Notice of Motion returnable on May 3, 2010.

7 Alberta Health's application was made pursuant to section 46(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA") and section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

8 While there is nothing on the face of this legislation that requires such an application for the appointment of a receiver to be made by a creditor, Alberta Health submitted that it was in fact a contingent creditor of Networc as a result of filing a Statement of Claim against Networc alleging that it had breached its agreement with Alberta Health by committing an act of insolvency and claiming unquantified damages.

9 The application by Alberta Health originally included an application to stay the application commenced by the Cambrian Group to petition Networc into bankruptcy.

10 The whole of the application was opposed for a number of reasons by the Cambrian Group, which sought an adjournment to file a responding affidavit and to cross-examine on the affidavits. The arguments made by the parties are summarized later in this decision. Submissions were made during a hearing that commenced in the morning of May 3, 2010 and was adjourned for a few hours. When the hearing recommenced, Alberta Health advised the court that it would adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings to a later date and would remove any reference to a stay of the bankruptcy proceedings from its application for an interim receiver. Ultimately, I appointed an interim receiver, adjourned the application to stay the bankruptcy proceedings and directed Networc to file its affidavit in response to the Cambrian Group's application for a bankruptcy order by the end of the next day. The matter was put over to May 11, 2010 on the basis that submissions could be made on all relief sought, including the issue of whether the appointment of an interim receiver should continue.

11 Between May 3, 2010 and May 11, 2010, the complexion of the application changed dramatically. Networc filed an affidavit denying the alleged indebtedness to the Cambrian Group and raising a number of defences to the bankruptcy application. Alberta Health acquired the interest of the Canadian Imperial Bank of Commerce in Networc's current secured borrowing facilities. According to the Interim Receiver's first report to the Court, the Canadian Imperial Bank of Commerce was in the process of considering its options, including the enforcement of its security (which it appears it would be entitled to do, relying on a breach of Networc's working capital covenant associated with its operating line of credit). The Cambrian Group subsequently agreed with Networc to discontinue its application to petition Networc into bankruptcy.

12 According to the Interim Receiver's first report, on the basis of its information as of May 10, 2010 and its calculations based on that information, if the Interim Receiver were discharged, Networc would not be able to carry on its operations and repay the CIBC loans and pre-receivership payables, including construction indebtedness and the Cambrian Group's claim for rent, without a cash injection of approximately $7.2 million. I continued the interim receivership and made some ancillary orders.

Analysis

Status of Alberta Health to Apply for Receivership

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

13 Alberta Health based its original application for an interim receiver on section 46(1) of the BIA and section 13(2) of the *Judicature Act*. These statutory provisions are set out in Appendix A to this decision.

14 Neither of these provisions requires that an application for a receivership be made by a creditor, but it is clear from case authority that it is usually a creditor that makes such an application. Section 46 follows the sections of the BIA that deal with an application made by a creditor against a debtor for a bankruptcy order, and it requires that such an application has been filed before an application for an interim receiver can be made. There do not appear to be any reported decisions of an application under section 46 being made by a party other than a creditor, although applications under section 47.1 of the BIA, which allows the appointment of a receiver in different circumstances, have been made by trustees in bankruptcy and even by debtors themselves on occasion: for example, *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.)

15 As noted by Professor Jacob Ziegel in Part II of "The Personal Liabilities of Insolvency Practitioners under Insolvency Legislation: A Comparative Analysis of the Canadian, English and American Positions" in J. Sarra, ed., 2006 Annual Review of Insolvency Law (Toronto: Carswell 2007) at 277-338, receivers are creations of equitable origin and have served a variety of functions in many different contexts. In determining whether Alberta Health had status to apply for the appointment of an interim receiver, it was helpful to look briefly at the history of the development of receiverships under the BIA.

16 Section 46 of the BIA has long provided for the appointment of an interim receiver where an application for a bankruptcy order has been filed if the court is satisfied that such appointment is shown to be necessary for the protection of the estate of a debtor, and an undertaking with respect to damages is provided by the applicant. The appointment of an interim receiver under section 46 is for conservatory purposes and is limited specifically by section 46(2) such that the interim receiver shall not unduly interfere with the debtor except to the extent necessary for such conservatory purposes or to comply with the order of appointment. Sections 47 and 47.1 were added to the BIA in 1992 and were intended to give greater protection and flexibility to secured creditors during the period of time when they were in the process of enforcing their security. An interim receiver appointed under these sections may exercise broader powers.

17 As noted by Professor Ziegel, these 1992 amendments radically transformed insolvency administrations, as they became very popular with secured creditors. Orders were granted that gave receivers extensive powers and remained in effect, not on an interim basis, but for lengthy periods of time. Some courts and commentators were critical of this broad use of what was described as an interim remedy under the BIA, and, in September 2009, amendments to sections 47 and 47.1 came into effect that had the result of limiting the period of time of an interim receiver appointment under these sections unless otherwise ordered by a court, and limiting the powers available to such interim receivers. However, a new provision was added to the BIA, section 243, which is available to secured creditors and allows a court to give such receiver (commonly referred to as a "national receiver") broad powers equivalent to those previously available to interim receivers under sections 47 and 47.1. It is noteworthy that these amendments did not affect section 46, either in terms of scope of powers or duration of appointment.

18 Section 13(2) of the *Judicature Act* does not require even the pre-requisite of the filing of an application for bankruptcy, as required under section 46 of the BIA, nor does it appear to limit the scope of powers of a receiver appointed under the section, requiring that it must appear to a court to be "just and convenient that the order be made." It is clear, however, that the appointment of a receiver under this provision should not be lightly granted, that alternate remedies should be explored short of a receivership, and that the rights of both an applicant and the respondent debtor must be carefully balanced before an appointment is made: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127, 2009 CarswellAlta 469 (Alta. C.A.).

19 In summary, although Alberta Health submitted when it originally applied for a receivership order that it had status to do so as a "contingent creditor", such standing was not required under section 46 of the BIA or under section 13(2) of the *Judicature Act* and the issue of whether or not Alberta Health was in fact a contingent creditor is not determinative of its status. Alberta Health is clearly a major stakeholder with respect to the operations and financial health of Networc. While counsel for the Cambrian Group suggested that Alberta Health had only the status of a "customer" of Networc, and that to allow a mere customer the use of the remedy of a receivership would open the proverbial floodgates, Alberta Health's interest in ensuring that

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

citizens of the Province who require the surgical services performed in the facility provided by Networc were not deprived of those services gives it an interest far greater than that of a mere customer of goods or services. The requirements set out in the authorities with respect to interim receiverships, both under the BIA and under the *Judicature Act*, (that an appointment must be necessary for the protection of an estate of the debtor and that a receiver should not be appointed lightly, but only after careful consideration of the equities) serve as a curb on the inappropriate or overly-broad use of the remedy. It is neither necessary nor advisable to impose a limitation that is not found in the legislation.

20 The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *A. Marquette & fils Inc. v. Mercure*, [1977] 1 S.C.R. 547 (S.C.C.) at 556, the Supreme Court commented:

> Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

Initial Application

21 The focus of the case law interpreting section 46 of the BIA is on protecting the debtor against unwarranted intrusion from petitioning creditors. The courts have recognized the serious consequences that the appointment of an interim receiver has on the business of a debtor, and thus, section 46 requires that the applicant establish that:

> a) on the balance of probabilities, the creditor petitioning the debtor into bankruptcy (in this case, the Cambrian Group), is likely to succeed in obtaining a receiving order in bankruptcy, and
>
> b) there is an immediate need for the protection of the debtor's estate.

22 Networc consented to Alberta Health's application to appoint a receiver at the initial application. The Cambrian Group, while it opposed the application, was vehement, at least on May 3, 2010, with respect to the strength of its application for an order petitioning Networc into bankruptcy.

23 Alberta Health deposed that there was an immediate need for the protection of Networc's estate. It submitted that if the bankruptcy threatened by the Cambian Group's application occurred, a trustee in bankruptcy would face huge obstacles to the continuance of Networc's operations, including exposure to liability, problems arising from the fact that the agreement between Networc and Alberta Health was not assignable without the consent of Alberta Health and the Minister of Health and the dearth of potential assignees that could properly be designated and accredited to run the facility. If Networc had to cease operations, surgeries would be disrupted, highly-skilled employees would be left jobless and physicians would be left without facilities in which to operate. Alternatively, allowing Networc to operate under the supervision of an interim receiver would alleviate this disruption and would allow Networc to generate income for the benefit of creditors.

24 The Cambrian Group applied for an adjournment of the application in order to file further materials and to cross-examine on the affidavits. Initially, given the careful consideration that a court must give to the appointment of a receiver, I considered granting a brief adjournment to May 11, 2010 without appointing an interim receiver, contingent upon the Cambrian Group agreeing not to proceed further with the bankruptcy application during this period of time. Counsel for Alberta Health submitted that in the absence of a stay, there were other parties that may take action during the week's adjournment. I asked counsel to identify this risk when the hearing recommenced in the early afternoon of May 3, 2010. At that time, Alberta Health produced an affidavit that indicated that the publicity of the proceedings had caused significant disruption to Networc's operations and uncertainty among patients, employees and suppliers, providing additional evidence of an immediate need for the protection of Networc's estate.

25 Alberta Health also indicated that it would agree to adjourn its application for a stay of the Cambrian Group's bankruptcy proceedings and had removed any reference to that relief from its application for an interim receivership order. I was satisfied that

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Alberta Health had established the basis for an interim receivership order, particularly as the alleged prejudice to the Cambrian Group arising from a stay of its right to proceed with the bankruptcy proceedings was no longer a major issue. I was satisfied that the supplemental affidavit provided persuasive evidence that the bankruptcy application and the subsequent receivership application had created significant uncertainty and concern and a heightened risk of an interruption in medical services at the Networc facility. I was therefore satisfied that there were strong public interest reasons to appoint an interim receiver until the matter could be more thoroughly argued.

Applications on May 11, 2010

A. Status of Parties

26 As previously described, Alberta Health had stepped into the shoes of a secured creditor between the initial appointment and May 11, 2010, and there was no longer an issue of whether it was entitled to apply for a receivership order under bankruptcy legislation. While it would be entitled to use section 47 and/or new section 243 of the BIA, Alberta Health applied to continue the receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* for reasons that will be discussed later in this decision.

27 As a result of the affidavit filed by Networc denying its indebtedness to the Cambrian Group and denying that it had committed an act of insolvency, the next step in the bankruptcy application would have been the trial of an issue under section 43 of the BIA. After a bankruptcy judge had heard evidence in this proceeding, he or she would have the option of:

> (a) granting a bankruptcy order against Networc if satisfied with the Cambrian Group's evidence;
>
> (b) dismissing the application if satisfied with Networc's defences, or
>
> (c) determining that there was a *bona fide* dispute with respect to the debt that could not be decided in bankruptcy court and should be litigated in the normal course.

28 The Cambrian Group, however, announced that it had agreed with Networc that it would withdraw its application to petition Networc into bankruptcy on the basis that neither party would be liable for costs, and applied for an order of the court allowing such withdrawal. Counsel for the Cambrian Group suggested that it was satisfied by Networc's recent affidavit that Networc could not be said to have committed an act of insolvency. It is, of course, also clear that if no application for a bankruptcy order exists, an interim receivership under section 46 of the BIA may no longer be sustainable.

29 Networc filed a Notice of Motion on May 4, 2010 applying to dismiss the bankruptcy proceeding and to terminate the interim receivership. However, on May 11, 2010, Networc did not oppose either the continuation of the receivership or the Cambrian Group's application to approve the agreement to withdraw the bankruptcy application.

30 Networc filed a supplemental affidavit on May 11, 2010 attaching a letter from its controller to its CEO projecting a more optimistic operating profit for Networc than that projected by the Interim Receiver. The controller gives his opinion that Networc's financial difficulties are due to the development of the new facilities and not Networc's normal operations.

31 Networc's current landlord, Healthcare Property Holdings Ltd., (the "Landlord") which supported Alberta Health's application on May 3, 2010, brought an application returnable on May 11, 2010 to require the Interim Receiver to either personally affirm and adopt the remainder of the lease with Networc or to abandon the premises or to allow the Landlord to terminate the lease and obtain vacant possession.

32 The Interim Receiver filed its first report and applied for the authority to make certain pre-filing payments to employees at Networc and to deposit money collected by the Interim Receiver on accounts receivable into its account established for the purpose.

B. Continuation of the Receivership

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

33 Alberta Health sought to continue the interim receivership under section 46 of the BIA and section 13(2) of the *Judicature Act* rather than substituting an application for a receivership under section 47 and/or section 243 of the BIA, and opposed the Cambrian Group's application for leave to withdraw its bankruptcy application.

34 Section 43(14) of the BIA provides that a petition for an order in bankruptcy cannot be withdrawn without the leave of the Court. The Court will not lightly permit such a withdrawal. An agreement to withdraw between the petitioning creditor and the debtor is not necessarily enough. As noted in Houlden, Morawetz & Sarra, *The 2010 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2009) at p. 155:

> Since bankruptcy proceedings are for the benefit of all creditors and since the date on which an application is filed may be of crucial importance in attacking fraudulent transactions, the court will not allow an application to be withdrawn or dismissed unless it is satisfied that the debtor is solvent and that other creditors will not be prejudiced by the withdrawal or dismissal.

35 The Cambrian Group has provided no evidence that Networc is solvent or that no other creditors would be prejudiced by the withdrawal. In fact, Alberta Health, now a secured creditor, would be prejudiced by the withdrawal.

36 Since Networc has agreed with the Cambrian Group not to oppose the withdrawal, the Cambrian Group bears no risk of a costs application if the withdrawal is delayed for a period of time. Counsel to the Cambrian Group could not identify any specific prejudice if the application for an order in bankruptcy remains in place during the course of a receivership, other than a vague reference to how this may affect the Cambrian Group's ability to pursue other options.

37 Alberta Health's concern over the withdrawal and the necessity that this may require the receivership to continue under a different statutory provision relates to the complexity of insurance coverage now put in place for the benefit of the Interim Receiver in recognition of its limited role under the section 46 receivership and the concern that a termination of a section 46 receivership and the commencement of a receivership authorized under section 47 or section 243 may create practical issues with respect to the possibility of two estates, or give rise to a perceived interruption in the stay of proceedings.

38 In addition, Alberta Health submits that allowing the Cambrian Group to withdraw its petition at this point in the proceedings would be contrary to the integrity of the process, and that creditors should be discouraged from filing for and then withdrawing petitions for receiving orders for strategic reasons. Alberta Health submits that adjourning the bankruptcy application to January 15, 2011 would preserve the existing process and prevent the possibility of complications arising from converting the receivership from a section 46 receivership to a section 47 or section 243 receivership.

39 Clark Builders, identified in the Interim Receiver's report as a major creditor of Networc with respect to the development of new facilities, opposed neither the withdrawal of the bankruptcy petition nor the continuation of the interim receivership. Counsel for Clark Builders noted that the situation would be no different in outcome if this was an application for a receivership under section 47 of the BIA.

40 The Landlord supported the Cambrian Group's application to withdraw its application in bankruptcy, alleging that Alberta Health's application was a misuse of the receivership remedy. The Landlord's submissions were tied to its application to lift the stay for certain purposes, and will be discussed in greater detail later in these reasons.

41 The Cambrian Group did not satisfy me that its application to withdraw its petition for a receiving order should be allowed. In particular, it did not prove the solvency of Networc, the lack of prejudice to other creditors or that the withdrawal would not undermine the integrity of the process. In addition, to allow the withdrawal and then force Alberta Health into the formality of an application under section 47 or 243 of the BIA would only create additional expense in the receivership, expense which I am aware would likely be borne by the taxpayers of Alberta. At any rate, even if the bankruptcy application that triggered Alberta Health's ability to apply under section 46 were now to disappear, there is no such prerequisite to the granting of a receivership order under section 13(2) of the *Judicature Act.*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

42 Farley, J in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) at 185 , in reference to the court's powers under then section 47(2)(c) (which have now been transferred to section 243(1)(c)), remarked famously that Parliament did not intend to take away from the court when fashioning an order in receivership the ability to do not only what "justice dictates" but also what "practicality demands". He noted, accurately, that:

> It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

43 While a certain amount of strategic posturing among creditors and stakeholders can be expected in the chaotic conditions that surround a situation of alleged insolvency, what is involved in this case is not just the rights of private creditors *inter se* but also the public interest in preserving the uninterrupted provision of surgical services in Alberta.

44 Counsel for the Cambrian Group submitted that the Court should not refuse it leave to withdraw its application for a receiving order since if the Court did so, it would be perceived by the public to be assisting Alberta Health in a manner not justified by law, suggesting that Alberta Health needed the bankruptcy proceedings to continue in order to justify its receivership application. As I have indicated in these reasons, that is a mischaracterization of the law and ignores the Cambrian Group's failure to satisfy the Court that its application should be withdrawn. These competing applications have raised public policy issues about the provision of health care services in Alberta by private contractors, but those issues are not issues for this Court except to the extent that the public interest in uninterrupted health care services may validly affect the exercise of any discretion granted to the Court in the appointment of a receiver.

45 It may be argued that the adjournment of the Cambrian Group's application for a receiving order for the period of time requested by Alberta Health is, in effect, a stay of these proceedings, although the Cambrian Group has now by virtue of its agreement with Networc made it clear that it will not be taking steps in the application in any event. While it is doubtful that the principles relating to an application for a stay apply to the circumstances as they have now evolved, I have considered whether the relief sought by Alberta Health would meet the tests for a stay.

46 Section 43(11) of the BIA provides under the description "Stay of proceedings for other reasons" that the court, for reasons other than the denial of the facts set out in an application for a bankruptcy order against the debtor, may "for other sufficient reason" make an order staying the proceedings. The general tests developed with respect to this section of the BIA do not apply to this particular circumstance. Under the common law, the tri-partite test for injunctive relief applies in determining whether a stay of a bankruptcy application should be granted: *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 (S.C.C.). Applying this test to the current circumstances, I am satisfied that there would be several serious issues to be tried (including whether the Cambrian Group should be allowed to withdraw its application, and if not, whether the application should be stayed), that there may be irreparable harm to the public interest if the existing application was terminated and Alberta Health was required to reapply under a different provision of the BIA, and that the balance of convenience favours Alberta Health's interest in having the application remain in place and be stayed as opposed to the Cambrian Group's application to have it withdrawn.

C. The Landlord

47 The Interim Receiver reports that, as the Canadian Imperial Bank of Commerce froze Networc's operating line of credit when the receivership order was granted, the automatic debit for May rent did not go through. On May 5, 2010, the Interim Receiver advised the Landlord that the Interim Receiver would pay the May rent as soon as it had a bank account in place and funding was obtained. On May 7, 2010, the rent was paid, including NSF charges.

48 Thus, Networc is not in default of its covenant to pay rent. The fact of the receivership, however, gives rise to a default under the lease which, but for the stay created by the receivership order, would entitle the Landlord to terminate it.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

49 As a general rule, in a receivership, a tenant's interest in a lease does not rest with the receiver but remains in the name of the debtor. In a court-appointed receivership, the receiver is not bound by the debtor's existing contracts, nor is it personally liable for the performance of those contracts: Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 341; *Bayhold Financial Corp. v. Clarkson Co.* (1991), 86 D.L.R. (4th) 127 (N.S. C.A.) at 143-147; *Sovereign Bank v. Parsons*, [1913] A.C. 160 (Ontario P.C.) at 167-172.

50 If the receiver occupies the premises, it may be liable for occupation rent, but that is not the situation in this case, given the Receiver's limited role. Nevertheless, Alberta Health has agreed to pay rent due and owing during the course of the receivership and has assured the Landlord that rent will be paid until at least January 31, 2011. The Landlord is not prejudiced except to the extent that its right to terminate the lease for breach of a covenant not to be insolvent is stayed during the course of the receivership.

51 The Landlord relies on *North America Steamships Ltd., Re*, 2007 BCSC 267 (B.C. S.C.) in which the court considered the necessity of a trustee in bankruptcy affirming certain forward swap agreements between a bankrupt and creditors if the trustee wished to take the benefit of the agreements. The first thing of note is that this decision deals with a trustee in bankruptcy, not a receiver. The relevance of this is set out in paragraphs 11 and 18 of the decision, discussing the position of a trustee in bankruptcy with respect to the debtor's business. The decision also deals with the special aspects of forward swap agreements: para. 15. It is noteworthy that recent amendments to the BIA now exempt eligible financial contracts from a stay in bankruptcy and provide for certain special rules with respect to their termination: Section 84.2 (7) (8) and (9) of the BIA. While the revisions to the legislation do not address eligible financial contracts in receiverships, it may be that the same policy reasons would apply to the lifting of the stay with respect to these specialized types of contract. In summary, this case does not establish a general rule that a receiver must affirm or disclaim a contract previously entered into by a debtor.

52 The present case can be distinguished even further by the fact that the receivership is a limited one, with the powers of the Receiver limited to records and financial affairs, and not a situation where a receiver-manager has been appointed.

53 The Landlord also relies on an oral decision of Brenner, J. in *Pope & Talbot Ltd., Re* [2008 CarswellBC 1726 (B.C. S.C. [In Chambers])] dated May 20, 2008. This was a complex matter, primarily involving a filing under the CCAA, but certain properties of the debtor were also subject to a receivership order. This specific decision involved a contract for the supply of wood chips between a third-party sawmill owner, Canfor, and Pope & Talbot with respect to one of its mills under receivership. From the date of the initial order under the CCAA in November 2007 to April 25, 2008, Pope & Talbot paid monthly for the supply of wood chips. After that, it stopped paying, and on May 10, 2008 a receiver was appointed. At the time of the application, invoices for two months supply of wood chips were outstanding and Canfor submitted that it was suffering additional prejudice with respect to storage costs, space issues and contamination of stored stock. Brenner, J. considered the use of the CCAA in an insolvency that was clearly heading towards a liquidation and noted that Canfor was no longer being paid for goods supplied even though a receiver-manager was in place. He referred to *North America Steamships Ltd.*, and commenting that he was "balancing the equities as best as I can", gave the receiver until June 13, 2008 to decide whether to affirm the contract. In this case, the supplier was not being paid for the supply of materials, and the termination of the contract in question had been stayed, first by the CCAA order and then by the receivership order for seven months. Like *North America Steamships Ltd.*, this case was driven by its specific and complex facts.

54 The Landlord deposes that, at the time the application for a receivership order was being made by Alberta Health, it was negotiating a new lease with the principals of Networc. The new tenant was to be a company related to Networc, which would take up Networc's business, subject to Alberta Health agreeing to issue a contract to this new tenant. The concept was that Networc would sell its assets to this new company through a proposal under the BIA, leaving the Cambrian Group litigation to be resolved separately. Counsel for the Landlord in a letter attached to the Landlord's affidavit notes that the Cambrian Group intends to withdraw its bankruptcy application and remarks "(t)here seems to be subterfuge here, but what that subterfuge is escapes me at the moment". The letter outlines the many details that would have to be resolved as part of this proposal.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

55 The Landlord also deposes to receiving expressions of interest from possible new tenants for the Networc space. It submits that the uncertainty over how long Networc may continue to be a tenant is prejudicial to its ability to re-lease the premises. What the Landlord proposes is that either Alberta Health or the Receiver assume the liabilities of Networc under the lease for the balance of its term or that it be allowed to terminate the lease.

56 Even in cases where a receiver has become liable for the supply of goods and services as a result of the use of these goods or services during the course of the receivership, this liability normally extends only during the course of the receivership, and does not place the receiver in the position of the debtor for the balance of the contract: *Dancole Investments Ltd. v. House of Tools Co. (Trustee of)*, 2001 ABQB 223 (Alta. Q.B.) at paras. 3, 4.

57 As noted by Alberta Health, even if a trustee in bankruptcy choses to affirm a contract, it does so on behalf of the debtor company, and any subsequent breach will only result in liability to the debtor company or its estate and not personally to the trustee: *North America Steamships Ltd.* at para. 20- 23 and 25 - 26; BIA section 31(4).

58 The Landlord submits that the limited role of the receiver in this case, and the limited scope of its powers may preclude the stay from applying to the Landlord. While the limited language of the receivership order is consistent with the cautionary language of section 46, that the receivership should not unduly interfere with the debtor carrying on its business, the stay imposed by the receivership must be broad enough to ensure that the goal of conservatory measures is effective. The Landlord, somewhat disingenuously, suggests that the "simple solution" would be to direct that the stay is not effective against it, and that it "would not act precipitously."

59 Allowing the Landlord to terminate the lease and evict Networc would certainly destroy the purpose of this receivership: to ensure that surgical services provided by Networc to the public in Alberta are not interrupted. As noted by Alberta Health, the Landlord's "simple solution" is to make the Landlord's problem the problem of Alberta Health and to allow the Landlord an advantage over other creditors and stakeholders that is not justified in the circumstances. The receivership is not, as argued by the Landlord, an "artificial construct".

60 Alberta Health has an interest as a major stakeholder, and now as a secured creditor, in applying for a receivership order. Its valid interest on behalf of the public of Alberta need not be postponed to that of the Landlord, who will continue to receive rent during the course of the receivership.

61 Given the strong public policy issues involved in this receivership, the fact that rent will continue to be paid and that the prejudice to the Landlord is limited to a delay in its ability to enforce its rights under the lease, I declined to lift the stay to allow the termination of the lease. I dismissed the Landlord's application to compel the Receiver to affirm or disclaim the lease.

62 If the parties are unable to agree on costs, they may be the subject of a later application.

Order accordingly.

Appendix A

Bankruptcy and Insolvency Act

46.(1) Appointment of interim receiver -

The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of the property of the debtor and direct the interim receiver to take immediate possession of the property or any part of it on an undertaking being given by the applicant that the court may impose with respect to interference with the debtor's legal rights and with respect to damages in the event of the application being dismissed.

(2) Powers of interim receiver -

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

The interim receiver appointed under subsection (1) may, under the direction of the court, take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of his business except as may be necessary for conservatory purposes or to comply with the order of the court.

Judicature Act

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 8

I hereby certify this to be a true copy of the original Order
Dated this 22 day of March
for Clerk of the Court

Clerk's stamp:

FIAT: Let the within Order be filed ~~notwithstanding~~ that the counsel approvals are by electronic signature and in counterpart, this 21st day of March, 2017.

not necessary
2012 ABCA 150 ¶7
J.C.Q.B.A

COURT FILE NO.	1701-03460
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ALBERTA ENERGY REGULATOR
RESPONDENT	LEXIN RESOURCES LTD.
DOCUMENT	**RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** Barristers 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Christa Nicholson Phone: 403 571 1053 Fax: 403 571 1528 Email: nicholsonc@jssbarristers.ca File: 13817.001

JUDICIAL CENTRE OF CALGARY
FILED
MAR 22 2017
CLERK OF THE COURT

DATE ON WHICH ORDER WAS PRONOUNCED: March 20, 2017

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary Courts Centre

NAME OF THE JUDGE WHO MADE THIS ORDER: The Honourable Justice P.R. Jeffrey

UPON the application of Alberta Energy Regulator ("**AER**") in respect of Lexin Resources Ltd. ("**Lexin**" or the "**Debtor**"); **AND UPON** having read the Application of the AER; the Affidavit of Laura Chant, sworn on March 11, 2017 including the reference therein to the "Equipment Order" granted March 3, 2017 in Court of Queen's Bench Action No. 1701 02272; the Affidavit of Service of Helen Bowker, sworn and filed March 14, 2017; and the Affidavit of Charles Selby, sworn and filed March 17, 2017; **AND UPON** reading the consent of Grant Thornton Limited to act as receiver ("**Receiver**") of the Debtor; **AND UPON** hearing counsel for AER and other interested parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of this Application is hereby abridged and service thereof is deemed good and sufficient.

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("**BIA**") and/or section 13(2) of the *Judicature Act,* R.S.A. 2000, Grant Thornton Limited is hereby appointed Receiver, without security, of all of Lexin's current and future assets, undertakings and properties of every nature and kind whatsoever, including all proceeds thereof, provided that the appointment of the Receiver shall not include any oil or gas wells, pipelines or facilities located outside the Province of Alberta or regulated by an entity other than the AER (the "**Property**").

RECEIVER'S POWERS

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized (but not obligated) to do any of the following where the Receiver considers it necessary or desirable:

   (a) to take possession of and exercise control over the Property, with the exception of taking possession of or exercising physical control over any Lexin oil or gas wells, pipelines, facilities or sites regulated by the AER (the "**Sites and Abandoned Sites**"), and any and all proceeds, receipts and disbursements arising out of or from the Property, and for greater clarity, while the Receiver shall have limited powers with respect to the Property as it relates to the Sites and Abandoned Sites as more particularly set out herein, the Receiver shall not have the power to take possession of and exercise physical control over the Sites and the Abandoned Sites;

(b) to exercise any powers it has under section 14.06 of the BIA;

(c) to receive, preserve and protect the books and records of the Debtor or any part or parts thereof, including, but not limited to, relocating of the books and records to safeguard them as may be necessary or desirable;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(f) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(g) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(h) to initiate, prosecute and continue the prosecution of any and all proceedings (with the exception of the hearing scheduled for March 22 and 23, 2017 of Lexin's application filed in Court of Queen's Bench Action Number 1701-02272 and in its Originating Application filed in Court of Queen's Bench Action Number 1701-03310 (the "**Applications**"), on the issue before the Court to be argued at that time, namely, the Court's jurisdiction to hear the foregoing Applications (the "**Jurisdiction Question**"), which Jurisdiction Question may continue to be advanced by Lexin as opposed to the Receiver), and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceedings, and

provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

(i) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

(j) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $50,000, provided that the aggregate consideration for all such transactions does not exceed $150,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 shall not be required.

(k) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(l) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(m) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(n) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(o) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(p) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(q) to, with leave of the Court, assign the Debtor into bankruptcy, to become the trustee in bankruptcy of the Debtor and to take all steps reasonably required to carry out its role as trustee in bankruptcy of the Debtor should the Receiver deem it appropriate in the circumstances to do so; and

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. Notwithstanding any other provision of this Order, nothing herein shall empower, authorize or require the Receiver: (i) to take possession of or exercise physical control over the Sites and the Abandoned Sites; or (ii) to manage, operate or carry on the business of the Debtor; and the Receiver shall not be deemed to have taken any of the actions or steps referred to in this paragraph 4 solely as a consequence of having taken some of the steps authorized pursuant to paragraph 3.

5. Upon the AER receiving from any person a request for approval to remove equipment from any of the Sites pursuant to the Equipment Order (the "**Request**"), the AER shall forthwith bring that communication to the attention of the Receiver, and the Receiver

shall cooperate with the AER with respect to any proposed removal of equipment from any Sites and Abandoned Sites, and will thereafter either:

(a) approve the removal of the equipment on such terms as are appropriate, having regard to the entitlements of all persons; or

(b) advise the person who made the Request that the equipment may not be removed without Court Order, made on application brought in these proceedings (Action No. 1701-03460) with 7 days' prior notice to the Receiver and AER.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

6. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependant on maintaining possession) to the Receiver upon the Receiver's request.

7. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 7 or in

paragraph 8 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

8. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

9. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

10. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court,

provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 10; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OF REMEDIES

11. All rights and remedies (including, without limitation, set-off rights) against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

12. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

13. All Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking

services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and this Court directs that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

14. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

15. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations

under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, SC 2005, c 47 ("**WEPPA**").

16. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

    (i) before the Receiver's appointment; or

    (ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring

the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

18. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

RECEIVER'S ACCOUNTS

19. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) of the BIA.

20. The Receiver and its legal counsel shall pass their accounts from time to time.

21. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

22. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such

rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

23. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "**A**" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

25. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

ALLOCATION

26. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

27. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

29. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. 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 Receiver 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. The Applicant shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

34. The Receiver shall establish and maintain a website in respect of these proceedings at www.grantthornton.ca/creditorupdates and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

_____
J.C.Q.B.A.

APPROVED as the Order granted:

GROIA AND COMPANY PROFESSIONAL CORPORATION

Per: _____
Joseph Groia
Counsel for Lexin Resources Ltd.

BORDEN LADNER GERVAIS LLP

Per: _____
Robyn Gurofsky
Counsel for Grant Thornton Limited

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____
Christa Nicholson
Counsel for the Alberta Energy Regulator

FILING

34. The Receiver shall establish and maintain a website in respect of these proceedings at www.grantthornton.ca/creditorupdates and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

J.C.Q.B.A.

APPROVED as the Order granted:

GROIA AND COMPANY PROFESSIONAL CORPORATION

Per: _____
Joseph Groia
Counsel for Lexin Resources Ltd.

BORDEN LADNER GERVAIS LLP

Per: _____
Robyn Gurofsky
Counsel for Grant Thornton Limited

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____
Christa Nicholson
Counsel for the Alberta Energy Regulator

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that GRANT THORNTON LIMITED, the receiver (the "**Receiver**") of all of the assets, undertakings and properties of LEXIN RESOURCES LTD. appointed by Order of the Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (the "**Court**") dated the ___ day of _____, ____ (the "**Order**") made in action number _____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [**daily**] [monthly **not** in advance on the ___ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Alberta Treasury Branches from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at _____.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

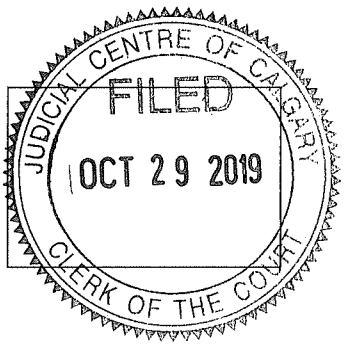
DATED the ___ day of _____, 20__.

GRANT THORNTON LIMITED, solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____
Name:
Title:

TAB 9

Clerk's Stamp:



COURT FILE NUMBER	1901-14615
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE OF	**CALGARY**
APPLICANT	**ORPHAN WELL ASSOCIATION**
:	
RESPONDENT	**HOUSTON OIL & GAS LTD.**
:	
DOCUMENT	**RECEIVERSHIP ORDER**
CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	Miles Davison LLP 900, 517- 10th Ave. S.W. Calgary, Alberta T2R 0A8 Solicitor: Terry Czechowskyj Telephone: 403 298 0326 Facsimile: 403 263 6840 Email: tczech@milesdavison.com File Number: 47280
DATE ON WHICH ORDER WAS PRONOUNCED:	October 29, 2019
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Madam Justice K. Eidsvik
LOCATION OF HEARING:	Calgary Court Centre

I hereby certify this to be a true copy of
the original Receivership Order
Dated this 29 day of October 2019
for Clerk of the Court

UPON the application of the Orphan Well Association (the "OWA") in respect of Houston Oil & Gas Ltd. (the "**Debtor**"); **AND UPON** having read the Application, the Affidavit of Lars De Pauw; and the Affidavit of Service of Ronda Cox,to be filed; **AND UPON** reading the consent of **Hardie and Kelly Inc.** to act as interim receiver and receiver and manager (the "**Receiver**") of the Debtor, filed; ; **AND UPON** hearing counsel for the OWA , counsel for the proposed Receiver and any other counsel or other interested parties present; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPOINTMENT

2. Pursuant to sections 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2, 99(a) of the *Business Corporations Act*, R.S.A. 2000, c.B-9, and 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c.P-7 **Hardie and Kelly Inc.** is hereby appointed Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**").

RECEIVER'S POWERS

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

   (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, **which shall include the Receiver's ability to abandon, dispose of or otherwise release any interest in any of the Debtors' real property, or any right in any immoveable, and any license or authorization issued by the Alberta Energy Regulator, or any other similar government authority, in respect of such interest in real property or immoveable, including pursuant to section 14.06(4) of the BIA, notwithstanding the provisions of the *Oil and Gas Conservation Act*, RSA 2000, c O-6, the *Pipeline Act*, RSA 2000, or any other similar provincial legislation;**

   (b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical

inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

(k) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:

(i) without the approval of this Court in respect of any transaction not exceeding **$1,000,000**, provided that the aggregate consideration for all such transactions does not exceed **$5,000,000**; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 or any other similar legislation in any other province or territory shall not be required.

(m) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Receiver for registration this Order shall be immediately registered by the Registrar of Land Titles of Alberta, or any other similar government authority, notwithstanding Section 191 of the *Land Titles Act*, RSA 2000, c. L-4, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of Land Titles shall accept all Affidavits of Corporate Signing Authority submitted by the Receiver in its capacity as Receiver of the Debtor and not in its personal capacity;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Debtor, and without interference from any other Person (as defined below).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the

Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a Province.

NO EXERCISE OF RIGHTS OF REMEDIES

9. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtor or the Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, including, without limitation, any rights or remedies or provisions in any agreement, construction, ownership and operating agreement, joint venture agreement or any such similar agreement or agreements to which the Debtor is a party that purport to effect or cause a cessation of operatorship as a result of the occurrence of any default or non-performance by or the insolvency of the Debtor, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings and under no circumstances shall the Debtor be replaced as operator pursuant to any such

agreements without further order of this Court provided, however, that this stay and suspension does not apply in respect of any "eligible financial contract" (as defined in the BIA), and further provided that nothing in this Order shall:

(a) empower the Debtor to carry on any business that the Debtor is not lawfully entitled to carry on;

(b) prevent the filing of any registration to preserve or perfect a security interest;

(c) prevent the registration of a claim for lien; or

(d) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment.

10. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH THE RECEIVER

11. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, except with the written consent of the Debtor and the Receiver, or leave of this Court. Nothing in this Order shall prohibit any party to an eligible financial contract (as defined in the BIA) from closing out and terminating such contract in accordance with its terms.

CONTINUATION OF SERVICES

12. All persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Debtor, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Debtor

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Debtor or exercising any other remedy provided under such agreements or arrangements. The Debtor

shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with the payment practices of the Debtor, or such other practices as may be agreed upon by the supplier or service provider and each of the Debtor and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

14. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("**WEPPA**").

15. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the

prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

(i) before the Receiver's appointment; or

(ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

17. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

RECEIVER'S ACCOUNTS

18. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to the benefits of and are hereby granted a charge (the "**Receiver's Charge**") on the Property, which charge shall not exceed an aggregate amount of $**1,000,000**, as security for their professional fees and disbursements incurred at the normal rates and charges of the Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

19. The Receiver and its legal counsel shall pass their accounts from time to time.

20. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed **$5,000,000** (or such greater amount as this

Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

22. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

25. The Receiver shall be allowed to repay any amounts borrowed by way of Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

26. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

27. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in

affidavit form and shall be considered by this Court as evidence. The Receiver's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

29. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Receiver 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

31. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. The Plaintiff shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis, including legal costs on a solicitor-client full indemnity basis, to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

34. The Receiver shall establish and maintain a website in respect of these proceedings at https://relieffromdebt.ca/houston-oil-gas-ltd./ (the "**Receiver's Website**") and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publicly available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

35. Service of this Order shall be deemed good and sufficient by:

(a) serving the same on:

(i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

(b) posting a copy of this Order on the Receiver's Website

and service on any other person is hereby dispensed with.

36. 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.

"K. Eidsvik"

Justice of the Court of Queen's Bench of Alberta

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that **Hardie and Kelly Inc.**, the interim receiver and receiver and manager (the "**Receiver**") of all of the assets, undertakings and properties of **Houston Oil & Gas Ltd.** appointed by Order of the Court of Queen's Bench of Alberta and Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (collectively, the "Court") dated the **29** day of **October, 2019** (the "**Order**") made in action numbers **[●]**, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of **[$]**, being part of the total principal sum of **[$]** that the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded **[daily] [monthly not in advance on the ● day of each month]** after the date hereof at a notional rate per annum equal to the rate of **[●]** per cent above the prime commercial lending rate of Bank of **[●]** from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at **[●]**.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

Hardie and Kelly Inc., solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____
Name:
Title:

TAB 10

2010 ABQB 647
Alberta Court of Queen's Bench

MTM Commercial Trust v. Statesman Riverside Quays Ltd.

2010 CarswellAlta 2041, 2010 ABQB 647, [2010] A.J. No. 1189, [2011] A.W.L.D. 35, [2011] A.W.L.D. 37, [2011] A.W.L.D. 5, [2011] A.W.L.D. 66, [2011] A.W.L.D. 8, 193 A.C.W.S. (3d) 1284, 70 C.B.R. (5th) 233, 98 C.L.R. (3d) 198

MTM Commercial Trust and Matco Investments Ltd. (Applicants) and Statesman Riverside Quays Ltd., Riverside Quays Limited Partnership and Statesman Master Builders Inc. (Respondents)

B.E. Romaine J.

Judgment: October 12, 2010
Docket: Calgary 1001-09828

Counsel: Blair C. Yorke-Slader, Q.C., Kelsey J. Drozdowski for Applicants
Robert W. Calvert, Q.C., Larry B. Robinson, Q.C., Sharilyn C. Nagina for Respondents

Subject: Corporate and Commercial; Insolvency

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — General principles
Debtors and creditors --- Receivers — Appointment — General principles
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — Applicants applied for, inter alia, appointment of receiver manager of Partnership and S Ltd. — Respondents cross-applied for various declarations — Respondents voluntarily halted construction on project and undertook not to recommence construction without court order — Application granted in part on other grounds; cross-application dismissed — Applicants' concession that receiver was not necessary as long as construction on project did not recommence was consistent with principle that court considering appointment of receiver must carefully explore remedies short of receivership that could protect interests of applicant — Applicants acknowledged that cessation of construction due to voluntary undertaking served same purpose and was adequate remedy — Question became less whether receiver should be appointed and more whether voluntary undertaking to cease construction should be replaced by court-imposed injunction restraining respondents from further construction on project pending resolution of matters between parties.
Contracts --- Remedies for breach — Injunction
M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Applicants alleged respondents breached various agreements, were guilty of misconduct that amounted to fraud and dishonesty, and commenced phase 2 of construction on project without proper approvals — M brought application for appointment of receiver manager of partnership and other relief; respondents cross-applied for various declarations — Application granted in part; cross-applications dismissed on other grounds — Respondents enjoined from continuing construction on project until issues of alleged breach of contract and other misconduct could be resolved on merits or until parties agreed otherwise — Applicants established strong prima facie case of breach of contract on question whether respondents proceeded with construction of phase 2 of project without necessary approvals of applicants as required under various agreements — Breaches amounted to breach of negative obligation, which was in substance obligation not to proceed to next phase of construction without obtaining Management Committee approval or approval of all S Ltd. directors under Unanimous Shareholders Agreement — If project were to fall into financial distress as result of untimely or imprudent commitments to proceed, it would be very difficult to quantify loss suffered — Applicants established that, on

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

balance, failure to enjoin further contractual breaches would give rise to irreparable harm — Balance of convenience favoured applicants, as failure to grant injunction would nullify its contractual right to be part of decision to proceed — If remedy was withheld, that right would be so impaired by time issues could be ultimately determined on their merits by unilateral action by respondents that it would be too late to afford applicants complete relief.

Contracts --- Construction and interpretation — Miscellaneous

M Trust and M Ltd. (collectively applicants) and S Ltd. and S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — Under Development Management Agreement (DMA), S Inc. was appointed as Manager of intended development — DMA provided that it shall terminate if Manager "misappropriates any monies or defrauds Partnership in any manner whatsoever" — Applicants alleged respondents breached various agreements — Applicants alleged that S Inc. misappropriated partnership funds and commenced phase 2 of construction on project without proper approvals — Applicants brought application for, inter alia, order confirming termination of S Inc. as Manager of Project; respondents brought cross-application for, inter alia, declaration that S Inc. remained Manager — Application granted in part on other grounds; cross-application dismissed — While applicants established strong prima facie case of contractual breach, issue of whether alleged breach was misappropriation was not entirely without doubt — It would also not be clear until issue of whether S Ltd. remained General Partner of Partnership who had authority to act for Partnership in order to instigate termination of DMA — Issue of removal and replacement of General Partner remained to be determined on its merits — No final determination made with respect to this issue.

Business associations --- Creation and organization of business associations — Partnerships — Relationship between partners — Membership — Introduction and expulsion

M Trust and M Ltd. (collectively applicants) and S Ltd. and its affiliate S Inc. (collectively respondents) entered into series of agreements regarding residential development project — Partnership was created — By terms of Limited Partnership Agreement, S Ltd. was appointed General Partner — Applicants alleged that S Ltd.'s actions in starting over $2 million of phase 2 construction and committing partnership to over $12.5 million of phase 2 construction contracts without approval of directors of S Ltd. as required by agreement and without meeting bank's requirements for funding of phase 2 credit facility, S Ltd.'s involvement in alleged "dummy trades" scheme and use of S Ltd. as co-signatory on promissory note unrelated to project all justified removal of S Ltd. as General Partner of partnership — Applicants brought application for, inter alia, order confirming removal of S Ltd. as General Partner; respondents cross-applied for various declarations, including declaration confirming S Ltd. as General Partner — Application granted in part on other grounds; cross-application dismissed — Interlocutory injunction granted in present application achieved purpose of enjoining further alleged breaches while preserving respondents' rights to fully present evidence and argument on issues of contractual authority — While applicants established strong prima facie case, there were ambiguities in agreements and submissions made with respect to contractual interpretation that did not make matter entirely without doubt — At present stage of proceedings, removal of S Ltd. as General Partner not confirmed — Confirmation of appointment and confirmation of new General Partner was premature — S Ltd. not confirmed as General Partner.

APPLICATION for appointment of receiver manager of Partnership and General Partner and other relief; CROSS-APPLICATION by respondents for various declarations.

***B.E. Romaine J.*:**

Introduction

1 By Originating Notice filed July 8, 2010, the Applicants MTM Commercial Trust and Matco Investments Ltd. (collectively, "Matco") applied for:

> (a) the appointment of a receiver and manager of Riverside Quays Limited Partnership (the "Partnership") and of its initial General Partner Statesman Riverside Quays Ltd. ("SRQL");
>
> (b) an order confirming the termination of Statesman Master Builders Inc. ("SMBI") as Manager of the Riverside Quays multi-family residential construction project (the "Project") pursuant to the terms of the Development Management Agreement (the "DMA");

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(c) an order confirming the removal of SRQL as the General Partner of the Partnership, and of its replacement by 1358846 Alberta Ltd. ("1358846"), an affiliate of the Applicant Matco Investment Ltd., pursuant to the terms of the Shareholders' Agreement (the "USA") and the Limited Partnership Agreement;

(d) an order confirming, if regarded as necessary, the authority of 1358846 to appoint Pivotal Projects Inc. ("Pivotal") as the new construction manager for the Project on appropriate terms.

2 By Notice of Motion filed July 15, 2010, SMBI and, by implication, its affiliate The Statesman Group of Companies Ltd. ("Statesman Group") (collectively, "Statesman") cross-applied for:

(a) a declaration confirming that SRQL remains the General Partner of the Partnership, with Garth Mann having a casting vote in the event of deadlock in construction matters; and

(b) a declaration confirming that SMBI remains the Manager of the Project.

Statesman purported to make such applications on behalf of SRQL. Matco submits that Statesman lacked the proper authority to do so.

3 The receivership motion was initially argued in part on July 15 and 19, 2010. On July 19, Statesman announced that construction of the Project had been voluntarily halted and undertook that it would not recommence construction without court order. The motions and cross-motions were further adjourned to August 18, 2010 pending the filing of additional affidavits by Statesman and cross-examinations on those and prior affidavits.

4 By further Notice of Motion filed August 6, 2010, SMBI applied to stay the action as it relates to matters dealing with the DMA and to appoint an arbitrator to determine such matters.

5 After hearing submissions on August 18, 2010, I advised the parties that I was not satisfied that there were not remedies short of a receivership that could protect the interests of the Applicants, and directed them to participate in a Judicial Dispute Resolution before a Justice of this Court. The Judicial Dispute Resolution was held on September 8, 2010 by Macleod, J. but did not resolve matters between the parties.

Analysis

A. Should a Receiver be Appointed?

6 Counsel for Matco conceded both on July 19, 2010 and on August 18, 2010 that Statesman's undertaking not to recommence construction without court order rendered the appointment of a receiver and manager unnecessary in the short term. Matco continues to take the position that, as long as construction does not resume while the issues between the parties are determined and as long as transitional matters that arise from these determinations can be effected cooperatively, a receiver and manager is not necessary.

7 Statesman, however, does not agree that it should continue to be bound by its undertaking not to recommence construction in the long term and submits that the application for a receiver should be dismissed and the Court should authorize Statesman to carry on with the financing and development of the Project as soon as possible.

8 Matco applied for the appointment of a receiver pursuant to certain provisions of the *Alberta Rules of Court*, certain provisions of the *Business Corporations Act*, R.S.A. 2000, c. B-9 and Section 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2.

9 Given the acknowledgement by Matco that a receiver is not necessary as long as construction on the project does not recommence, it is not necessary to analyze the law with respect to the appointment of a receiver, except to recognize that Matco's concession in that regard is consistent with the principle that a court considering the appointment of a receiver must carefully explore whether there are other remedies short of a receivership that could serve to protect the interests of the applicant. The

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

potentially devastating effects of granting the receivership order must always be considered, and, if possible, a remedy short of receivership should be used: *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 CarswellAlta 469 (Alta. C.A.) at paras. 16 & 17; *BG International Ltd. v Canadian Superior Energy Inc.*, [unreported, February 9, 2009] (Alta. Q.B.).

10 While the conduct of a debtor's business rests in the receiver upon appointment and thus the Applicants would be protected from further alleged breaches if a receivership order was granted, they acknowledge that the cessation of construction that occurred as a result of the voluntary undertaking served the same purpose and is an adequate remedy in their view. The question, therefore, becomes less whether a receiver should be appointed and more whether the voluntary undertaking to cease construction should be replaced by a court-imposed injunction restraining Statesman from further construction on the Project pending the resolution of matters between the parties.

11 As has been noted in *Anderson v. Hunking*, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15, the test for the appointment of a receiver is comparable to the test for injunctive relief. Determining whether it is "just and convenient" to grant a receivership requires the court to consider and attempt to balance the rights of both the applicant and the respondent, with the onus on the applicant to establish that such an order is required: *BG International* at para. 17. The factors set out to be considered in a receivership application are focused on the same ultimate question that the court must determine in considering an application for an interlocutory injunction: what are the relative risks to the parties of granting or withholding the remedy?

B. Injunctive Relief

12 The test for interlocutory injunctive relief is set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at paras. 47-48, 62-64, (1994), 111 D.L.R. (4th) 385 (S.C.C.), as follows:

> (i) a preliminary assessment must be made of the merits of the case to ensure that there is a serious issue to be tried;
>
> (ii) it must be determined that the moving party would suffer "irreparable harm" if the motion is refused and;
>
> (iii) an assessment must be made to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits - that is, the "balance of convenience."

(i) Strength of the Applicant's Case

Breach of Agreements

13 Matco and Statesman set up a structure and entered into a series of agreements in order to develop the Project, which is to be a residential project in the Inglewood area of Calgary. In total, the Project is to include 615 apartments and 71 townhouses in six phases. Matco owned the land and Statesman was to provide the development services.

14 The Partnership was created, the units of which are held by a trust. Other investors invested in the trust, but Matco and Statesman hold the largest interests through corporate, individual, family and employee investments. The General Partner is SRQL, a corporation that Matco and Statesman own equally.

15 The USA provides that Matco and Statesman have equal representation on the board of directors of the General Partner and that all major decisions require unanimous directors' approval. Such decisions include approving related party transactions, executing any contract more than $100,000 and requiring capital contributions. The USA also provides that, to the extent development financing is available on reasonable market terms, it would be obtained rather than utilizing shareholders' equity. Matco submits that the result is that, while Statesman has day-to-day control of the General Partner's operations, Matco retains the ability to restrain the pace of development, to fund it through borrowing rather than equity and to oversee Statesman's management of the Project.

16 Under the DMA, an affiliate of Statesman, SMBI, was appointed as Manager of the intended development. The Manager is given full signing authority and wide powers, but is specifically required to submit for Management Committee approval all construction contracts (although there is some dispute about this between the parties), budgets for each phase of the development,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

any budget variances exceeding 3%, any transaction with a person not at arm's length with the Manager, and the scheduling of any material component of the development. The amounts of commissions payable to the Manager on the sales of residential units and third party referral fees relating to such sales are specifically set. The Manager acknowledged in the DMA that it is a fiduciary to the Partnership, and agreed that the DMA would automatically terminate if it misappropriated any amounts or if it defrauded the Partnership in any manner.

17 Under the Limited Partnership Agreement, SRQL as General Partner agrees to discharge its duties honestly, in good faith, and in the best interests of the Partnership. If the General Partner breaches its obligations in such a way as would have a materially adverse effect on the business, assets or financial condition of the Partnership, the Limited Partner (being the trust) is entitled to remove and replace the General Partner by resolution.

18 While there is some confusion over terminology, it is clear that development of the Project was planned in phases. Subject to conditions for each phase, bank financing was obtained for land acquisition and infrastructure, and for construction of the first two phases of residential units (the Bank of Montreal Credit Agreement dated April 21, 2008).

19 Land acquisition and infrastructure (including a parkade for Phases 1 and 2) were funded by the Bank and are complete. Phase 1 of the residential unit construction was also funded and is essentially complete. Phase 1 is comprised of 124 residential condominium units and an amenities centre.

20 Phase 2 is to consist of a second building of 122 residential condominium units, plus two townhouses.

21 Only nine units in Phase 1 remained unsold as of July 20, 2010, although 14 sales were pending. As of that date, 57 units in Phase 2 had been pre-sold. The Credit Agreement was revised on June 9, 2010 to provide that, as a condition precedent to the Bank providing financing for Phase 2, there must be satisfactory evidence of not less than 166 eligible purchase agreements under Phase 1 and Phase 2. Statesman submits that sales agreements for 169 units have been submitted to the Bank for review.

22 Matco submits that Statesman has begun to disregard its obligations under the agreements. It asserts breaches of various agreements, some of which it submits amount to misappropriation and misapplication of funds. It alleges that, without seeking the necessary directors' or Management Committee approval, Statesman or one of its affiliates executed more than $12.5 million worth of construction contracts in excess of $100,000 each, and commenced Phase 2 of the development. Matco also alleges that Statesman instructed trades to carry out more than $2 million of Phase 2 construction work without first having met the Bank's funding requirements.

23 Matco submits that Statesman misapplied partnership funds to pay unauthorized commissions and referral fees to its own staff in contravention of the contractual terms. It submits that, after having been repeatedly told not to do so, Statesman assigned its president's son to work on the development.

24 Initially, Statesman submitted that the construction that was the subject of Matco's complaints was part of Phase 1 and that there had been no improper commencement of Phase 2 construction. It was now clear, from evidence from the architects, the City, the banking documents, the Statesman Project Manager, tradespeople, the Statesman Chief Financial Officer and even cross-examination of the President of Statesman, that Phase 2 construction has commenced and that more than $12.5 million of contracts that relate to Phase 2 have been executed by Statesman.

25 Specifically, Matco submits that SMBI as Manager under the DMA launched into Phase 2 construction without seeking or obtaining Management Committee approval for a revised Phase 2 budget, and that it awarded at least 19 Phase 2 contracts and instructed the commencement of work under them without seeking or obtaining Management Committee approval.

26 Statesman does not deny that it did this. It submits, however, that, since the construction of Phase 2 of the Project is not an event outside the ordinary business of the General Partner or the Partnership, consent of all the directors of SRQL to the commencement of construction on Phase 2 is not required under the USA.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

27 Statesman argues that under the USA, the development of the Project as a whole has been approved and that there is therefore no need to obtain approval of each phase. These submissions do not deal with the alleged breaches of specific terms of the DMA and the USA.

28 Statesman submits that, at any rate, Matco's failure to give consent is not commercially reasonable. That is not within the province of this court to decide: Matco is not under any contractual obligation to act in a commercially reasonable manner in giving or withholding its consent, and Matco's motives or judgments in respect of its decision are not properly at issue before me, except to the extent that they may relate to considerations of irreparable harm or balance of convenience.

29 Statesman submits that, pursuant to the by-laws of SRQL's board of directors, the President of Statesman, Garth Mann, has a casting vote as Chairman of the board, and therefore effectively a determining vote with respect to construction matters.

30 However, Section 3.5 of the USA provides that each shareholder shall use its best efforts to cause its nominees to the SRQL board to act in such a way to ensure that the provisions of the USA shall govern the affairs of the corporation, and provides that if there is any conflict between the provisions of the USA and the articles or by-laws of SRQL, the articles or by-laws will be amended. The nature of a USA does not allow its provisions to be trumped by a procedural by-law, and the provisions of the USA that require approval by all directors of certain major decisions cannot in effect be vitiated by such a by-law.

31 Statesman also submits that Matco has no entitlement to halt construction until shareholders' loans are repaid (which it submits is the reason for Matco's reluctance to agree to the next stage of construction), citing section 8.1(d) of the USA which provides for equity injections by shareholders in certain circumstances. Matco rightly points out that additional capital contributions to the Partnership require the unanimous consent of the directors of SRQL.

32 Statesman submits that Matco was aware that construction had commenced on Phase 2. It appears from the evidence that Matco had begun to suspect that construction on Phase 2 had commenced in May of 2010, although there may have been general discussion of Phase 2 requirements in the months leading up to May. It also appears that Matco became aware of what it asserts are other breaches and misconduct of Statesman at about the same time. The Originating Notice was filed on July 8, 2010. Matco therefore acted with reasonable dispatch once it became suspicious that breaches had occurred.

33 Matco also submits that Statesman has beached the DMA in other ways. By the terms of the DMA, the Manager is a fiduciary to the Partnership, and the DMA "shall terminate upon any of" certain events. One such event is said to occur when the "Manager misappropriates any amounts or defrauds the Partnership in any manner whatsoever".

34 The DMA contemplates payment of only three amounts to the Manager - Sales Fees, Management Fees and Strategic Management Fees. Matco thus submits that if the Manager converts Partnership funds for any other purpose, *prima facie* that would be fraud. If the Manager used Partnership funds to pay its staff fees of an authorized description, but deliberately and repeatedly took too much, that might be merely misappropriation.

35 Matco submits that, in breach of the express terms of Clause 5.06 of the DMA, SMBI misapplied Partnership funds to pay unauthorized sales commissions, salaries and fees to its staff. The amounts improperly taken appear to total about $51,328 not including an additional $6,000 of what Matco asserts are improper referral fees.

36 Statesman does not deny that SMBI paid such amounts to its sales staff, nor does it assert that it had Matco's approval or consent, but it claims that its actions represented good and necessary business decisions. Statesman also submits that the amounts paid are reasonable out-of-pocket costs and expenses under Clause 5.09 of the DMA and thus do not require Matco's consent.

37 Statesman says that these payments have been disclosed to Matco or its representatives in the Construction Superintendent Reports, and that, in any event, these issues should be dealt with by arbitration. Statesman submits that if the amounts paid are not permitted under the DMA, it will reimburse the Partnership.

38 The June 9, 2010 Management Committee Meeting minutes state the following with respect to this issue:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> Mr. Mathison queried commission payments apparently made contrary to the agreed formula and in excess of budget. Mr. Mann acknowledged that higher commission payments had been made to Statesman salespeople. He stated that MLS Resale Listing fees were forgiven to stimulate sales where a purchaser had a product to sell, therefore, offset the higher commission payments with a zero net result. Mr. Mathison repeated that this decision was again made unilaterally without notice or the approval of Matco.

39 It therefore appears that Matco did not agree to this alleged breach, by silence or otherwise.

40 Matco also submits that Statesman breached the provision of the USA that requires approval by the SRQL directors of the execution of any contract involving more that $100,000.

41 Statesman submits that the DMA gives the Manager the responsibility of awarding construction contracts. That responsibility, however, is subject to the specific terms of the DMA agreement, which includes the provision that the Manager shall submit construction contracts to the Management Committee for approval, provided that in any disagreement Statesman has the determining vote. There is no evidence that these contracts were submitted to the Management Committee for approval. Statesman points out, however, that Phase 1 construction contracts were not all submitted to the Management Committee.

42 There is a certain amount of ambiguity in the agreements with respect to the concept of a Management Committee. The DMA does not define the structure of the Management Committee, but merely states it shall be "as constituted and subject to the Partnership Agreement" (Section 1.03). The Limited Partnership Agreement does not reference a Management Committee. The recitals to the DMA provide that the Partnership wishes to engage the Manager and Matco as to certain strategic management decisions and Section 1.15 of the DMA engages Matco as a "strategic manager" for the Project. However, the DMA clearly requires Management Committee oversight and approval of numerous matters, and the parties have operated with a Management Committee with equal representation from Matco and Statesman. Whether the Management Committee is a committee of the directors of SRQL or of SRQL as Manager and Matco as "strategic manager" is not entirely clear.

43 While this ambiguity exists, the issue is less the conduct of Statesman in entering into individual contracts, and more the complaint that it commenced construction on Phase 2 without Management Committee approval.

44 Section 4.4(f) of the USA provides that all directors of SRQL must approve "related party transactions and major decisions with regard to those transactions".

45 There appears to be no dispute that Mr. Mann's son, Jeff Mann, has been acting project manager of the Project from time to time, and Matco says this was done without the necessary approval. Statesman says that Jeff Mann acted as an interim project manager for approximately 75 days in June, 2009 when the previous construction manager left without notice and that Matco was aware of this. It says that Jeff Mann assumed the role of interim project manager again in mid-January, 2010 until a replacement for the then construction superintendent could be found. Statesman also maintains that Jeff Mann was not paid by the Partnership for these services. Statesman submits that it relied on Herbert Meiner, who it says was an independent contractor through a corporate entity hired by Statesman, to inform Mr. Mathison of these kinds of details. It also argues that this was not a "related party transaction" since Jeff Mann was never intended to fill a permanent role. There appears to be conflicting evidence with respect to whether Matco knew of Jeff Mann's employment. Mr. Mathison's evidence, however, is that he never consented to this, and objected when it was brought to his attention.

Other Alleged Breaches

46 Matco also submits that Statesman is guilty of misconduct that amounts to fraud and dishonesty, apart from alleged breaches that simply relate to breach of contractual provisions.

47 Matco submits that Mr. Mann committed the Partnership to a US $732,600 promissory note to pay an unrelated debt of an American affiliate of Statesman. It also submits that Statesman signed up a number of tradespeople to agreements to purchase residential units on the understanding that they would not be required to close such purchases.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

48 There is conflicting affidavit and cross-examination on affidavit evidence with respect to these serious allegations. With respect to the allegation that Mr. Mann on behalf of Statesman used SRQL to guarantee a settlement obligation of a Statesman affiliate that had nothing to do with the Project, Matco alleges Statesman did not just commit SRQL as a co-promissary on a promissory note that had nothing to do with the Project, but attempted to block the Applicants from obtaining information about this.

49 Statesman asserts that this was an innocent and inadvertent clerical error that was remedied within a few days, but at any rate by June 16, 2010. There are serious issues of credibility that arise from the documentation and the evidence of Mr. Mann and others on this issue. Given the serious nature of the allegation and the conflicting evidence, this issue requires *viva voce* evidence before a determination can be made.

50 With respect to the allegation that Statesman entered into "dummy" purchase contracts with various tradespeople for units in Phase 2 of the Project, pre-sales agreements that were not intended to close in an attempt to inflate sales numbers in order to satisfy the Bank's condition with respect to numbers of sales of units, while it is now clear that at least twelve of these so-called "investor sales" were entered into, Statesman submits that these were done by Mr. Meiner acting without authority, that Mr. Mann was not aware of them and that when he became aware of them, full disclosure was made to the Bank and to Matco. Again there is conflicting evidence with respect to this issue, including what senior Statesman management knew about this scheme and when they knew it, and no final determination can be made on the basis of affidavit evidence and cross-examination on affidavit.

51 Matco complains of a number of other breaches and irregularities in the management of the Project. Given the conclusion I have reached on the alleged breaches described, it is not necessary to review all of these allegations.

52 While the first factor of the test set out in *RJR-MacDonald* only requires a serious issue to be tried, the strength of the applicant's case is an important consideration in a determination of whether to grant an injunction prior to trial. I am satisfied that in this case Matco has established a strong *prima facie* case of breach of contract with respect to the question of whether Statesman proceeded with the construction of Phase 2 of the Project without the necessary approvals of Matco as required under the various agreements.

53 I am also satisfied that these breaches amount to a breach of a negative obligation, which is in substance the obligation not to proceed to the next phase of construction without obtaining Management Committee approval or the approval of all of directors of SRQL under the USA.

54 The determination of these issues depends primarily on an interpretation of the various agreements, rather than issues of credibility. A determination of the relative strength of Matco's case for the purpose of the first factor is therefore a more predictable matter than a determination of the other issues between the parties which are the subject of conflicting evidence and questions of credibility. That is not to say that Matco has failed to establish a serious issue to be tried with respect to the other alleged breaches, but it is because they raise questions of credibility that a more determinative assessment of merit cannot be made.

55 The contractual interpretations that Statesman submits would lead to the conclusion that approval of construction of Phase 2 of the Project is not necessary or that Mr. Mann has a casting vote that would allow Statesman to make the decision to proceed in the face of Matco's opposition do not address the structure of the development agreements as a whole, and ignore or fail to give effect to specific provisions to the contrary.

(ii) Irreparable Harm

56 While there are authorities that suggest that it is unnecessary to establish irreparable harm or that less emphasis will be placed on this factor in the context of an injunction application involving a negative context (see John D. McCamus, *The Law of Contracts*, Irwin Law Inc., 2005 at page 995, note 197), I have considered the application with reference to this factor. To

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

show that it would suffer irreparable harm, Matco must establish either that failure to enjoin Statesman's continued breach of contract would give rise to harm that either cannot be quantified in monetary terms or that cannot be subsequently cured.

57 Matco submits that allowing Statesman to continue to construct Phase 2 without its consent gives rise to grave risks, given the current economy, of the Project falling into financial distress. It submits that Statesman's actions in launching into commitments for approximately $12.5 million of Phase 2 contracts without the approval of its development partner and without confirmation of Bank funding are reckless and irresponsible and put the interests of Matco and other Project investors at risk. If the Project were to fall into financial distress as a result of untimely or imprudent commitments to proceed, it would be very difficult to quantify the loss that may be suffered by, not only by Matco, but by other investors. In the context of this situation, I find that Matco has established that, on balance, the failure to enjoin further contractual breaches would give rise to irreparable harm.

58 In the usual case of an application for injunctive relief, the moving party would provide an undertaking in damages in the event it is not ultimately successful. Given the manner in which this application has proceeded, Matco has not had an opportunity to address this requirement. If Matco is unwilling to supply the usual undertaking as to damages, it has leave to apply to be relieved from such an obligation. Such an undertaking should be supplied or an application to relieve from the undertaking should be made within two weeks, and Statesman will of course be allowed an opportunity to respond to the application.

(iii) Balance of Convenience

59 This factor requires the Court to consider which of the parties would suffer the greater harm from the granting or refusal of an interlocutory injunction.

60 It is clear that failure to enjoin Statesman from continuing to breach the agreements by continuing construction on Phase 2 of the Project would nullify Matco's right to a say in whether construction on the Project should continue at this time. As noted by Matco, Statesman has indicated no commitment to discontinue the alleged breaches: rather, by its response to the application, it asserts its right to proceed without consultation or approval and applies to be relieved of its voluntary undertaking to stop construction and for confirmation of what it says is its right to proceed.

61 The enforcement of the negative obligation not to continue construction on Phase 2 without Matco's consent would not required Court supervision and has in fact already been effected through the voluntary shut-down of the Project. It is possible to readily define what Statesman should be enjoined from doing. There is no issue that permanent injunctive relief may not have been an available remedy to Matco after trial, given the nature of the obligation as a negative obligation.

62 Statesman alleges that it has significant financial exposure in the event that construction on the Project does not continue and that, the longer the Project is delayed, the more likelihood that the loss of momentum will be highly detrimental to the ongoing success of the Project. What Statesman complains of is the loss of immediate opportunity. Matco clearly does not agree with the submission that delay will prejudice the Project. It also does not agree that it has little financial exposure with respect to the Project, pointing out that Matco and related parties have a significant investment as unitholders in the trust in addition to other financial obligations and its share of fees and profits.

63 It is noteworthy that Matco does not propose that the Project be abandoned or that development cease on a permanent basis: what is involved is a difference of opinion between two experienced partners to a development with respect to the timing of development, the structure and availability of financing and the use of funds. Whether Matco or Statesman is correct with respect to these matters is not a question to be decided by this Court. What the Bank may do in the face of a failure to recommence construction on Phase 2, what various tradespeople or purchasers who have entered into pre-sale agreements may do is only speculative at this point, and does not tip the balance of convenience in favour of one party or the other.

64 It is likely that existing owners of Phase 1 units will be unhappy with a delay in construction, and likely that tradespeople that were anticipating immediate employment opportunities on the Project will likewise be disappointed. This does not justify ignoring Matco's contractual right to be part of the decision on timing of the commencement of construction of the next phase of the Project.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

65 I find that the balance of convenience favours Matco in this case, as failure to grant the injunction would nullify its contractual right to be part of the decision to proceed. If the remedy was withheld, that right would be so impaired by the time the issues could be ultimately determined on their merits by unilateral action by Statesman that it would be too late to afford Matco complete relief.

C. Should There Be an Order Confirming the Termination of SMBI as Manager of the Project?

66 As previously indicated, the DMA provides that it shall terminate if the Manger "misappropriates any monies or defrauds the Partnership in any manner whatsoever." Matco submits that misappropriation does not require fraud or even dishonesty and that it is sufficient if there is a failure by a fiduciary to meet an obligation, even where the fiduciary believes the reasons for his failure to be valid, citing *Kitnikone, Re* (1999), 13 C.B.R. (4th) 76 (B.C. S.C.) at 77 -78 and *Janco (Huppe) v. Vereecken* (1982), 44 C.B.R. (N.S.) 211 (B.C. C.A.) at 213 -214.

67 Matco submits that the alleged misappropriation by SMBI of partnership funds to pay unauthorized sales commissions to its staff is a misappropriation that has terminated the DMA. Statesman's response to this submission has been set out previously in these reasons. While Matco has established a strong *prima facie* case of contractual breach, the issue of whether this alleged breach is a misappropriation is not entirely without doubt.

68 It will also not be clear until the issue of whether SRQL remains the General Partner of the Partnership who has authority to act for the Partnership in order to instigate termination of the DMA.

69 For these reasons, and since the issue of the removal and replacement of the General Partner remains to be determined on its merits for the reasons set out later in this decision, I make no final determination of this issue at this time.

D. Should There Be an Order Confirming the Removal of SRQL as General Partner?

70 By the terms of the Limited Partnership Agreement, SRQL was appointed as initial General Partner. Statesman has had day to day authority over the operation of SRQL, but the USA provides that all "Major Decisions", including the approval of related party transactions and the execution of any contract involving more than $100,000, require the approval of all directors. SRQL itself specifically committed to act exclusively as General Partner of the Partnership and to comply with these approval requirements. By the Limited Partnership Agreement, SRQL covenanted to discharge its duties honestly, in good faith and in the best interests of the Partnership.

71 The Limited Partnership Agreement provides that "the Limited Partners may remove the General Partner and appoint a successor by Extraordinary Resolution" where the "General Partner has breached its obligations under this Agreement in such a manner as would have a material adverse effect on the Business, assets or financial condition of the Limited Partnership." By Extraordinary Resolution signed by all of the Trustees of the Limited Partner dated June 28, 2010, the Limited Partner removed SRQL as General Partner and appointed 1358846 as its successor. Matco submits that this removal should be summarily confirmed in this application.

72 Matco submits that SRQL's actions in commencing over $2 million of Phase 2 construction and committing the Partnership to over $12.5 million of Phase 2 construction contracts without the approval of the directors of SRQL as required by the USA and without meeting the Bank's requirements for funding of the Phase 2 credit facility, SRQL's involvement in the alleged "dummy trades" scheme and the use of SRQL as a co-signatory on a promissory note unrelated to the Project all justify the removal of SRQL as General Partner of the Partnership.

73 While the Limited Partner of the Partnership, being MTM Commercial Trust, may remove the General Partner and appoint a successor by Extraordinary Resolution, Section 15.1(b) provides that if a breach is capable of being cured, the General Partner can only be removed if such breach continues unremedied for a period of twenty business days after the General Partner has received written notice of such breach from any Limited Partner, which in this case means MTM Commercial Trust.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

74 The alleged breaches with respect to the "dummy trades" and the promissory note problem have been addressed by the General Partner, although it may be an issue whether a fiduciary may cure a breach of trust of this kind. As indicated previously, these allegations, however, raise issues of credibility that cannot be determined in an application of this kind. The alleged breach of proceeding with construction of Phase 2 without required approval is less subject to credibility issues, and the question is whether it is appropriate to made a final determination of the issues of whether Statesman has breached the agreements in this respect, whether such breaches have had a material adverse effect on the business or financial condition of the Partnership, whether such breaches are capable of being cured and it so, whether proper notice has been given and thus whether the Limited Partner was justified in removing the General Partner as part of this summary application.

75 The interlocutory injunction granted in this application achieves the purpose of enjoining further alleged breaches while preserving Statesman's rights to fully present evidence and argument on these issues of contractual authority. While Matco has established a strong *prima facie* case, there are ambiguities in the agreements and submissions made with respect to contractual interpretation that do not make the matter entirely without doubt. I therefore decline to confirm the removal of SRQL as General Partner of the Partnership at this stage of the proceedings. It follows that confirmation of the appointment and confirmation of 1358846 Alberta Ltd. as new General Partner is premature.

76 For the same reasons that I decline to make a final order with respect to SRQL as General Partner and SMBI as Manager of the Project on the motion by the Applicants, I decline to confirm SRQL as General Partner and SMBI as Manager of the Project in accordance with Statesman's counter motions.

E. Should the SMBI Issue Be Stayed and an Arbitrator Appointed Pursuant to the Terms of the DMA?

77 I agree that the parties have gone too far down the litigation trail for some of the inter-related issues to be now referred to arbitration.

78 While the DMA contains an arbitration clause, the other agreements to not. The issues among the parties are affected by three agreements, and involve affiliated entities that are not parties to the DMA. It would be undesirable to have a multiplicity of proceedings where there is clear to be overlapping subject matter. Absent consensual arbitration of all issues, the law is clear in such circumstances that it is the arbitration that should be stayed in favour of the litigation, not the other way around: *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280 (Alta. C.A.) at paras. 39ff; *Hammer Pizza Ltd. v. Domino's Pizza of Canada Ltd.*, [1997] A.J. No. 67 (Alta. Q.B.) at paras. 6-9.

Conclusion

79 Statesman is enjoined from continuing construction on the Project until the issues of alleged breach of contract and other misconduct can be resolved on their merits or until the parties agree otherwise. I will remain seized of the matter as case management judge to hear applications to have the matters in issue proceed to a full hearing on an expedited basis and to hear any other related motions.

80 If the parties are unable to agree on costs of these applications, they may be addressed.

Application granted in part; cross-application dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 11

2009 ABCA 127
Alberta Court of Appeal

BG International Ltd. v. Canadian Superior Energy Inc.

2009 CarswellAlta 469, 2009 ABCA 127, [2009] A.W.L.D. 1936, [2009] A.W.L.D. 1973, [2009] A.J. No. 358, 177 A.C.W.S. (3d) 41, 457 A.R. 38, 457 W.A.C. 38, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156

BG International Limited (Respondent / Plaintiff) and Canadian Superior Energy Inc. (Appellant / Defendant)

R. Berger, F. Slatter, P. Rowbotham JJ.A.

Heard: March 10, 2009
Judgment: April 7, 2009
Docket: Calgary Appeal 0901-0048-AC

Counsel: V.P. Lalonde, M.A. Thackray, Q.C. for Appellant
C.L. Nicholson, M.E. Killoran for Respondent
T.S. Ellam for Interested / Affected Party, Challenger Energy Corp.
H.A. Gorman for Interested / Affected Party, Canadian Western Bank
L.B. Robinson, Q.C for Receiver, Deloitte & Touche Inc.

Subject: Corporate and Commercial; Natural Resources; Contracts; Insolvency; Civil Practice and Procedure

Headnote

Debtors and creditors --- Receivers — Appointment — General principles

Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

Natural resources --- Oil and gas — Exploration and operating agreements — Joint operating agreement

Interim receiver — Defendant was operator of well and plaintiff paid its share of invoice of M, which was operator of semi-submersible rig, to defendant, but funds were not forwarded to M — Plaintiff commenced arbitration proceedings under joint operating agreement and obtained order from chambers judge appointing interim receiver to take control of oil well pending hearing of arbitration — Defendant appealed decision appointing interim receiver — Appeal dismissed — Real risk existed that M would remove rig and it was in interests of all parties that rig stay on well and that well be flow-tested — Defendant was in default and was unable to cure this, and plaintiff did not dispute its obligation to pay defendant's share of operating expenses — Extending to plaintiff protection of receiver's certificates was not unreasonable exercise of chamber judge's discretion and no evidence existed showing that this created any serious prejudice to defendant — Practical effect of accelerating removal of defendant as operator of well was apparent since it did not have funds to cure its defaults, and this removal merely accelerated inevitable and did not cause it significant prejudice.

APPEAL by operator of oil well of decision appointing interim receiver.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

***Per curiam*:**

1 This is an appeal of a decision appointing an interim receiver to take control of the Endeavour oil well located off the coast of Trinidad and Tobago. The appeal was dismissed following oral argument, with reasons to follow.

Facts

2 The appellant and the respondent both have an interest in the well. The appellant is the operator of the Endeavour well under the standard form joint operating agreement approved by the Association of International Petroleum Negotiators. While Challenger Energy Corp. is a party to the joint operating agreement, there is some dispute as to whether Challenger has effectively acquired a part of the appellant's interest, which would trigger its obligations.

3 There is at present a semi-submersible rig working on the well. The rig is operated by Maersk Contractors Services on behalf of the owners of the rig. All the parties agree that it is extremely important that the rig is not removed from the well, and that the well be flow tested. Maersk sent its invoice for its November operations. The respondent paid its share of the invoice to the appellant, but those funds were not forwarded to Maersk. Once the invoice became overdue, Maersk commenced the process under the drilling contract that would allow it to terminate the contract.

4 When the respondent found out that Maersk had not been paid, it became very concerned. It deposes that operating funds were not being kept in a segregated account as covenanted. It deposes that the appellant is in default of its obligations by not paying Maersk. The appellant does not dispute that Maersk has not been paid. It proposed a payment schedule to Maersk (which Maersk rejected), which is essentially an acknowledgment that payments are overdue.

5 The respondent commenced arbitration proceedings in accordance with the joint operating agreement. It then immediately applied to the Court of Queen's Bench for interim relief pending the hearing of the arbitration, as contemplated by Article 18.2 (C)(9) of the arbitration clause. The application for an interim receiver was brought on very quickly. The Canadian Western Bank, which held security over the appellant's assets, was given notice and appeared. While the appellant was also given notice of and appeared at the application, it did not have time to file an affidavit in response nor to cross examine on the respondent's affidavit. An adjournment to do that was denied, and the interim receiver was appointed on February 11th, 2009. The order protected the priority of the Canadian Western Bank, and gave second priority to the respondent's advances. This appeal was promptly launched and expedited.

Standard of Review

6 Granting a receivership order under the *Judicature Act*, R.S.A. 2000, c. J-2, involves the exercise of a discretion. The granting of the order will not be interfered with on appeal unless it is based on an error of law, or the granting of the remedy is wholly unreasonable in the circumstances: *Roberts v. R.*, 2002 SCC 79, [2002] 4 S.C.R. 245 (S.C.C.) at para. 107; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 43 Alta. L.R. (4th) 5 (Alta. C.A.) at para. 3.

Appointment of the Receiver

7 The chambers judge was motivated to appoint the interim receiver without any delay because she perceived a real risk that Maersk would remove the rig, thereby causing irreparable harm to all concerned. The respondent was prepared to advance $47 million through the receiver to complete the work on the well. The appellant argues, first, that there was no real prospect of Maersk removing the rig, and that Maersk was merely taking steps to preserve its legal rights. It is argued the chambers judge committed a palpable and overriding error in finding a real risk the rig would be removed.

8 The record shows, however, that Maersk was taking the formal steps under the drilling contract that were conditions precedent to the termination of that contract. While Maersk wrote that it would show "flexibility", that was premised on the appellant proposing an "acceptable" solution. Maersk had already rejected the appellant's payment schedule, and was resisting attempts to postpone the dispute resolution meeting that was a precondition to termination. The respondent's witness deposed that Maersk did not propose to test the well unless paid, and that Maersk preferred to move the rig to another well in Australia.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

He also deposed that if the rig was removed, it would take approximately one year and cost $35 million to bring in a replacement. The finding of a risk of removal of the rig made by the trial judge is supported by the record, and does not warrant appellate interference.

9 Next the appellant argues that it was denied its basic rights because it was not granted an adjournment, it was not allowed to cross examine on the respondent's affidavit, and it was not given time to file its own affidavit. Despite the presence of the appellant, the application proceeded almost as if it was an *ex parte* application. While there is substance to this complaint, it is not uncommon for interim receivers to be appointed on an *ex parte* basis, and there were remedies available to review or withdraw the order granted. Given the urgency found by the chambers judge, the method of proceeding was not, in this case, fatal. We do not find that Article 18.2 (C)(9) of the arbitration provisions, which enables electronic hearings, effectively prohibits *ex parte* procedures.

10 The appellant was asked to suggest terms on which an adjournment might be granted, but persisted in its request for an adjournment that did not address the respondent's legitimate concerns. The chambers judge was entitled to conclude that the requested adjournment could itself have led to irreparable damage to all parties.

11 We note that in the weeks that have followed since the granting of the order, the appellant has still not cross examined on the respondent's affidavit, nor has it filed an affidavit in reply. Any such evidence could have been used in an application to set aside or vary what was similar to an *ex parte* order, it could have been used on the stay application, and it would likely have been admitted on this appeal. We conclude that the appellant's objections are to some extent tactical. Even though the record may be incomplete, many of the key facts are not in dispute, and the key documents are included. A fair picture of the situation can be obtained from this record, supplemented as it has been by counsels' submissions.

12 The appellant notes that under Article 18.3 (A) of the joint operating agreement, when one party gives notice of default it is required by the contract to pay the amounts owed by the defaulting party. The appellant points out that this is a contractual obligation, and that the respondent was required to pay all outstanding amounts without seeking any more security or protection than that provided by the operating agreement. By advancing the $47 million by way of receiver's certificates, the respondent has in effect managed to enhance its position under the contract. The respondent replies that it had already paid its share of the Maersk invoice, and the clause cannot mean that it has to pay twice the amount misapplied by the appellant. It also argues that the security provided by Article 18.4 (E) of the joint operating agreement may not cover all of the money the respondent proposes to advance.

13 The default clause in the joint operating agreement provides in Article 18.4 (H) that it is not intended to exclude any other remedies available to the parties. The enhanced security collaterally obtained by the respondent through the use of receiver's certificates has not been shown on this record to create any serious prejudice to the appellant. After all, it is the appellant that is in default, and the respondent is prepared to advance significant sums to cure that default, even if it is required to do so by the contract. The chambers judge found that the appellant had been commingling joint venture funds, and that the respondent had a reasonable concern about the protection of future advances. Unlike in most receivership cases, the funds advanced under this enhanced security are to be used to pay other creditors, and would not further subordinate their interests. The security of the receiver's certificates may merely be parallel to that already provided for in the operating agreement. While the appointment of the receiver does arguably have the effect identified by the appellant, that does not make the receivership order unreasonable in the circumstances.

14 The appellant also points out that the appointment of the interim receiver has had the effect of displacing it as the operator. While the respondent has initiated the procedure under Article 4 of the joint operating agreement to replace the appellant as operator because of its default, the mechanism provided for in the agreement would take at least 30 days. By applying for an interim receiver, the respondent has essentially accelerated that period of time during which the appellant could cure its default, and maintain its status as operator. Again, this submission of the appellant is not without substance. We note, firstly, that the appellant has not offered to cure its default, and indeed it appears it is unable to do so. We are advised by counsel that last Thursday the appellant was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. If the appellant was now in a position to cure its defaults, this point might be determinative of the appeal. Secondly, the parties had

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

already agreed that the respondent should become the operator in April of this year. There is no significant prejudice to the appellant by the brief acceleration.

15 The appellant complains that the respondent was not required to post an undertaking to pay damages if it turns out its allegations are unfounded. Filing an undertaking in these circumstances is not the usual practice in Alberta. Damages for wrongful appointment of a receiver were granted in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.) without the presence of an undertaking. We note that the respondent has paid significant sums of money on behalf of the appellant, and that the appellant would likely have a right of set-off if it obtains an award of damages against the respondent. An undertaking would add little.

Conclusion

16 We agree that the appointment of a receiver is a remedy that should not be lightly granted. The chambers judge on such an application should carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant. For example, the order might be granted but stayed for, say, 48 hours to allow the company to cure deficiencies, propose alternatives, or clarify the record.

17 In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) at para. 31:

> [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the *Judicature Act*, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

18 The chambers judge was aware of all of the points now raised by the appellant. She had a difficult job balancing the rights and interests of the parties. It is in the interests of all parties that the rig stay on the well, and that the well be flow tested. The appellant is in default. The respondent has not disputed its obligation to pay the appellant's share of operating expenses, and is quite willing to pay the $47 million required to do that. In all the circumstances it was not an unreasonable exercise of her discretion for the chambers judge to extend to the respondent the protection of receiver's certificates. The practical effect of accelerating the removal of the appellant as the operator was apparent to her. If the appellant does not have the necessary funds to cure its defaults, then its removal as operator merely accelerated the inevitable.

19 The chambers judge had to make a difficult decision in a very short period of time based on limited materials. Deference is owed to her discretionary decision to appoint a receiver. While an order short of a receivership might have been crafted, we have not been satisfied that her eventual balancing of the various rights and interests involved was unreasonable. She was primarily motivated by preserving the value of the well for the benefit of all concerned. We cannot see any error that warrants appellate interference, and the appeal is dismissed.

20 The dismissal of the appeal is not intended to limit the powers of the chambers judge or the CCAA case management judge. The receivership was to be "interim" only, and it has an internal mechanism for review. The Queen's Bench retains the ability to revoke or amend the order as circumstances dictate.

Appeal dismissed.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 12

2014 ONSC 2781
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corp. v. 6711162 Canada Inc.

2014 CarswellOnt 5836, 2014 ONSC 2781, [2014] O.J. No. 2146, 13 C.B.R. (6th) 136, 240 A.C.W.S. (3d) 646, 2 P.P.S.A.C. (4th) 332, 35 C.L.R. (4th) 167

Romspen Investment Corporation, Applicant and 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

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

In the Matter of 6711162 Canada Inc., and Those Other Companies Listed in Schedule "A" Hereto

D.M. Brown J.

Heard: May 2, 2014
Judgment: May 5, 2014 *
Docket: CV-14-10470-00CL, CV-14-10529-00CL

Proceedings: additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 CarswellOnt 7939, 2014 ONSC 3480, D.M. Brown J. (Ont. S.C.J. [Commercial List])

Counsel: S. Jackson for Romspen Investment Corporation
D. Magisano, S. Puddister for Respondents / CCAA Applicants, 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd. and Casino R.V. Resorts Inc.
A. Bouchelev for Altaf Soorty and Zoran Cocov
E. Tingley for Pezzack Financial Services Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.

Construction law --- Construction and builders' liens — Trust fund — Miscellaneous

Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application

Applicant lent money to respondent 671 Inc. and related companies — Loan matured and had not been repaid — At issue was who would get control of development and/or realization of partially-completed condominium project - court appointed receiver or current owners and management of one of applicants under Companies' Creditors Arrangement Act (CCAA), H Ltd. — Applicant applied for appointment of receiver under s. 243(1) of Bankruptcy and Insolvency Act and appointment of construction lien trustee under s. 68 of Construction Lien Act — 671 Inc. and related companies (borrowers/CCAA applicants) opposed appointment of receiver and applied for initial order under CCAA — Application for appointment of receiver and construction lien trustee granted; application for initial order under CCAA dismissed — Evidence established indebtedness, maturing of loan facility, demands for payment, failure to repay and validity of security held by applicant on properties — Amount owed was not disputed, and security documents contained clear contractual right of applicant to appoint receiver upon act of default and required borrowers to consent — Lender's conduct did not place borrowers in default of obligations — Failure of borrowers to abide by terms of commitment letter led them to default — Unfairness characterized proposed approach of borrowers to complete construction of project as alternative to appointment of receiver — Plan in essence appeared to be request to impose extension of term of loan — Apparent desire to have CCAA intitial order secure compelled extension of term of loan at minimal cost was not proper use of CCAA process — There was no credible evidence that CCAA applicants were close to finding sources to fund completion of construction of project, let alone to resolve existing lien claims which one would expect would be necessary step to get project back up and running — Court had strong reservations about leaving court-supervised completion of project in hands of respondent principals of borrowers, given that their credibility had been undermined.

APPLICATION by lender for appointment of receiver and construction lien trustee; APPLICATION by borrowers for initial order under *Companies' Creditors Arrangement Act*.

***D.M. Brown J.*:**

I. Competing applications for the appointment of a receiver and the making of an initial order under the Companies' Creditors Arrangement Act

1 Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

2 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a *CCAA* initial order.

3 The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario — a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

4 For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the *CCAA*.

II. Evidence about the debt and secured assets

5 Romspen is a commercial mortgage lender. The respondents, Altaf Soorty and Zoran Cocov, are the principals of a group of property holding and development companies which own parcels of land in Midland, Cambridge and Ramara, Ontario and to which Romspen lent money.

A. The Loan and the demands

6 By Commitment Letter dated July 18, 2011, Romspen agreed to provide 671162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a $16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

> The Loan shall be funded by way of advances, the amount(s) and timing of such advances(s) to be in the absolute discretion of Lender.

7 The funds were to be used "for general corporate purposes...to retire existing mortgage indebtedness [on two properties]...to pay fees and transaction costs, to set up an interest reserve, and up to $10,000,000 for the acquisition of additional real property, to be secured by mortgage(s) and other security satisfactory to Lender in its sole discretion."

8 The Loan was secured by first mortgages on three properties in Ramara, as well as by a second mortgage on a fourth. Three of the properties were owned by 671 and 179; the fourth was owned by Soorty and Cocov. The Commitment Letter stated that the Borrower had represented that the cumulative value of the four properties was $28.1 million. The Loan was also secured by general security agreements.

9 A year later, on June 12, 2012, the parties amended the Commitment Letter in several respects (the "First Supplement"). First, another company controlled by Soorty and Cocov, Casino R.V. Resorts Inc., was added as a "Borrower". Second, an additional advance of $470,000 was made, secured by two other properties. The parties agreed that this advance was transitional in nature and ultimately was taken out by replacement financing.

10 However, the principals of the CCAA Applicants made some very serious allegations about the validity of the First Supplement. Soorty, in his April 17, 2014 affidavit, deposed:

> I did not sign the said document and verily believe that it is a forgery. Unlike all other documents signed between Romspen Investment Corporation and myself, the pages of the First Supplement are not initialed and the signatures not witnessed, even though space for witnessess' signatures is provided.

Soorty so deposed evidently to support his contention that he had never agreed to make Casino R.V. a "Borrower" under the Loan, which on its face was one of the effects of the First Supplement. In his April 17 affidavit Cocov also alleged that his signature on the First Supplement was a forgery.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

11 Romspen adduced evidence which showed that slightly over 15 other documents were signed as part of the additional $470,000 loan put in place by the First Supplement. Soorty signed many of those on behalf of Casino R.V. One of the documents was an opinion by corporate counsel for Casino R.V. dated June 14, 2012 which stated that the "Loan and Security Documents have been duly and validly executed and delivered by the Company and create valid and legally binding obligations of the Company enforceable against the Company in accordance with the term thereof".

12 After Romspen filed that evidence Soorty swore a further affidavit (April 23) in which he backpedalled from his forgery allegation, now contending that:

> I have no recollection of ever signing [the First Supplement]. If I ever did sign it, it was without understanding and appreciation of the nature and legal consequences of the document that was put in front of me.

Then, in his affidavit in support of the *CCAA* application, Soorty deposed that "even a cursory review of the First Amendment shows that it was put together in a rather hap-hazard fashion". Finally, in his second affidavit in support of the *CCAA* application, Soorty simply stated that the First Supplement "was placed in front of me with little time to obtain meaningful legal advice".

13 Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear — there is absolutely no basis to support the allegations of Soorty and Cocov that the First Supplement was a forgery or that they did not understand it. Their allegations of forgery can only be described as falsehoods, and such falsehoods severely undermine the credibility of the *CCAA* application given that Soorty and Cocov are the principals of the CCAA Applicants.

14 To continue with the technical narrative, a further amendment was made to the Commitment Letter on August 15, 2012 (the "Second Supplement"). Four entities were added as "Borrowers": Hugel Lofts Limited, 20333387 Ontario Inc., 1564168 Ontario Inc., and 1387267 Ontario Inc. The use of the loaned funds provision was amended so that the next advances under the Loan could be used by the Borrowers to refinance a condominium project in Midland and "to provide funds to assist in completion of construction on [the Midland Condo Project] on a cost to complete basis in accordance with a project budget to be approved by Lender (including contingency allowance satisfactory to Lender) (approximately $7,000,000) and to pay further fee and transaction costs."

15 Also, the Second Supplement increased the security provided by the Borrowers to include three Midland properties, including the lands upon which the Midland Condo Project was being built, as well as three properties in Cambridge. Romspen took first and second mortgages on the Midland lands, a first mortgage on one Cambridge property, and second mortgages on two other Cambridge properties which were behind mortgages held by Pezzack Financial Services Inc.

16 The mortgage security taken by Romspen contained a standard provision enabling it to appoint a receiver upon an event of default, and the chargor also agreed to consent to a court order appointing a receiver.

17 The Second Supplement also amended the Commitment Letter by adding, as a schedule, Romspen's Standard Construction Conditions. Section 4 of those Conditions stated:

> **4. Cost to Complete**
>
> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

18 According to Wesley Roitman, a Managing General Partner of Romspen, in the months following the execution of the Second Supplement Romspen became concerned that the costs to complete the Midland Condo Project would exceed the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

budgeted $7 million and that a funding gap of about $3.1 million would arise. On June 7, 2013, the parties entered into a forbearance agreement. After reciting the language of the Commitment Letter's Section 4 "Cost to Complete", the forbearance letter went on to state:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*. (emphasis added)

19 Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter Romspen stated that it agreed to forbear from exercising its available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan "to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario".

20 The Borrowers did not invest the $3,180,994.00 stipulated in the forbearance agreement. The record showed that at most they invested a further $270,000 on June 20, 2013 and paid a supplier's $89,383 invoice on June 14, 2013.

21 Rompsen stopped making any further advances under the Loan in October, 2013.

22 In December, 2013, suppliers to the Midland Condo Project registered liens totaling about $2.248 million.

23 On January 3, 2014, Romspen sent to all of the Borrowers, except Casino, a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security. The demand stated that as of January 3, 2014, the sum of $11.996 million was owed under the Loan. Payment was demanded by January 17, 2014. None was made.

24 On March 28, 2014, Romspen sent to Casino R.V. Resorts a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security which stated that as of March 28, 2014 the amount due under the Loan was $12.284 million.

25 On March 4, 2014 Romspen commenced its application to appoint a receiver, subsequently amending its notice of application on April 3. A schedule for the hearing of Romspen's receivership application was set by the Court on April 11, 2014.

26 Then, on April 28, 2014, 671, 179, 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc. and Hugel Lofts Ltd. (the "CCAA Applicants"), issued their notice of application seeking an initial order under the *CCAA*.

B. The businesses of the CCAA Applicants

27 Five of the CCAA Applicants own vacant land: 671 and 179 own the properties in Ramara, and 138, 156 and 203 own the Cambridge properties. At the present point of time, those CCAA Applicants operate simply as land holding companies; they have no employees.

28 The other CCAA Applicant, Hugel Lofts, owns the land on which the Midland Condo Project is located, together with two undeveloped parcels of land in Midland.

C. The Midland Condo Project and other Midland properties

29 The Midland Condo Project involves a partially constructed 4-storey residential building with 53 units. Construction is either about 50% or two-thirds completed, depending on which evidence one consults. The project has had a difficult development history, with Hugel Lofts acquiring the already-started project in power of sale proceedings in June, 2012 for $4 million, with a mortgage back for $3.1 million.

30 Between December 11 and December 20, 2013, trades registered six construction liens against the Midland Condo Project, with certificates of action registered this past January and February. In early April Hugel Lofts filed notices of intent to defend those lien actions. Construction has ceased on the Project.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

31 There was a dispute in the evidence about the fair market value of the three properties in Midland. The CCAA Applicants pointed to an October 3, 2013 "short narrative appraisal" prepared by Real Estate Appraisers and Consulting Limited which appraised the properties at $18 million (the "RE Appraisal"). That appraisal consisted of an "as is" appraisal of the one parcel on which the Midland Condo Project is located (151 Marina Park Ave.), which the appraiser arrived at by deducting the costs to complete from an appraised "as if complete" sellout value for the 53 condo units. The RE Appraisal also contained "as if" appraisals of the other two Midland parcels assuming "all approvals for the proposed development are in place and the subdivisions registered" (Vindon and Victoria Streets).

32 The RE Appraisal recounted the following history of the Midland Condo Project as obtained from the current property owner — i.e. Hugel Lofts:

> Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.
>
> . . .
>
> The building as of the date of appraisal is described as about 50% completed.
>
> It is also reported that all units were completely presold by the previous owner for about $275 per sq ft. These sales were however void after liquidation of the previous owner.
>
> Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between $300 and $325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back.*
>
> (emphasis added)

Photographs of the Midland Condo Project taken by the appraiser in October, 2013 showed significant completion of the exterior work on the building, but the need for extensive interior work.

33 The RE Appraisal used a "cost to complete" for the Midland Condo Project of $6.591 million based upon a payment schedule dated September 15, 2013 provided by the general contractor, Sierra Construction. Sierra's schedule recorded a total value for its construction contract of $7.452 million, with the value of work done to that date of $1.145 million.

34 Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an "as is" value to 151 Marina Park of $10.6 million, and a "hypothetical" "as if" value of $7.4 million to the other two parcels.

35 Romspen's internal valuations placed the worth of the Midland properties at far less than $18 million.

D. The Ramara properties

36 The CCAA Applicants contended that the four Ramara Properties — 5781 Rama Road, 5819 Rama Road, 4243 Hopkins Bay Road and 4285 Hopkins Bay Road — were worth about $27 million on a built-out basis. An August 11, 2010 narrative appraisal of the vacant, unserviced development land prepared by Schaufler Realty Advisors for 671 provided a "hypothetical value of the subject site as fully serviced sites approved for the contemplated commercial and residential development" as of October 6, 2012 of $27.1 million.

37 The Schaufler Appraisal noted that the four properties had been acquired for $4.4 million.

38 A November 21, 2013 "draft" appraisal prepared by Schaufler also used a $27.1 million hypothetical value.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

39 Romspen's internal valuations placed the "as is" worth of the Ramara properties at far, far less than $27.1 million.

E. The Cambridge Properties

40 138, 156 and 203 own six parcels of vacant land in Cambridge, some of which are "brown-field" lands which will require remediation for environmental reasons. Romspen holds first mortgages over the Cambridge properties owned by 138, and second mortgages over those owned by 156 and 203, with Pezzack Financial Services and TD Canada Trust holding $300,000 in first mortgages on those properties.

III. Evidence about the owners' approach should the Court grant a CCAA initial order

41 Soorty deposed that the CCAA Applicants intend to complete the Midland Condo Project without any further financial support from Romspen and he believed that the proceeds from condo units sales would be "sufficient to repay Romspen, resolve any lien claims and make a proposal to creditors using the remaining properties as the basis for that proposal":

> The Applicants simply want to complete the Condo Project with funds that will likely be supplied by Zoran and I (from our own resources) and repay Romspen the funds they did advance once the Condo Project is complete.

Soorty deposed elsewhere:

> ... I believe that Zoran and I should have the opportunity to restructure the Applicants' affairs, repay Romspen on its loan, pay remaining creditors and keep control of our real estate development projects. As shown above, there is more than enough value in the Applicants' assets to repay Romspen in full.

A. Proposed sources of funds

A.1 Principals of CCAA Applicants mortgage other assets under their control

Harbour Mortgage

42 As to the sources of those funds, Soorty deposed that a related company, 1026517 Ontario Limited, owned lands in Mississauga which secured a collateral mortgage in favour of Harbour Mortgage Corp. in the amount of $8 million. He deposed that Harbour Mortgage had "agreed to increase the loan amount to $11,250,000, thereby providing 1026517 Ontario Limited with an additional $3,250,000. I intend to use these funds to finish the construction at the Midland Property".

43 The April 2, 2014 term sheet signed by Harbour Mortgage had not been signed and accepted by Soorty on behalf of 1026517 Ontario. The "loan amount" of $11.25 million was "not to exceed 65% of the appraised value and/or value as determined by the Lender" of the Mississauga properties. No evidence of their value was placed in evidence. The term sheet offered a loan with a 12-month term, and described the "use of funds" as follows:

> The proceeds of the Loan shall be used to refinance existing debt and to repatriate Borrower equity for planned future development.

The term sheet made no reference to a permitted use of funds for the Midland Condo Project.

National Bank

44 Cocov deposed that he was the President of Harmony Homes Oshawa Ltd., a recently completed townhome condominium project in Oshawa, and that the National Bank had agreed to provide Harmony Homes with a mortgage for $4.8 million: "I intend to use these funds to complete construction at 151 Marina Park Avenue, Midland, Ontario."

45 Cocov attached to his affidavit an April 11, 2014 "Discussion Paper" from National Bank which stated: "This Discussion Paper is an outline of proposed terms for purpose of considering your application only and is not: (i) a commitment letter;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

nor (ii) an agreement to provide financing". The Discussion Paper only referenced the Oshawa property, and it described the "purpose of proposed loan" as "refinancing", with the "type of facility" as "first rank conventional mortgage financing". The Discussion Paper made no reference to the Midland Condo Project, and I infer from its terms that the bank simply envisaged that its loan would replace the existing financing for the Oshawa property.

46 Harmony Home signed the Discussion Paper on April 17, 2014. This motion was heard on May 2. No detailed evidence was provided concerning what discussions, if any, had ensued between Harmony Home and National Bank between April 17 and May 2.

47 The Projected Statement of Cash Flows for the period May 2 through to June 6, 2014 filed by the CCAA Applicants did not make any reference to cash receipts from financings from either Harbour Mortgage or National Bank.

A.2 Proposed DIP Financing

48 Soorty deposed that the CCAA Applicants would require $250,000 to complete four model suites, together with $50,000 in soft costs to begin pre-sales. Soorty and Cocov would finance those costs using their personal funds to make available up to $300,000 in "drip" financing, provided their financing was given a DIP Priority Charge.

49 The filed CCAA Cash Flow statement contemplated using $150,000 of the DIP financing during the initial 30-day period.

A.3 HST Refund

50 Soorty deposed that in early April, 2014, Cocov had contacted the CRA which had advised that it had approved an HST refund to Hugel Lofts of about $254,000. The filed CCAA Cash Flow statement contemplated receipt of the HST Tax refund during the week of May 23, 2014. The CCAA Applicants did not adduce any written communications from CRA which confirmed the entitlement to the HST Refund or the expected date of refund issuance.

B. Costs to complete the Midland Condo Project

51 As to the costs to complete the Midland Condo Project, Soorty initially deposed that the Project's general contractor, Sierra Construction (Woodstock) Limited:

> [I]s prepared to complete the Condo Project for $5.5 million plus H.S.T. (the "Project Completion Costs"). In fact, they have guaranteed to complete the Condo Project for no more than then Project Completion Costs.

The April 23, 2014 Sierra Construction letter which Soorty filed in support of that evidence did not support Soorty's assertion. Sierra Construction did write that "the all in number to complete should be $5,500,000.00 (HST is not included)". However, it continued:

> Sierra, the project trades and their respective suppliers have suffer and continue to suffer damages as a result of non-funding. Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. Our summary would indicate the costs spent to date and the costs to complete weighted against the projected revenues, support the request for the project to continue to completion. We look forward in assisting you in completing this project.

Sierra's letter contained no "guarantee" that it would complete construction for $5.5 million.

52 In a subsequent affidavit Soorty attached a further, April 28, 2014 letter from Sierra which stated, in part:

> The outstanding Construction Liens cumulative balance is $1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is $957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades, the all in

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> number to complete should be $5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.
>
> Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

53 The CCAA Applicants did not file a detailed statement from Sierra which identified the work needed to complete the Midland Condo Project, similar to the one attached as Appendix "E" to the October, 2013 RE Appraisers report, nor did they file any explanation about why Sierra, which in that October, 2013 statement valued the work remaining to be done at $6.3 million, would be prepared to commit to complete the work for the significantly lesser amount of $5.5 million.

54 Also, Sierra's April 28 letter suggested that it would not be prepared to resume work unless its lien was vacated. The CCAA Applicants did not address where the funds would come from to either pay off or bond off Sierra's lien, let alone those of other lien claimants, apart from their evidence about dealings with Harbour Mortgage and National Bank.

55 Romspen filed its own internal calculations which placed all of the costs to complete — both "hard" and "soft" — several million dollars higher than the $5.5 million referred to by Sierra.

C. Summary

56 In sum, the evidence filed by the CCAA Applicants disclosed that, if granted CCAA protection, they would look to the future sale of the units from the Midland Condo Project to "repay the Romspen Indebtedness in full and provide funds for resolving lien claims". The evidence of projected unit sales revenue of $17.579 million filed by the CCAA Applicants consisted of a short email (which contained no date) from Mr. Jonathan Weizel, who described himself as a sales representative at Royal LePage Terrequity Realty in Thornhill. Soorty deposed that Weizel had been responsible for selling out the Midland Condo Project before the previous owners were placed into a receivership.

57 Soorty also deposed that the CCAA Applicants proposed "...leaving the balance of the Applicants' assets as a basis for a proposal to the Applicants' remaining creditors". In terms of the amounts due to those "remaining creditors", Crowe Soberman Inc., in its April 30, 2014 Pre-Filing Report in its capacity as the proposed Monitor, estimated the amounts owed by Hugel Lofts at $15.98 million, consisting of $12 million due to Romspen, $958,000 due to lien claimants, and $3 million due to unsecured creditors, including related parties. Soorty deposed:

> The most significant unsecured creditors are Zoran and I with respect to shareholder loans we have made to facilitate completion of the Condo Project.

58 Soorty, in his *CCAA* affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

59 Romspen seeks the appointment of SF Partners Inc. as receiver and construction lien trustee over the respondents under *BIA* s. 243(1), section 101 of the *Courts of Justice Act* and section 68 of the *Construction Lien Act*. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed....
>
> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.[1]

60 The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*:

> There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership.[2]

61 Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, the British Columbia Court of Appeal stated:

> Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.[3]

62 More recently, C. Campbell J., in *Dondeb Inc., Re*, after quoting the above passage from *Cliffs Over Maple Bay*, stated:

> Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:
>
> > This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.

In *Edgeworth*, dealing with the specifics of that case I noted:

> Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

. . .

[In the present case] the request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

. . .

Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity. [4]

B. Applying the legal principles to the evidence

63 The evidence adduced by Romspen established the indebtedness of the Borrowers under the Loan, the maturing of the Loan facility in September, 2013, the demands for payment, the failure of the Borrowers to repay the amount demanded and the validity of the security held by Romspen on the Ramara, Midland and Cambridge properties. The Borrowers did not dispute the amount owed, and the security documents contained a clear contractual right of Romspen to appoint a receiver upon an act of default and required the Borrowers, in such circumstances, to consent to an order appointing a receiver. An active development was underway on only one of the properties securing the Loan — the Midland Condo Project — the other lands being vacant and undeveloped. The other creditors who hold security against the Cambridge lands did not oppose the appointment of a receiver. Pezzack Financial simply submitted that in the event a receiver were appointed, the receiver should not enjoy priority over Pezzack Financial for its fees and expenses on those properties where Pezzack Financial held the first mortgages. The lien claimants against the Midland Condo Project did not appear on the return of the application, although served with the court materials. Sierra Construction provided the Borrowers with a letter of support, but did not formally appear in the proceeding.

64 In the usual course of affairs those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. However, the Borrowers opposed the making of such an order

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

on two main grounds. First, they argued that by its conduct Rompsen had caused the Borrowers to default under the Loan and Romspen should not be allowed to take advantage of such conduct. Second, they contended that the plan advanced by the CCAA Applicants offered a fairer way to balance the competing economic interests at play and any consideration of the appointment of a receiver should be deferred until the CCAA Applicants had been afforded an opportunity to complete the Midland Condo Project. Let me deal with each argument in turn.

65 First, Soorty, in his affidavit in support of the CCAA application, and the CCAA Applicants in their written submissions to the Court, contended that their default on the Loan was caused by Romspen's wrongful failure to advance the full amount of the Loan as it was contractually required to do, leading to the trades to lien the Midland Condo Project. The CCAA Applicants argued that a lender was not entitled to take advantage of, or seek relief in respect of, a default which its own wrongful conduct had created.

66 While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations, [5] that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4 of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

67 The June, 2013 Forbearance Letter contained an acknowledgement by the Borrowers of their failure to have advanced their own funds towards the Midland Condo Project:

> At this time, the amount required to be invested by you to comply with Section 4 above, is $3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith*.

68 In sum, the evidence established that it was the failure of the Borrowers to abide by the terms of the Commitment Letter, as amended by the Second Supplement and the Forbearance Letter, which led to them to commit acts of default.

69 The CCAA Applicants also strongly intimated in their evidence that throughout the earlier part of this year Romspen had misled them into thinking that the difficulties with the Loan could be worked out. In support of that submission they pointed to language in an April 4, 2014 email from Roitman to them which talked about the completion of the Midland Condo Project as "clearly...the best outcome for all of us". That was not an accurate characterization of the email by the CCAA Applicants, as can be seen when one reads the email in full:

> Al, these emails are not really very useful. As we have discussed at length, Romspen's lawyers need to push our case forward as forcefully as they can. This does not prevent us from changing course later on. When you and Zoran have your affairs arranged to the point where you can move the project forward again, we will be glad to discuss terms for reinstating the loan and completing the project. Clearly this would be the best outcome for all of us, *but we have waited about one year already for you guys to work things out between each other and to find the funding to cover the cost, and we just can't wait forever*. (emphasis added)

70 The last phrase in Roitman's email most likely suggests the real reason for the default of the CCAA Applicants under the Loan — internal disagreements between Soorty and Cocov about how much each of them should contribute to the continued construction of the Midland Condo Project. The June 7, 2013 forbearance agreement signed by both hinted at this problem, with its reference to Soorty and Cocov having advised "that you have been and are currently unable to fund this amount" (i.e. $3.18 million). Soorty expressly referred to the internal problems in paragraph 55 of his *CCAA* initial affidavit when he deposed: "As

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

a sign of our good faith, I was prepared to put $2 million towards the Condo Project immediately, however, Zoran required additional time to finalize similar financing".

71 Turning to the second argument advanced by the Borrowers/CCAA Applicants, does their proposed approach to complete the construction of the Midland Condo Project offer a better, more practical alternative to Romspen's proposed appointment of a receiver?

72 At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses — they want to carry on just as they have in the past.

73 I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had "absolutely no confidence" in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

74 Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that "all units were completely presold by the previous owner" and "many of the previous buyers show strong interest in coming back". If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the *CCAA* initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the *CCAA* process in the circumstances.

75 Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

76 Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

77 Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

78 For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

C. The scope of the appointment

79 Romspen holds security, by way of mortgages and general security agreements, over the companies which own the Ramara Properties — 6711162 Canada Inc. and 1794247 Ontario Inc. — the companies which own the Cambridge Properties — 1387267 Ontario Inc., 1564168 Ontario Inc. and 2033387 Ontario Inc. — and the company which owns the Midland Properties - Hugel Lofts Ltd. A receiver is appointed over those companies and those properties.

80 One of the Ramara Properties — 4271-4275 Hopkins Bay Road, Rama — is owned by Altaf Soorty and Zoran Cocov. At the hearing I had questioned Romspen's counsel about why his client was seeking the appointment of a receiver over Soorty and Cocov. He responded by pointing to GSAs given by both individuals to Romspen. After further discussion counsel advised that he had received instructions to withdraw the request for a receiver over Soorty and Cocov. I had not been able to read most of the application records prior to the hearing. I now see that Romspen obtained a charge from Soorty and Cocov over the Hopkins Bay Road properties owned by them. My queries about the need to appoint a receiver over the individual respondents were not focused on that property, but on whatever other assets the two individuals possessed. Consequently, I consider it most appropriate to appoint a receiver over the property owned by Soorty and Cocov at 4271-4275 Hopkins Bay Road, Rama.

81 Much ink was spilt by both sides over the appointment of a receiver over Casino R.V. Resorts Inc. That issue can be dealt with quickly. Romspen loaned money to Casino and received a package of security in return, part of which included the addition of Casino as a "Borrower" under the Commitment Letter pursuant to the First Supplement. All parties agreed that that loan was repaid in full. On July 16, 2012, Romspen wrote that upon receipt of the amount to pay out the loan to Casino, it would provide its signed authorization to register its assignment of its *PPSA* registrations in respect of the loan, as well as a release of its interest. The loan was repaid, but apparently Romspen did not provide those documents. It contended it was never asked to do so.

82 Be that as it may, while I am prepared to grant Romspen's request to add Casino R.V. Resorts Inc. as a party to the receivership application, I am not prepared to appoint a receiver over Casino or any properties it previously provided as security. The appointment of a receiver is an equitable remedy. Casino repaid the loan and Romspen agreed to release its interest. Under those circumstances, it is neither fair nor reasonable for Romspen to seek the appointment of a receiver over Casino.

83 Counsel for Romspen circulated a draft appointment order at the hearing. On behalf of Pezzack Financial Services Inc., Mr. Tingley submitted that the receiver's charge should not enjoy priority over his client's first mortgages on Cambridge Properties because the receivership really concerned a dispute involving the Midland Condo Project. That was a reasonable request in the circumstances, and I order that in respect of the Cambridge Properties the charge granted to the receiver shall stand subordinate to any first charges registered against those properties by any person other than Romspen.

84 A sealing order shall issue in respect of the Confidential Exhibits to the Affidavit of Wesley Roitman in order to preserve the integrity of any sales and marketing process undertaken by the Receiver. Counsel can submit a revised draft appointment order to my attention through the Commercial List Office for issuance.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

V. Costs

85 I would encourage the parties to try to settle the costs of these applications. If they cannot, Rompsen may serve and file with my office written cost submissions, together with a Bill of Costs, by May 16, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by May 29, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

86 Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air". [6]

Application for appointments granted; application for initial order dismissed.

Footnotes

* Additional reasons at *Romspen Investment Corp. v. 6711162 Canada Inc.* (2014), 2014 ONSC 3480, 35 C.L.R. (4th) 193, 2014 CarswellOnt 7939 (Ont. S.C.J. [Commercial List]).

1 (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), paras. 10 and 12.

2 [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services Inc. v. Canada (Attorney General)], para. 14.

3 2008 BCCA 327 (B.C. C.A.), para. 36.

4 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]), paras. 19-21, 25, 26 and 31.

5 *Royal Bank v. Chongsim Investments Ltd.* (1997), 46 C.B.R. (3d) 267 (Ont. Gen. Div.)

6 (2003), 64 O.R. (3d) 135 (Ont. S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States v. Yemec*, [2007] O.J. No. 2066 (Ont. Div. Ct.), para. 54.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 13

1983 CarswellMan 154
Supreme Court of Canada, Laskin C.J.C.

R. v. Wilson

1983 CarswellMan 154, 1983 CarswellMan 189, [1983] 2 S.C.R. 594, [1983] S.C.J. No. 88, [1984] 1 W.W.R. 481, 11 W.C.B. 200, 26 Man. R. (2d) 194, 37 C.R. (3d) 97, 4 D.L.R. (4th) 577, 51 N.R. 321, 9 C.C.C. (3d) 97, J.E. 84-70

James Stephen Wilson, Appellant and Her Majesty the Queen, Respondent

Dickson, Estey, McIntyre and Chouinard JJ.

Heard: March 14, 1983
Judgment: December 15, 1983
Docket: 16931

Proceedings: Affirmed, 65 C.C.C. (2d) 507, 13 Man. R. (2d) 155, 1982 CarswellMan 69, [1982] 2 W.W.R. 91 (Man. C.A.)

Counsel: *R.L. Pollack*, for appellant
J.D. Montgomery, Q.C., for respondent

Subject: Criminal

Headnote

Criminal Law --- Invasion of privacy — Interception of private communications — Admissibility — Authorization

Authorization reviewable only upon prompt application to court originally granting it.

At trial, wiretap evidence was ruled inadmissible on the basis that the authorization granted by the Court of Queen's Bench was unlawful. This determination was made without opening the sealed packet containing the documents relating to the authorization after cross-examination of the police officer indicated that there was no evidence to support the statement in the authorization that other investigative procedures had been tried and failed, that other investigative procedures were unlikely to succeed, and that the matter was urgent. Upon the Crown's appeal from the accused's acquittal, a new trial was ordered on the basis that an authorization could not be challenged collaterally in Provincial Court. The accused appealed.

Held:

Appeal dismissed.

Per McIntyre J. (Laskin C.J.C. and Estey J. concurring)

A trial judge has no authority to collaterally attack a wiretap authorization; he is limited to a consideration of defects and irregularities apparent on the face of the authorization and may not go behind it. In his capacity as trial judge, there is no authority to direct the opening of the sealed packet. Having no access to the materials necessary to review the granting of the authorization, a collateral attack is not possible. Any application to review an authorization must be made as soon as possible to the court which originally granted it, preferably before the authorizing judge. If the trial judge happens to be of the same court that made the authorization order, an application may be made to him directly for review to avoid delay, but such a review would be done in his capacity as a judge of the authorizing court, not in his capacity as trial judge. The trial judge effectively went behind the authorizations, even though he did not open the sealed packet, and thus exceeded his jurisdiction and was in error in refusing to admit the Crown's evidence.

Per Dickson J. (concurring in result) (Chouinard J. concurring)

Section 178.16(1)(*a*) and 3(*b*) of the Criminal Code require a trial judge to consider the validity of an authorization and give him authority in doing so to go behind an apparently valid wiretap authorization to determine whether there are defects or irregularities in either the giving of the authorization or in the application for it. Such a determination cannot properly be made without opening the sealed packet. A superior court judge has authority to do so. A trial before an inferior court judge should be adjourned to allow counsel to apply for an order permitting its opening. The trial judge erred in deciding that the pre-conditions of s. 178.13(1)(*b*) had not been met without examining the contents of the sealed packet.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Appeal from decision of Manitoba Court of Appeal, [1982] 2 W.W.R. 91, 65 C.C.C. (2d) 507, 13 Man. R. (2d) 155, allowing appeal and ordering new trial on basis trial judge had no authority to exclude wiretap evidence on basis of collateral attack on wiretap authorization.

Considered by majority:

Bador Bee v. Habib Merican Noordin, [1909] A.C. 615 (P.C.) — *referred to*

Bidder v. Bridges (1884), 26 Ch. D. 1 (C.A.) — *referred to*

Boyle v. Sacker (1888), 39 Ch. D. 249 (C.A.) — *referred to*

Can. Tpt. (U.K.) Ltd. v. Alsbury, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385 , affirmed *(*sub nom. *Poje v. A.G.B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785 — *applied*

Charette v. R., [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158 , affirming *(*sub nom. *R. v. Parsons)* 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161 — *considered*

Clarke v. Phinney, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Dickie v. Woodworth (1883), 8 S.C.R. 192 — *applied*

Gibson v. Le Temps Publishing Co. (1903), 6 O.L.R. 690 — *applied*

Goldman v. R., [1980] 1 S.C.R. 976, 13 C.R. (3d) 228, 51 C.C.C. (2d) 1, 108 D.L.R. (3d) 17, 30 N.R. 453 — *referred to*

Gulf Islands Navigation Ltd. v. Seafarers' Int. Union (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 (B.C.C.A.) — *applied*

Maynard v. Maynard, [1951] S.C.R. 346, [1951] 1 D.L.R. 241 — *referred to*

Miller and Thomas, Re (1975), 28 C.C.C. (2d) 128 (B.C. Co. Ct.) — *referred to*

Pashko v. Can. Accept. Corp. Ltd. (1957), 12 D.L.R. (2d) 380 (B.C.C.A.) — *referred to*

R. v. Blacquiere (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336, 79 A.P.R. 336 (P.E.I.S.C.) — *considered*

R. v. Bradley, [1980] C.S. 1051, 19 C.R. (3d) 336 (Que. S.C.) — *referred to*

R. v. Cardoza (1981), 61 C.C.C. (2d) 412 (Ont. C.A.) — *referred to*

R. v. Crease (1980), 53 C.C.C. (2d) 378 (Ont. C.A.) — *referred to*

R. v. Dass, [1979] 4 W.W.R. 97, 8 C.R. (3d) 224, 47 C.C.C. (2d) 194 , leave to appeal to S.C.C. refused 30 N.R. 609n — *considered*

R. v. Donnelly, [1976] W.W.D. 100, 29 C.C.C. (2d) 58 (Alta. T.D.) — *considered*

R. v. Gabourie (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.) — *referred to*

R. v. Gill (1980), 56 C.C.C. (2d) 169 (B.C.C.A.) — *considered*

R. v. Hancock, [1976] 5 W.W.R. 609, 36 C.R.N.S. 102, 30 C.C.C. (2d) 544 (B.C.C.A.) — *referred to*

R. v. Haslam (1977), 36 C.C.C. (2d) 250 (Nfld. T.D.) — *referred to*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

R. v. Ho (1976), 32 C.C.C. (2d) 339 (B.C. Co. Ct.) — *referred to*

R. v. Hollyoake (1975), 27 C.C.C. (2d) 63 (Ont. Prov. Ct.) — *referred to*

R. v. Johnny (1981), 62 C.C.C. (2d) 33 (B.C.S.C.) — *referred to*

R. v. Kalo (1975), 28 C.C.C. (2d) 1 (Ont. Co. Ct.) — *referred to*

R. v. Miller, [1976] 1 W.W.R. 97, 32 C.R.N.S. 192, *(*sub nom. *Re Miller and Thomas)* 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679 (B.C.S.C.) — *referred to*

R. v. Newall (1982), 67 C.C.C. (2d) 431, 136 D.L.R. (3d) 734 (B.C.S.C.) *referred to*

R. v. Robinson, [1977] 4 W.W.R. 697, 39 C.R.N.S. 158 (B.C. Co. Ct.) — *referred to*

R. v. Turangan, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 , affirmed 32 C.C.C. (2d) 254n (B.C.C.A.) — *referred to*

R. v. Welsh (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A.) — *applied*

R. v. Wong (1976), 33 C.C.C. (2d) 506 (B.C.S.C.) — *considered*

R. and Collos, Re, [1977] 5 W.W.R. 284, 37 C.C.C. (2d) 405 , reversing [1977] 2 W.W.R. 693, 34 C.C.C. (2d) 313 (B.C.C.A.) — *referred to*

R. and Kozak, Re (1976), 32 C.C.C. (2d) 235 (B.C.S.C.) — *referred to*

Royal Comm. Inquiry into Royal Amer. Shows Inc. (1978), 40 C.C.C. (2d) 212 (Alta. T.D.) — *referred to*

Royal Trust Co. v. Jones, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292 — *applied*

Stewart and R., Re (1975), 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 , affirmed 13 O.R. (2d) 260, 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592 (H.C.) — *referred to*

Stewart v. Braun, [1924] 2 W.W.R. 1103, [1924] 3 D.L.R. 941 (Man K.B.) — *applied*

Zaduk and R., Re (1977), 37 C.C.C. (2d) 1 (Ont. H.C.) — *referred to*

***McIntyre J.*:**

1 The appellant was charged with nine counts relating to betting. He was tried before Dubienski, Provincial Court Judge in the Manitoba Provincial Court. The Crown's case depended on evidence obtained by wiretap for which it had procured four authorizations under the provision of Part IV. 1 of the *Criminal Code* from judges of the Court of Queen's Bench of Manitoba. Each authorization contained the following words:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Chemiak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

2 At trial, on cross-examination of the police officer Cherniak who is referred to in the authorizations, evidence was given that Cherniak had had the sole direction of the investigation and that he had made the applications for the authorizations. He said that the interceptions were made under the authorizations, that they were the sole investigations made and that no other

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

investigation was done or ordered by him after the first authorization. He was unaware of any other investigating steps. It is evident that counsel for the appellant by this line of cross-examination was attempting to ascertain whether or not the above-quoted words from the authorization were true and whether the prescriptions of s. 178.13(1)(b) of the *Code* had been satisfied. That section reads:

> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied.
>
> [...]
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

3 No objection was taken by the Crown to this line of examination.

4 On the basis of the cross-examination of the police officer, the trial judge made the following finding:

> No other investigative procedures had been tried and failed, that there was no evidence that investigative procedures were likely to succeed, nor that there was any urgency.

5 As a result, the trial judge held that the interceptions of the private communications of the appellant had not been lawfully made as required by s. 178.16 of the *Criminal Code* and he ruled the evidence obtained by the wiretaps inadmissible. The case for the Crown collapsed and the appellant was acquitted on all counts.

6 On appeal to the Manitoba Court of Appeal, the Crown argued that the provincial court judge was without jurisdiction to go behind the authorizations and thereby make a collateral attack upon the order of a superior court. The appeal was allowed and a new trial was ordered. Monnin J.A. (as he then was), with whom Matas J.A. concurred, held that an authorization granted by a superior court judge could not be collaterally attacked in a provincial court. O'Sullivan J.A., concurring in the result, went further and said that: "In my opinion, where there is an authorization granted by a superior court of record, it cannot be collaterally attacked in any court and it cannot be attacked at all in an inferior court." A further argument was advanced by the appellant Wilson that there was no evidence of proper notice of intention to adduce wiretap evidence as required under s. 178.16(4) of the *Code*. This argument was rejected in the Court of Appeal and, on an acknowledgment that there was some five months' notice given, it was rejected in this Court as well. The only remaining issue then is whether or not the trial judge erred in law in refusing to admit the wiretap evidence.

7 In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

8 I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally-and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

9 Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in *Can. Tpt. (U.K.) Ltd. v. Alsbury*, 7 W.W.R. (N.S.) 49, 105 C.C.C. 20, [1953] 1 D.L.R. 385, affirmed *(*sub nom. *Poje v. A.G. B.C.)* [1953] 1 S.C.R. 516, 17 C.R. 176, 105 C.C.C. 311, [1953] 2 D.L.R. 785, a judgment of the British Columbia Court of Appeal. In that case striking employees picketed the wharf where a vessel was waiting to take on cargo. The shipowner secured an ex *parte* injunction in the Supreme Court restraining the defendant

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

and others from picketing. The injunction was disobeyed and contempt proceedings were commenced against the defendant. At first instance before the Chief Justice of the Supreme Court of British Columbia the defendants contended that an attachment for contempt should not issue for the reason that the injunction order, made by a judge of the Supreme Court, was a nullity and could not therefore form the basis for a contempt order. This collateral attack was rejected by the Chief Justice, attachment issued, and penalties for contempt including fines and imprisonment were imposed. In the Court of Appeal the appeal was dismissed with one dissent and, at p. 406, Sidney Smith J.A. said:

> First it was said that the injunction order of Clyne J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned Judge's order, chief among them being: (1) that it was based on improper and inadmissible evidence; (2) that the injunction was in conflict with the *Trade-unions Act* [R.S.B.C. 1948, c. 342] and the *Laws Declaratory Act*[R.S.B.C. 1948, c. 179]; (3) that the injunction was in permanent form and no Court could grant a permanent injunction *ex parte*.
>
> To this the general answer is made that the order of a Superior Court is *never* a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General, *viz., Scott v. Bennett* (1871), L.R. 5 Hi. 234 at p. 245; *viz., Scott v. Bennett* (1871), L.R. 5 H.L. 234 at p. 245; *Revell v. Blake* (1873), L.R. 8 C.P. 533 at p. 544 (Ex. Ch.); *Scotia Const. Co. v. Halifax*, [1935] S.C.R. 124, [1935] 1 D.L.R. 316; and to these I might add *Re Padstow Total Loss & Collision Assur. Assn.* (1882), 20 Ch.D. 137 at p. 145 (C.A.), and *Hughes v. Northern Elec. & Mfg. Co.* (1915), 50 S.C.R. 626 at pp. 652-3, 21 D.L.R. 358. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in Kerr on Injunctions, 6th éd., p. 668, and 7 Hals., p. 32, which include the authoritative decision in *Eastern Trust Co. v. MacKenzie, Mann & Co.*, [1915] A.C. 750 at p. 761, 31 W.L.R. 248, 22 D.L.R. 410, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other authorities for holding that an injunction, though wrong, must be obeyed till set aside, are *Leberry v. Braden* (1900), 7 B.C.R. 403, and *Bassel's Lunch Ltd. v. Kick*, [1936] O.R. 445 at p. 456, 67 Can. C.C. 131 at p. 135.
>
> [1936] 4 D.L.R. 106 at p. 110 (C.A.)

10 Bird J.A., who wrote a separate concurring judgment, made the following comments, at p. 418:

> The order under review is that of a Superior Court of Record, and is binding and conclusive on all the world until it is set aside, or varied on appeal. No such order may be treated as a nullity.

and later, at pp. 418-19:

> In *Eastern Trust Co. v. MacKenzie, Mann & Co.*, 22 D.L.R. at p. 418, [1915] A.C. at p. 760, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said: "(The injunction) was, or course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged."
>
> Duff C.J.C., approved the same principle in *Scotia Const. Co. v. Halifax*, [1935], 1 D.L.R. 316, S.C.R. 124, and expressed the principle in these terms (p. 317 D.L.R., p. 128 S.C.R.) "In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing ... authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction."
>
> In my opinion these submissions must be rejected.

11 On appeal to this Court, *Poje v. A.G. B.C.*, [1953] 1 S.C.R. 516, the appeal was dismissed. The question of a collateral attack upon a court order was not specifically dealt with. Kerwin J. expressed no opinion on the matter, but Estey J. in a short concurring judgment said at p. 528:

> I agree the appeal should be dismissed. The learned Chief Justice, in my opinion, upon this record had jurisdiction to hear the motion. I am in respectful agreement with the conclusions of the majority of the learned judges in the Court of Appeal,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> both with respect to the objections taken to the order as made by Mr. Justice Clyne and the findings of the learned Chief Justice. In view of the foregoing it is unnecessary to determine the nature and character of the contempt.

12 The case was referred to in *Pashko v. Can. Accept. Corp. Ltd.* (1957), 12 D.L.R. (2d) 380, in the British Columbia Court of Appeal.

13 In addition to these authorities and those referred to in judgments of the majority in the *Canadian Transport* case, reference may be made as well to the words of Osier J.A. in *Gibson v. Le Temps Publishing Co.* (1903), 6 O.L.R. 690 (Ont. H.C. [In Chambers]) at 694-95, where a judgment was attacked on the basis of a deficiency in service during the earlier proceedings which gave rise to the judgment. Osier J.A. said:

> If the judgment in the Quebec action is to be regarded as a judgment against a corporation or body corporate, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that is an objection which should have been taken on the motion to enter summary judgment, and it appears not to have been then taken. This was the substantial ground of defence to the action, and, so far as I can see, it was not brought to the attention of the Court at the proper stage and has never been decided. A similar difficulty attends the objection as to the service of the writ on the manager. On the motion for judgment it might have been shewn (unless the defendants had done something to waive the objection) that the requirements of Rule 224 had not been complied with, and therefore that there had never been an effective service of the writ upon the firm, the person served not being, in fact, a partner, and not having been informed by the prescribed notice that he was served as manager: Snow's Annual Practice, *1902, p. 655;* Yearly Practice, *1904*, p. *504*. Or the firm might have moved to set aside the faulty service on the manager: *Nelson v. Pastorino & Co.* (1883), 49 L.T. 564 . Neither of these courses was taken and there is now a judgment against a partnership firm, which stands unimpeached, and which cannot be attacked in a collateral proceeding. While it stands, the plaintiff has the right to enforce it by any means open to him under Rule *228*.

14 Further authority in support of the rule against collateral attack may be found in *Clarke v. Phinney* (1895), 25 S.C.R. 633; *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241; *Bador Bee v. Habib Merican Noordin*, [1909] A.C. 615 (P.C.) and particularly in *Royal Trust Co. v. Jones*, [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292. In that case the validity of a codicil to a will was upheld in proceedings in the Supreme Court of British Columbia. The trial judgment was affirmed in the Court of Appeal. The unsuccessful party brought a new action to set aside this judgment which succeeded notwithstanding the confirmation on appeal of the earlier judgment. No appeal was taken and the trustee proceeded for a period of fifteen years to administer the estate on the basis that the codicil was invalid. On an application for directions on a matter which did not directly involve the validity of the codicil and which involved parties not in the first proceeding, the Court of Appeal on its own motion declared that the trial judge, Manson J., who had declared the codicil invalid and set aside the earlier judgment, was without jurisdiction to do so and reversed his judgment. On appeal to this Court the appeal was allowed. Cartwright J. (as he then was) said, at p. 145:

> An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.

15 The first judgment had therefore been properly challenged by a direct action. The second judgment, not having been appealed or directly challenged, was binding. Cartwright J. said, at p. 146:

> It follows that Manson J. had jurisdiction to entertain the action which was brought before him and his judgment in that action, not having been appealed from or otherwise impeached, *is* a valid judgment of the Court binding upon all those who were parties to it.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

16 The cases cited above and the authorities referred to therein confirm the well-established and fundamentally important rule, relied on in the case at bar in the Manitoba Court of Appeal, that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.

17 The authorizations in question here are all orders of a superior court. Unless Parliament has altered or varied the rule above-described, it would apply in this case. It would then follow that in this action to determine the guilt or innocence of the accused the trial judge was in error in entertaining a collateral attack on the validity of the authorizations and, in effect, going behind them. Support for this view, with some qualifications for cases where there has been a defect on the face of the authorization or fraud, is to be found in *R. v. Welsh* (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363 at 371-72, 74 D.L.R. (3d) 748 (C.A.), where Zuber J.A., at pp. 371-72, said:

> Ordinarily the trial Court is obliged to simply accept the authorization at face value. Cases in which a trial Court could decline to accept the authorization would be rare indeed and, without attempting to set out an exhaustive list, would include cases in which the authorization was defective on its face, or was vitiated by reason of having been obtained by a fraud. However, even an authorization that was said to be defective on its face may attract the curative provisions of s. 178.16(2)(b) *[now s.* 178.16(3)(b)].

18 In the case at bar, the trial judge preferred to follow the reasoning of Meredith J., of the British Columbia Supreme Court, in *R. v. Wong* (1976), 33 C.C.C. (2d) 506, where he asserted a broader power in the trial judge to go behind the authorization.

19 The question then is: has Parliament by the enactment of Part IV. 1 of the *Criminal Code* altered the rule which would render the authorizations immune from collateral attack? In my opinion, the answer must be no.

20 Section 178.16(1) deals with the admissibility of evidence obtained under the authority of the authorization. Subsection (3) gives the trial judge a discretion to admit evidence that is inadmissible under subs. (1) "by reason only of a defect of form or an irregularity in procedure not being a substantive defect or irregularity, in the application for or the giving of the authorization". The trial judge may be required to determine whether he will admit under subs. (3) evidence otherwise inadmissible under the provisions of Part IV.1 of the *Code*. This step, it would seem, would require some examination of the procedures followed in obtaining the authorization in order to determine whether evidence has been rendered inadmissible only by a defect or an irregularity of a nonsubstantive nature.

21 It is my opinion that the trial judge in reaching a conclusion on this subject is limited to a consideration of defects and irregularities which are apparent on the face of the authorization and he may not go behind it. Such a step would involve a collateral attack upon the authorization. It would require, in my opinion, much clearer statutory language than that employed in subs. (3) of s. 178.16 to permit such a step in the face of the clearly established rule. I find additional support for this view in the fact that once an authorization is granted s. 178.14 provides that all documents connected with it, save the authorization itself, be sealed in a packet and kept in the custody of the court, to be opened only for the purposes of a renewal or by an order of a judge of a superior court of criminal jurisdiction or a judge defined in s. 482 of the *Code*. Many trial judges will not fall into either of those categories and accordingly will not have authority to direct the opening of the sealed packet. It follows that a trial judge *qua* trial judge has not, and was not intended to have, access to the materials necessary to review the granting *of* the authorization. This makes any collateral attack on the authorization a virtual impossibility.

22 It should be observed as well that subs. (3) of s. 178.16 gives no power to go behind the authorization and no power to vary or question it. It merely provides that if in the performance *of his* task of determining the admissibility of evidence the trial judge forms the opinion that a relevant, private communication is inadmissible because of subs. (1) of s. 178.16 he may, if the admissibility results only because of a defect in form or an irregularity in procedure which is not substantive in the giving of the authorization, admit the evidence notwithstanding subs. (1). This subsection gives a power to the trial judge in appropriate circumstances to admit evidence despite its inadmissibility under the authorization, but it includes no power to attack the authorization itself. I have not overlooked the fact that this Court in *Charette v. R.*, [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158, affirming *(*sub nom. *R. v. Parsons)* 17 O.R. (2d) 465, 40 C.R.N.S.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161, approved the judgment of Dubin J.A. in the Ontario Court of Appeal in *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), and that Dubin J.A. said in that case, at pp. 501-02:

> *A voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to the admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.

23 In my view, these words do not support the notion that the trial judge may go behind the authorization. They indicate that consideration of the validity of the authorization on the part of the trial judge is limited to matters appearing on its face, and it is my opinion that Dubin J.A. did not in that case assert a power in the trial judge to do more.

24 Since no right of appeal is given from the granting of an authorization and since prerogative relief by *certiorari* would not appear to be applicable (there being no question of jurisdiction), any application for review of an authorization must, in my opinion, be made to the court that made it. There is authority for adopting this procedure. An authorization is granted on the basis of an *ex parte* application. In civil matters, there is a body of jurisprudence which deals with the review of *ex parte* orders. There is a widely recognized rule that an *ex parte* order may be reviewed by the judge who made it. In *Dickie v. Woodworth* (1883), 8 S.C.R. 192 at 195, Ritchie C.J.C. said, at p. 195:

> The judge having in the first instance made an *ex parte* order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted ... .

25 This view is reflected in the words of Mathers C.J.K.B. in the case of *Stewart v. Braun*, [1924] 2 W.W.R. 1103, [1924] 3 D.L.R. 941 at 945 (Man. K.B.), at p. 945:

> But it frequently happens that Judges and judicial officers are called upon to make orders *ex parte*, where only one side is represented and where the order granted *is* not the result of a deliberate judicial decision after a hearing and argument. An application to rescind or vary an *ex parte* order is neither an appeal nor an application in the nature of an appeal and therefore the Judge or officer by whom such an order has been made, has since the Judicature Act, as he had before, the right to rescind or vary it... .

26 Such power of review has been asserted and exercised in respect of authorizations to intercept private communications in *Re Stewart and R.* (1975), 8 O.R. (2d) 588, 23 C.C.C. (2d) 306, 58 D.L.R. (3d) 644 (Ontario County Court, Ottawa-Carleton Judicial District), application for *certiorari* dismissed, 13 O.R. (2d) 260, 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592 (H.C.) (1976); *R. v. Turangan*, [1976] 4 W.W.R. 107, 32 C.C.C. (2d) 249 (B.C.S.C), appeal dismissed for lack of jurisdiction, affirmed 32 C.C.C. (2d) 254n (B.C. C.A.)

27 The exigencies of court administration, as well as death or illness of the authorizing judge, do not always make it practical or possible to apply for a review to the same judge who made the order. There is support for the proposition that another judge of the same court can review an *ex parte* order. See, for example, *Bidder v. Bridges* (1884), 26 Ch.D. 1 (C.A.), and *Boyle v. Sacker* (1888), 39 Ch.D. 249 (C.A.). In the case of *Gulf Islands Navigation Ltd. v. Seafarers' Int. Union* (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 at 626-27 (B.C. C.A.) Smith J.A. said, at pp. 626-27:

> After considering the cases, which are neither as conclusive nor as consistent as they might be, I am of opinion that the weight of authority supports the following propositions as to one Judge's dealings with another Judge's *ex parte* order: (1) He has power to discharge the order or dissolve the injunction; (2) he ought not to exercise this power, but ought to refer the motion to the first Judge, except in special circumstances, e.g., where he acts by consent or by leave of the first Judge,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> or where the first Judge is not available to hear the motion; (3) if the second Judge hears the motion, he should hear it *de novo* as to both the law and facts involved.

28 I would accept these words in the case of review of a wiretap authorization with one reservation. The reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the *ex parte* review should the authorization be disturbed. It is my opinion that, in view of the silence on this subject in the *Criminal Code* and the confusion thereby created, the practice above-described should be adopted.

29 An application to challenge an authorization should be brought as soon as possible. In most cases, because of the requirement for reasonable notice of intention to adduce wiretap evidence, it may be that the application can be made before trial. Otherwise, defence counsel wishing to challenge an authorization may, in accordance with the suggestion made by O'Sullivan J.A. in the case at bar, have to apply for an adjournment for this purpose.

30 It may be argued that where a trial judge happens to be of the same court that made the authorization order (as was the case in *Wong (No. 1), supra)* an application to review the authorization could be made to him directly, rather than incurring extra expense and needless delay by instituting completely separate proceedings. There may be some merit to this argument but, if such a review were undertaken, it would be done by the judge in his capacity as a judge of the court that made the original order and not in his capacity as trial judge.

31 In the case at bar, the trial judge held the wiretap evidence to be inadmissible and at the same time he stated that he did not need to go behind the authorizations. In my opinion, he did go behind the authorizations even though he did not consider it necessary to open the sealed packets. In so doing, for the reasons discussed above, he exceeded his jurisdiction. I am in substantial agreement with the Manitoba Court of Appeal that the trial judge was in error in refusing to admit the evidence which was tendered by the Crown. I would therefore dismiss the appeal and confirm the order for a new trial.

***Dickson J.*:**

32 The issue is whether a trial judge, who is a provincial court judge, can look behind an apparently valid wiretap authorization given by a superior court judge and rule intercepted private communications inadmissible in evidence.

I The Facts and Judicial History

33 The appellant, James Stephen Wilson, was tried before Dubienski Prov. Ct. J. of the Manitoba Provincial Court (Criminal Division) on nine counts, all related to betting. The Crown sought to adduce wiretap evidence. Dubienski Prov. Ct. J. ruled the evidence inadmissible as having been illegally obtained. The Crown's case collapsed and Wilson was acquitted on all nine counts. The issue on appeal is whether Dubienski Prov. Ct. J. exceeded his jurisdiction in refusing to admit the intercepted communications in evidence.

34 The tapes were made pursuant to four authorizations, obtained from judges of the Manitoba Court of Queen's Bench, concerning the accused Wilson and authorizing interceptions at named addresses. In each of the authorizations the following words appear:

> AND UPON hearing read the affidavit of Detective Sergeant Anton Cherniak;
>
> AND UPON being satisfied that it is in the best interests of the administration of justice to grant this authorization and that other investigative procedures have been tried and have failed, that other investigative procedures are unlikely to succeed, and that the urgency of the matter is such that it would be impractical to carry out the investigation of the undermentioned offences using only other investigative procedures;

35 Counsel for Wilson concedes all four authorizations are valid on their face. Police Inspector Anton Cherniak testified as to the manner in which the authorizations had been obtained. Cherniak said, in respect of the first authorization:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> ... while in company with Mr. John Guy [a Crown counsel and designated agent] we attended in judges chambers before Mr. Justice Hunt. Mr. Justice Hunt was supplied with an application. He appeared to read it. He was supplied with an affidavit. He appeared to read it. He was then supplied with an authorization. He appeared to read it and he then applied his signature, in my presence, to the authorization.

36 Testimony with respect to the other authorizations was virtually the same. On cross-examination, Inspector Cherniak added that he might have been asked a number of questions. Wilson's counsel spent considerable time cross-examining Cherniak about the matters referred to in ss. 178.12(1)(g) and 178.13(1)(b) of the *Criminal Code:*

> 178.12 (1) An application for an authorization shall be made *ex parte* and in writing ...
>
> and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:
>
> [...]
>
> (g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
>
> 178.13 (1) An authorization may be given if the judge to whom the application is made is satisfied
>
> (a) that it would be in the best interests of the administration of justice to do so; and
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

37 The questions related to the actual state of facts at the time the authorizations were applied for and not to the contents of the affidavits. The Crown made no objection to this line of questioning. On the basis of Cherniak's testimony at trial, Dubienski Prov. Ct. J. decided none of the three alternative pre-conditions of s. 178.13(1)(h) had been met at the time the authorizations were given: (i) no other investigative procedures had been tried and failed, (ii) there was no evidence other investigative procedures were unlikely to succeed, (iii) there was no urgency. The judge concluded that the improper granting of the authorizations was not due to any error on the part of the authorizing judges, but due to the fault of the police.

> My whole problem was that the evidence that was before me, as presented by the police, was quite different from the evidence that would appear to have been given and upon which the authorizations were based.

38 He further commented:

> I am inclined to say the police have developed a pattern of application based on routine.

39 It would be carrying it too far to say Dubienski Prov. Ct. J. concluded the authorizations had been obtained by fraud, but, at least, he assumed there had been insufficient or false information in the affidavits. This determination was reached without examination of the affidavits. They remain in sealed packets, pursuant to s. 178.14 of the *Code*, and Dubienski Prov. Ct. J., as a provincial court judge, had no authority to order the opening of the packets. The judge decided the interceptions of private communications had not been lawfully made and to admit the evidence would bring the administration of justice into disrepute. He therefore excluded the evidence.

40 The Crown appealed the acquittals to the Manitoba Court of Appeal, which unanimously allowed the appeal and ordered a new trial. Monnin J.A., as he then was, and Matas J.A. concurring, concluded that an authorization issued by a superior court

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

could not be collaterally challenged in a provincial court. In separate reasons, O'Sullivan J.A. said that an authorization granted in a superior court could not be collaterally attacked in any court and could not be attacked at all in an inferior court.

41 In the Manitoba Court of Appeal and in this Court counsel for Wilson argued, as an additional point, that the requirement under s. 178.16(4) to give notice of intention to adduce wiretap evidence had not been proven at trial. The Manitoba Court of Appeal rejected this argument. In this Court we gave our opinion on the day of hearing that notice had been sufficiently proven. Thus, the only outstanding issue is the trial judge's treatment of the authorizations.

II The Reviewability of Authorizations

42 An authorization to intercept a private communication is an *ex parte* order which may be made by a judge of a superior court of criminal jurisdiction, as defined in s. 2 of the *Criminal Code*, or a judge, as defined in s. 482. That means that in Manitoba authorizations may be obtained from judges of the Court of Appeal, the Court of Queen's Bench, or a County Court. The designations in other provinces are slightly different; I will use the Manitoba references in the following discussion.

43 To what extent, if any, and in what manner are authorizations reviewable? The Manitoba Court of Appeal identified two problems in the present case: (i) an inferior court had refused to accept the validity of superior court authorizations, and (ii) collateral attack. I will deal with the latter point first.

(A) Collateral Attack

44 In dealing with the issue of collateral attack I will, for the moment, put to one side the question of a trial judge assessing an authorization given by a higher court. I will assume that the trial judge is of the same court, or a higher court, than the judge who gave the authorization.

45 The collateral attack issue is this: in the absence of an actual application to set aside the authorization, can a trial judge, *qua* trial judge, consider the validity of an authorization in order to determine the admissibility of evidence? O'Sullivan J.A., as I indicated, expressed the view that a superior court authorization could not be collaterally attacked in any court. That was perhaps implicit in the judgment of Monnin J.A. In the earlier case of *R. v. Dass* (1979), [1979] 4 W.W.R. 97, 8 C.R. (3d) 224, 47 C.C.C. (2d) 194 (Man. C.A.), leave to appeal to S.C.C. refused 30 N.R. 609n, Huband J.A., speaking for a five judge Court, said this, at p. 214:

> A question arose as to whether objection could be taken in this Court, to evidence flowing from an interception which had been authorized by a Court order made by a Justice of the Manitoba Court of Queen's Bench .... There *is* a well-recognized rule that the orders of a superior Court cannot be made the subject of a collateral attack: see *Re Sproule* (1886), 12 S.C.R. 140 at 193. In this instance, however, defence counsel does not complain that an application to intercept communications was made. He does not complain that an order was granted. He does not complain as to the terms or the wording of the order, except for the substitution of one location for another as previously discussed. The complaint is not as to the order itself, but rather as to the means by which the order was implemented. The issue raised is therefore not an attack on the order itself, and consequently it is an appropriate subject-matter for the consideration of this Court on appeal. [Emphasis added.]

46 The exception was, however, a broad qualification. There had been a renewal of the authorization in which a new location had been added; the Court of Appeal concluded that was improper; to that extent the renewal was invalid, and any communications intercepted at the new location should not have been admitted in evidence. (Nonetheless, s. 613(1)(b)(iii) was applied.) Despite its asseveration to the contrary, it *is* hard to conclude that the Manitoba Court of Appeal did not, in effect, collaterally attack the authorization in *Dass*.

47 I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs. This general rule is, however, subject to modification by statute. In my view, Parliament has indeed modified the rule in the enactment of two provisions of Part IV.1 of the *Criminal Code, ss.* 178.16(1) and 178.16(3)(b):

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> 178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> (3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings
>
> (a) is relevant to a matter at issue in the proceedings, and
>
> (b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,
>
> he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

48 The present s. 178.16(3) was formerly, with slightly different wording, s. 178.16(2).

(i) Invalidity on the Face of the Authorization

49 On what basis can a trial judge assess the validity? This Court has been receptive to the view that a trial judge can collaterally attack an authorization. In *Charette v. R.*, [1980] 1 S.C.R. 785, 14 C.R. (3d) 191, 51 C.C.C. (2d) 350, 110 D.L.R. (3d) 71, 33 N.R. 158, affirming, sub nom. *R. v. Parsons*), 17 O.R. (2d) 465, 40 C.R.N.S. 202, 37 C.C.C. (2d) 497, 80 D.L.R. (3d) 430, 33 N.R. 161 (Ont. C.A.), the trial judge had concluded the superior court authorization was invalid on its face and refused to admit the evidence obtained pursuant to it. The Ontario Court of Appeal disagreed, holding the authorization was valid on its face, but the Court accepted the submission that the trial judge had jurisdiction to consider the validity of the authorization. In Charette this Court adopted the reasons of Dubin J.A., which included the following passage at pp. 501-02:

> A *voir dire* is not held to pass on the sufficiency of the evidence, but only to determine questions of admissibility. In cases such as these, initial issues as to admissibility of the tendered evidence immediately arise. In order to render evidence of intercepted private communications admissible when Crown counsel relies upon an authorization, Crown counsel must first satisfy the trial Judge that the statutory conditions precedent have been fulfilled, i.e., that the interceptions were lawfully made, and that the statutory notice was given. In a case where the Crown relies upon an authorization it is for the trial Judge to pass upon such matters as the validity of the authorization, and that the investigation authorized had been carried out in the manner provided for in the authorization. He must be satisfied that the authorization includes either as a named or unnamed person any of the parties to the communication, and, as I have said, that the statutory notice has been complied with.
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge and are properly determined in a voir dire. [Emphasis added.]

50 The trial judge has the responsibility of deciding upon the admissibility of evidence. Section 178.16(1) says that, absent consent, evidence of a private communication can only be introduced if the interception was lawful. Absent consent, an interception is only lawful if made pursuant to an authorization given in accordance with Part IV. I of the *Criminal Code*. The fact that an authorization purports to be made under Part IV. I is insufficient. Section 178.16(3)(6) gives the trial judge

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

discretion to admit unlawfully obtained evidence if there is a *non-substantive* defect in form or irregularity in procedure in the giving of the authorization. The corollary would seem to be that if the defect or irregularity is *substantive*, there is no such discretion and the evidence is inadmissible. If a court order authorizing the interception were conclusive, even if it did not comply with Part IV.I, there would be no need for the curative provisions of s.178.16(3)(b). The combination of ss. 178.16(1)(a) and 178.16(3)(b) requires the trial judge to consider whether the authorization was valid. The fact that it amounts to what might be called a collateral attack is no bar.

(ii) Going Behind an Apparently Valid Authorization

51 Does the same rationale apply when the question is one of going behind an apparently valid authorization? In the present case Dubienski, Prov. Ct. J. claimed he was not going behind the authorizations. In my view that position is untenable. When a trial judge rules evidence inadmissible because the authorization, although valid on its face, was not lawfully obtained, it can scarcely be said that he is not going behind the authorization. He is not necessarily declaring the authorization invalid for all purposes; he is not actually setting it aside; but he is, for the purpose of determining the admissibility of evidence, going behind the authorization. Is there jurisdiction to do so?

52 I am of the view that ss. 178.16(1)(a) and 178.16(3)(b) apply to give the trial judge authority to go behind an apparently valid authorization. There is nothing in the language of the sections justifying a distinction between that which appears on the face of the record and that which is dehors the record. There is nothing limiting the trial judge to an examination only of what appears on the face of the authorization. To impose such a restriction as a matter of statutory interpretation would unnecessarily fetter his ability to determine whether the wiretap evidence is admissible. In many cases wiretap evidence may be the only evidence against the accused. It must be noted that not only does s. 178.16(3)(b) refer to defects or irregularities in the *giving of* the authorization, but also in the *application for* the authorization. Once again, since s. 178.16(3)(b), in effect, gives a discretion to cure for *non-substantive* defects or irregularities it would seem to follow as a necessary inference that *substantive* defects or irregularities *in the application for* the authorization will result in the evidence being inadmissible. In *R. v. Gill* (1980), 56 C.C.C. (2d) 169 at 176 (B.C.C.A.), Lambert J.A. expressed this view at p. 176:

> Subsection (2)(b) [now 178.16(3)(b)] of that section contemplates that any defect or irregularity in the application for or the giving of the authorization may make a private communication inadmissible, and that if it is inadmissible and if the defect or irregularity is a substantive one, then there is no discretion in the trial Judge to admit the private communication.
>
> I think that s. 178.16 defines its own concepts and that if, in the application for the authorization, or in the giving of the authorization, there is a substantive defect or irregularity, then the interception cannot be regarded as being lawfully made within the meaning of s. 178.16(1)(a). A private communication intercepted under such an authorization would be inadmissible. In reaching that conclusion, I disagree on this narrow point with the reasons of Anderson J. of the Supreme Court of British Columbia in *R. v. Miller*, [1976] 1 W.W.R. 97, 32 C.R.N.S. 192, *(*sub nom. *Miller and Thomas)* 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679, and with the reasons of McDonald J. of the Alberta Supreme Court, Trial Division, in *R. v. Donnelly*, [1976] W.W.D. 100, 29 C.C.C. (2d) 58.

53 A view similar to that of Lambert J.A. was expressed by Meredith J. in *R. v. Wong* (1976), 33 C.C.C. (2d) 506 at 509-510 (B.C.S.C.), a case relied upon by Dubienski Prov. Ct. J. *Wong* involved, as does the present case, a question of compliance with s. 178.13(1)(6).

54 Notwithstanding what has been said by D.C. McDonald, J., in the case cited above [*R. v. Donnelly*, supra], it seems to me to follow by necessary inference that a substantive defect of form or irregularity in procedure in an application for or the giving of the authorization may render the evidence of the communication intercepted as a result, inadmissible as unlawful. Thus, it seems to me that as I am the Judge who must rule on the admissibility of evidence in this case, I must consider whether there has been a substantive defect of form or irregularity in procedures as might render the evidence inadmissible. I do not think that such an examination requires that the ex parte order by which the authorization was granted be reviewed or set aside. [At pp. 509-10].

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

55 *R. v. Ho* (1976), 32 C.C.C. (2d) 339 (B.C. Co. Ct.) is to the same effect. See Krever J. in *Re Stewart and R.* (1976), 30 C.C.C. (2d) 391 at 400 (Ont. H.C.). See also Manning, *The Protection of Privacy Act*, (1974) at pp. 135-37; Bellemare, *La révision d'une autorisation en écoute électronique* (1979), 39 Revue du Barreau 496.

56 As noted in the above-quoted passages, there is a contrary view, expressed most strongly by McDonald J. in *R. v. Donnelly*, supra, and by Anderson J. in *R. v. Miller*, supra. I will refer specifically to the arguments raised by McDonald J. in considerably influenced by the wording of s. 178.14:

> 178.14 (1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be
>
> (a) opened or the contents thereof removed except
>
> (i) for the purpose of dealing with an application for renewal of the authorization, or
>
> (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and
>
> (b) destroyed except pursuant to an order of a judge referred to in subparagraph (a)(ii).
>
> (2) An order under subsection (1) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application was made for the authorization to which the order relates has been given an opportunity to be heard.

57 McDonald J. started with the assumption that, but for s. 178.16(2)(b) (now 3(b)), he would have thought "lawfully made" in s. 178.16(1)(a) meant in accordance with an apparently valid authorization. He conceded that s. 178.16(2)(6) appeared to imply that the evidence was inadmissible if there were a substantive defect in form or irregularity in procedure in the application for the authorization. He declined, however, to draw this inference, at the same time acknowledging that this relegated portions of s. 178.16(2)(b) to mere surplusage. He sought to avoid three consequences he asserted would flow if s. 178.16(2)(6) were interpreted to enable a trial judge to go behind an apparently valid authorization.

> (1) That which was on its face lawfully done, pursuant to an order (i.e., the authorization) of a Judge of a superior or district Court, would be held to have been unlawful. The trial Judge would retrospectively render unlawful that which had appeared to be lawful. I should think that a statute which is said to give a trial Judge such a power should be scrutinized very carefully to determine whether such a power has in fact been given by Parliament.
>
> (2) The contents of the affidavit would be disclosed to public view even though it might reveal investigations not only which led to the prosecution of the accused but also those which might relate to continuing or concluded investigations of other persons not yet charged or tried. I should think that a statute which is said to enable a trial Judge to do an act with such a consequence should be held to do so only if that power is given expressly or by necessary inference.
>
> (3) The *Protection of Privacy Act*, 1973-74 [Can.], c. 50, amended both the *Criminal Code* and the *Crown Liability Act*, R.S.C. 1970, c. C-38 [s. 7.2(1), (2) [en. 1973-74, c. 50, s. 4].
>
> > 7.2(1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> (2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of
>
> (a) was lawfully made;
>
> (b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or
>
> (c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.
>
> Whatever interpretation is placed upon the words "lawfully made" in s. 178.16(1)(a) of the *Criminal Code* must surely be given also to s. 7.2(2)(a) of the *Crown Liability Act*, both those provisions having been created by the same statute. It would follow as well that where the issue arises not as one of the admissibility of an intercepted communication (or derivative evidence at a trial but as one of liability under the *Crown Liability Act*, the contention of the defence would entail that liability would flow from an act of interception which when done by a servant of the Crown had been done pursuant to an authorization which on its face made the interception lawful. [At pp. 64 and 65.]

58 With respect, I do not find these three arguments to be wholly persuasive. As to the third consequence, a majority of this Court was not convinced by an argument along the same line in *Goldman v. R.*, [1980] 1 S.C.R. 976 at 998-99, 13 C.R. (3d) 228, 51 C.C.C. (2d) 1, 108 D.L.R. (3d) 17, 30 N.R. 453. Mr. Justice McDonald's first and third consequences are related. It does not necessarily follow that a determination of "not lawfully made" for the purposes of admissibility makes an interception unlawful for all purposes under Part IV.I. The evidence may be inadmissible yet there might be a defence to a criminal or civil proceeding arising from the interception. That question does not arise in this case and need not be decided here. The second consequence predicted by McDonald J. tends to overstatement. The affidavit would not need to be made public in order to rule evidence inadmissible; selected aspects only could be made public. As Stanley A. Cohen suggests in his work *Invasion of Privacy: Police and Electronic Surveillance in Canada* (1983), the integrity of the packet might be preserved "through initial judicial screening, and, if necessary, judicial editing" (p. 155). Due regard to the confidentiality provisions of s. 178.14 is not inconsistent with ruling evidence inadmissible under s. 178.16.

59 I therefore conclude that s. 178.16(1)(a) and 178.16(3)(b) do enable a trial judge to go behind an apparently valid authorization.

(iii) Examining the Contents of the Sealed Packet

60 In most cases it will be necessary to examine the contents of the sealed packet in order to determine whether there was a defect or irregularity in the application for the authorization.

61 In the present case Dubienski Prov. Ct. J. ruled that the requirements of s. 178.13(1)(b) had not been met, without examining the contents of the sealed packet. In this respect he followed Meredith J. in *Wong*, supra, and in my view fell into error. It is important to note that s. 178.13 does not require that the authorization contain a list of the reasons which prompted the judge to give the authorization. In order finally to determine whether other investigative procedures had been tried and failed, other investigative procedures were unlikely to succeed, or that there was urgency, it would be necessary to examine the affidavits. This would enable the trial judge to say whether the apparent conflict between the evidence at trial and what can be assumed to have been said in the affidavits is actual. It may be that the comparison will give rise to clarification, showing that one of the three pre-conditions had been met. For example, in the present case little was said in the testimony at trial as to whether other investigative procedures were unlikely to succeed. If one were to examine the affidavits, there might be an explanation that would satisfy the requirements of s. 178.12(1)(g) and 178.13(1)(b) and hence make the authorizations valid. I therefore conclude Dubienski Pray. Ct. J. could not properly decide the interceptions were not lawfully made without examining the contents of the sealed packets.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

62 If this case had been before a superior court trial judge would it have been proper for the judge to order the opening of the sealed packet under s.178.14? Most of the cases have assumed that only rarely is this proper; there appears to be a reticence to go behind an apparently valid authorization; *R. v. Gill*, supra; *Re Stewart and R.*, supra; *Re Miller and Thomas* (1975), 28 C.C.C. (2d) 128 (B.C. Co. Ct.); *R. v. Newall* (1982), 67 C.C.C. (2d) 431, 136 D.L.R. (3d) 734 (B.C.S.C.); *R. v. Johnny* (1981), 62 C.C.C. (2d) 33 (B.C.S.C.); *R. v. Bradley* (1980), 19 C.R. (3d) 336 (C.S. Que.); *Re Royal Comm. Inquiry into Royal Amer. Shows Inc.* (1978), 40 C.C.C. (2d) 212 (Alta. T.D.); *Re Zaduk and R.* (1977), 37 C.C.C. (2d) 1 (Ont. H.C.); *R. v. Haslam* (1977), 36 C.C.C. (2d) 250 (Nfld. D.C.); *Re R. and Kozak* (1976), 32 C.C.C. (2d) 235 (B.C.S.C.); contra: *R. v. Kalo* (1975), 28 C.C.C. (2d) 1 (Ont. Co. Ct.). It is not necessary to decide whether this restricted view of s. 178.14 is correct. There is a broad consensus that prima fade evidence of fraud or non-disclosure is a valid reason for opening the packet. Misleading disclosure would be in the same category. The present case is one in which the trial judge made a prima facie finding of either misleading disclosure or nondisclosure.

63 Opening the sealed packet, and holding an authorization to be invalid, on the basis of fraud, non-disclosure, or misleading disclosure, is, in a sense, a less serious interference with the authorizing judge's decision than a finding of invalidity on the face of the authorization. The latter conclusion connotes that the authorizing judge did something wrong — he signed an order not in accordance with the Criminal Code. On the other hand, a finding of invalidity based on fraud, non-disclosure, or misleading disclosure means that the authorizing judge acted properly on the basis of evidence before him — the invalidity arose because the evidence was false or incomplete — the fault of others.

64 Once a foundation is laid for the opening of the packet, I would say that the trial judge, assuming him to be a judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, can open the packet and make a full review for compliance with Part IV.I. He cannot, of course, decide whether, in the exercise of his discretion, he would have granted the authorization. He can only decide whether it was lawfully obtained. He can also apply the curative provisions of s. 178.16(3)(b) to non-substantive defects or irregularities. A failure to comply with a mandatory provision such as 178.12(1)(g) or 178.13(1)(b) would, in my view, amount to a substantive and non-curable defect.

65 Although I conclude that Dubienski Prov. Ct. J. was in error in holding the authorizations to have been unlawfully made without examining the contents of the sealed packet, I also conclude, contrary to the Manitoba Court of Appeal, that a collateral attack by a trial judge, either in respect of invalidity on the face of the authorization or going behind an apparently valid authorization, is contemplated by Part IV.I of the *Criminal Code*.

(iv) Cross-examination of the Deponent

66 Cross-examination was conducted in the present case in order to determine whether any of the preconditions of s. 178.13(1)(6) had been met. The Crown made no objection, but in other cases objections have been made, and in some instances successfully. Such cross-examination of the deponent to the affidavit was ruled improper in *R. v. Blacquiere* (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336, 79 A.P.R. 336 (P.E.I.S.C.); *R. v. Collos*, [1977] 5 W.W.R. 284, 37 C.C.C. (2d) 405, reversing on other grounds [1977] 2 W.W.R. 693, 34 C.C.C. (2d) 313 (B.C.C.A.); *R. v. Haslam*, supra; and *R. v. Robinson*, [1977] 4 W.W.R. 697, 39 C.R.N.S. 158 (B.C. Co. Ct.) . The rationale was that permitting such cross-examination would, by implication at least, reveal the contents of the sealed packet declared to be confidential by s. 178.14. On the other hand, cross-examination has been permitted in *R. v. Johnny*, supra, and in *R. v. Hollyoake* (1975), 27 C.C.C. (2d) 63 (Ont. prov. Ct.). I prefer the latter view. These authorizations are made *ex parte and in camera*. If it is admitted that there is a right of the trial judge to go behind an apparently valid authorization, it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure. The questioning can be such as to enable defence counsel to get some indication of whether the authorization was properly obtained, without the disclosure of information which, in the opinion of the judge, ought to be kept confidential. Examples of such confidential information would be the identity of undercover agents and informers or specific information which would jeopardize a continuing police investigation. The interest in confidentiality expressed in s. 178.14 and defence counsel's interest in testing the validity of the authorization need not lead to conflict.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

v) Review by a Judge Other than the Trial Judge

67 I have said that in my view Part IV.I contemplates that the trial judge is the proper person to review the validity of the authorization whether on its face or otherwise. The Manitoba Court of Appeal, as I have indicated, thought otherwise. O'Sullivan J.A. said that Part IV.I contemplated a different form of review of authorizations; he suggested the trial could be adjourned and the review of the validity of the authorization would be conducted in the court that gave the authorization. At the hearing before this Court, Crown counsel adopted this position, adding that it was preferable that the actual judge who gave the authorization be the one to review it. Absent the statutory scheme of interception of private communications, and, in particular, s. 178.16, I would agree with this view. The law recognizes a general right of review of an ex parte order by the court which made the order and preferably by the judge who made the order. The statutory provisions, however, override the common law rules. As I read s. 178.16 Parliament mandated that the trial judge conduct such a review.

68 The language of s. 178.16 does not suggest review by anyone other than the trial judge. The only other provision that seems to say anything about review is s. 178.14, concerning the opening of the sealed packet. This would normally be used where an attempt was being made to go behind an apparently valid authorization. As a matter of statutory construction s. 178.14 seems to contemplate that the packet may be opened by any judge of a superior court of criminal jurisdiction or a judge as defined in s. 482, and is not confined to either the court or the judge who granted the authorization. The policy consideration underlying this broader approach may lie in a desire to avoid any suggestion that the judge who granted the authorization might be inclined simply to reaffirm his previous order without serious consideration.

69 I do find statutory support for the proposition that the trial judge shall review an authorization, and I find no statutory support for the proposition that only the judge or court that made the order can review an authorization.

70 There is a further point. Any decision of the trial judge regarding admissibility of evidence, therefore including questions as to the validity of authorizations, will be subject to appeal on a question of law in the ordinary way. In contrast if only the court that made the order can review an authorization, there is no right of appeal from this review because the Criminal Code does not grant an appeal.

71 The suggestion of O'Sullivan J.A. that the trial be adjourned for review of the authorization by the court granting the authorization would result in needless delays and be costly in terms of trial economy.

(B) Trial Judges Dealing with Authorizations Given By Judges of Higher Courts

72 One issue identified by the Manitoba Court of Appeal remains to be addressed. Does the situation which I have been describing change when, as here, a provincial court judge is dealing with an authorization given by a superior court judge? There are examples in the cases of inferior courts purporting to review superior court authorizations, particularly for invalidity on the face of the authorization. In none of these cases, however, was the question of a trial judge in an inferior court assessing the validity of a superior court authorization mentioned as a problem or an issue.

73 As earlier noted, in *Charette v. R.*, this Court approved the statement [found at (1977), 37 C.C.C. (2d) 497, at pp. 501-02]:

> ... it is for the trial Judge to pass upon such matters as the validity of the authorization ....
>
> The determination of whether the statutory conditions precedent have been fulfilled rests exclusively with the trial Judge ....

74 The appeal case in Charette discloses that the trial judge was a county court judge and the authorization had been given by a superior court judge.

75 Other examples of an inferior trial court assessing the validity of a superior court authorization are: *R. v. Welsh* (1977), 15 O.R. (2d) 1, 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748 (C.A.); *R. v. Crease* (1980), 53 C.C.C. (2d) 378 (Ont. C.A.); *R. v. Cardoza* (1981), 61 C.C.C. (2d) 412 (Ont. Co. Ct.); *R. v. Gabourie* (1976), 31 C.C.C. (2d) 471 (Ont. Prov. Ct.); and *R. v. Hancock*, [1976] 5 W.W.R. 609, 36 C.R.N.S. 102, 30 C.C.C. (2d) 544 (B.C.C.A.).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

76 None of the above cases is persuasive in view of the fact that the inferior court/superior court problem was not addressed, but it is curious that it was not identified as a problem.

77 In my opinion the implicit assumption that an inferior court can attack a superior court authorization is correct. At first glance, this may sound heretical, but I think the justification lies in the statutory language. As discussed earlier, I conclude that ss. 176.16(1)(a) and (3)(b) give the trial judge, qua trial judge, the authority to decide the validity of an authorization. There is nothing in the wording of s. 178.16 which suggests that certain trial judges are in a different position than other trial judges. I would not be prepared to read in such a distinction.

78 If an inferior court trial judge can determine the validity of a superior court authorization for the purpose of deciding admissibility of evidence, what happens when, as in the present case, the trial judge is not authorized to order the opening of the sealed packet? The answer must be, in obedience to the statutory language, that the trial be adjourned to allow counsel to apply under s. 178.14 for an order permitting the opening of the packet. The judge acting under s. 178.14 would not examine the contents of the packet or decide the validity of the authorization (see Bellemare, supra). That is the responsibility of the trial judge. This does not mean that the judge acting under s. 178.14 is performing a mere formality. He has a discretion whether to order opening of the packet. He may refuse, and if so the provincial court judge will have to abide by that decision: see *Re R. and Kozak*, supra.

III Bringing the Administration of Justice into Disrepute

79 After concluding that the interceptions were not lawfully made, Dubienski Prov. Ct. J. went on to hold that to admit the evidence would bring the administration of justice into disrepute. In the circumstances, this was an irrelevant consideration. Section 178.16(2) contains the only reference to bringing the administration of justice into disrepute:

> 178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made; or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.
>
> (2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.

80 Section 178.16(2) deals with derivative evidence only, i.e. evidence discovered as a result of intercepting the private communication. It does not relate to primary evidence, i.e. evidence of the private communication itself-the wiretap. That was what was under consideration in this case. Once the interception is held to have been unlawful (and absent consent) it is inadmissible unless the curative provisions of s. 178.16(3)(b) are applied.

IV Conclusion

81 I conclude that Dubienski Prov. Ct. J. erred in deciding, without examining the contents of the sealed packet, that none of the three alternate preconditions of s. 178.13(1)(6) had been met.

82 I would dismiss the appeal and confirm the order of the Manitoba Court of Appeal directing a new trial on all counts.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

83 *Appeal dismissed.*

Appeal dismissed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 14

2011 SCC 52
Supreme Court of Canada

British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)

2011 CarswellBC 2702, 2011 CarswellBC 2703, 2011 SCC 52, [2011] 12 W.W.R. 1, [2011] 3 S.C.R. 422, [2011] B.C.W.L.D. 7337, [2011] B.C.W.L.D. 7338, [2011] B.C.W.L.D. 7441, [2011] B.C.W.L.D. 7442, [2011] B.C.W.L.D. 7444, [2011] B.C.W.L.D. 7477, [2011] A.C.S. No. 52, [2011] S.C.J. No. 52, 2012 C.L.L.C. 230-001, 207 A.C.W.S. (3d) 375, 23 B.C.L.R. (5th) 1, 25 Admin. L.R. (5th) 173, 311 B.C.A.C. 1, 337 D.L.R. (4th) 413, 421 N.R. 338, 529 W.A.C. 1, 73 C.H.R.R. D/1, 95 C.C.E.L. (3d) 169

Workers' Compensation Board of British Columbia (Appellant) and Guiseppe Figliola, Kimberley Sallis, Barry Dearden and British Columbia Human Rights Tribunal (Respondents) and Attorney General of British Columbia, Coalition of BC Businesses, Canadian Human Rights Commission, Alberta Human Rights Commission and Vancouver Area Human Rights Coalition Society (Interveners)

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

Heard: March 16, 2011
Judgment: October 27, 2011
Docket: 33648

Proceedings: reversing *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2010), 2 B.C.L.R. (5th) 274, 2010 CarswellBC 330, 2010 BCCA 77, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 3 Admin. L.R. (5th) 49 (B.C. C.A.); reversing *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2009), 2009 CarswellBC 737, 2009 BCSC 377, 67 C.H.R.R. D/195, 93 B.C.L.R. (4th) 384, 96 Admin. L.R. (4th) 250 (B.C. S.C.)

Counsel: Scott A. Nielsen, Laurel Courtenay for Appellant
Lindsay Waddell, James Sayre, Kevin Love for Respondents, Guiseppe Figliola, Kimberley Sallis, Barry Dearden
Jessica M. Connell, Katherine Hardie for Respondent, British Columbia Human Rights Tribunal
Jonathan G. Penner for Intervener, Attorney General of British Columbia
Peter A. Gall, Q.C., Nitya Iyer for Intervener, Coalition of BC Businesses
Sheila Osborne-Brown, Philippe Dufresne for Intervener, Canadian Human Rights Commission
Janice R. Ashcroft for Intervener, Alberta Human Rights Commission
Ryan D.W. Dalziel for Intervener, Vancouver Area Human Rights Coalition Society

Subject: Occupational Health and Safety; Public; Constitutional; Civil Practice and Procedure; Employment

Headnote

Administrative law --- Standard of review — Reasonableness — Patently unreasonable

Human rights --- Practice and procedure — Commissions and boards of inquiry — Powers

Discretion to dismiss complaints — Complainants with work-related chronic pain appealed to review division of Workers' Compensation Board, alleging that Board's chronic pain compensation policy was contrary to Human Rights Code — Review officer held policy did not contravene Code — Instead of seeking judicial review, complainants filed complaints with Human Rights Tribunal making same allegations — Board brought motion to dismiss complaints under s. 27(1)(f) of Code on basis that complaints had been appropriately dealt with in another proceeding — Tribunal dismissed application, concluding that substance of complaints was not appropriately dealt with in review process — Board applied for judicial review — Chambers judge granted application, concluding same issues had already been decided by review officer — Complainants appealed — Court of Appeal held standard of review was patent unreasonableness, and found chambers judge's reasons did not identify patently unreasonable behaviour — Board appealed to Supreme Court of Canada — Appeal allowed — Tribunal's decision

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

set aside; complaints dismissed — Tribunal's decision was patently unreasonable — Tribunal based its decision to proceed with complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f) of Code — Tribunal's strict adherence to application of issue estoppel was overly formalistic interpretation of s. 27(1)(f) of Code, particularly of phrase "appropriately dealt with" — Complainants were trying to relitigate in different forum.

Droit administratif --- Norme de contrôle — Caractère raisonnable — Manifestement déraisonnable

Droits de la personne --- Procédure — Commissions et tribunaux — Pouvoirs

Pouvoir discrétionnaire de rejeter les plaintes — Plaignants souffraient de douleurs chroniques liées au travail et ont interjeté appel devant la section de révision de la Workers' Compensation Board de la Colombie-Britannique (« Commission »), soutenant que la politique de l'indemnité fixe pour les douleurs chroniques contrevenait au Human Rights Code de la Colombie-Britannique (« Code ») — Agent de révision a conclu que la politique n'enfreignait pas le Code — Plutôt que de demander un contrôle judiciaire de la décision de l'agent de révision, les plaignants ont déposé devant le tribunal des droits de la personne (« Tribunal ») des plaintes reprenant les mêmes arguments — Commission a présenté au Tribunal une requête pour rejet des plaintes en vertu de l'art. 27(1)(f) du Code, faisant valoir que les plaintes avaient fait l'objet d'un examen de façon appropriée dans une autre instance — Tribunal a rejeté la requête, concluant que le fond de la plainte n'avait pas fait l'objet d'un examen de façon appropriée dans le cadre du processus de révision — Commission a déposé une requête en contrôle judiciaire — Juge siégeant en cabinet a accueilli la requête, estimant que l'agent de révision avait déjà statué de façon définitive sur les mêmes questions — Plaignants ont interjeté appel — Cour d'appel a conclu que la norme de contrôle applicable était celle de la décision manifestement déraisonnable et que les motifs de la juge siégeant en cabinet ne relevaient aucun comportement manifestement déraisonnable — Commission a formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — Décision du Tribunal annulée et plaintes rejetées — Décision du Tribunal était manifestement déraisonnable — Décision du Tribunal de recevoir les plaintes et de les entendre de nouveau reposait principalement sur des facteurs non pertinents et ne tenait pas compte du mandat véritable que lui conférait l'art. 27(1)(f) du Code — En s'en tenant à l'application stricte de la préclusion découlant d'une question déjà tranchée, le Tribunal a donné une interprétation trop formaliste à l'art. 27(1)(f) du Code et, plus particulièrement, aux mots [TRADUCTION] « a été statué de façon appropriée » — Plaignants cherchaient à soulever de nouveau la question devant un autre forum.

The complainants with work-related chronic pain appealed to the review division of the Workers' Compensation Board, alleging that the Board's chronic pain compensation policy was contrary to s. 8 of the B.C. Human Rights Code. A review officer held the policy was not contrary to the Code. Instead of seeking judicial review of the review officer's decision, the complainants filed complaints with the Human Rights Tribunal based on the same allegations.

The Board brought a motion to have the Tribunal dismiss the complaints pursuant to s. 27(1)(f) of the Code, which provides that a complaint may be dismissed where the substance of the complaint has been appropriately dealt with in another proceeding. The Tribunal dismissed the Board's motion, concluding that the substance of the complaints was not appropriately dealt with in the review process.

On judicial review, the Tribunal's decision was set aside by a chambers judge who concluded that the same issues had already been conclusively decided by the review officer and that the Tribunal had failed to take into proper account the principles of res judicata, collateral attack, and abuse of process. The chambers judge found the complaints to the Tribunal were a veiled attempt to circumvent judicial review. The complainants appealed.

The Court of Appeal restored the Tribunal's decision. The Court of Appeal determined that the appropriate standard of review was patent unreasonableness, and concluded that the Tribunal's decision was not patently unreasonable. The Board appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Abella J. (LeBel, Deschamps, Charron, Rothstein JJ. concurring): The Tribunal's decision should be reviewed on a standard of patent unreasonableness. Because the Tribunal based its decision to proceed with the complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f) of the Code, its decision was patently unreasonable. The Tribunal's decision should be set aside and the complaints dismissed.

Section 27(1)(f) of the Code is the statutory reflection of the collective principles underlying the doctrines of issue estoppel, collateral attack, and abuse of process. These principles are factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) to hear or refrain from hearing a complaint.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Section 27(1)(f) does not codify the actual doctrines or their technical explications; it embraces their underlying principles in pursuit of finality, fairness, and integrity by preventing unnecessary inconsistency, multiplicity and delay. Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what was being complained of to the Tribunal; and whether there was an opportunity for the complainants to know the case to be met and have the chance to meet it. These questions go to determining whether the substance of a complaint has been "appropriately dealt with". The Tribunal's strict adherence to the application of issue estoppel was an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with".

Per Cromwell J. (concurring in the result) (McLachlin C.J.C., Binnie, Fish JJ. concurring): The appeal should be allowed. In accordance with the general rule in B.C., the Board's application to dismiss the complaints should be remitted to the Tribunal for reconsideration.

The Tribunal's decision was patently unreasonable within the meaning of s. 59 of the Administrative Tribunals Act. However, the majority's interpretation of the discretion conferred by s. 27(1)(f) of the Code and the decision not to remit the complaints to the Tribunal were not agreed with. Looking at the text, context and purpose of the provision, the discretion conferred under s. 27(1)(f) of the Code was conceived of as a broad discretion.

Where the substance of a matter has been addressed previously, it becomes necessary for the Tribunal to exercise its discretion while giving significant weight to interests in finality and adherence to proper review mechanisms. The Tribunal must decide if there is something in the circumstances of the case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. The most important consideration is whether giving the earlier proceeding final and binding effect will work an injustice.

The Tribunal committed a reversible error by basing its decision on the alleged lack of independence of the review officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the substance of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also failed to have regard to the fundamental fairness of the earlier proceeding. This led the Tribunal to give no weight to the interests of finality and to focus on irrelevant considerations of whether the strict elements of issue estoppel were present.

Les plaignants souffraient de douleurs chroniques liées au travail et ont interjeté appel devant la section de révision de la Workers' Compensation Board de la Colombie-Britannique (« Commission »), soutenant que la politique de l'indemnité fixe pour les douleurs chroniques contrevenait à l'art. 8 du Human Rights Code de la Colombie-Britannique (« Code »). Un agent de révision a conclu que la politique n'enfreignait pas le Code. Plutôt que de demander un contrôle judiciaire de la décision de l'agent de révision, les plaignants ont déposé devant le tribunal des droits de la personne (« Tribunal ») des plaintes reprenant les mêmes arguments.

La Commission a présenté au Tribunal une requête pour rejet des plaintes en vertu de l'art. 27(1)(f) du Code, lequel prévoit qu'une plainte peut être rejetée si le fond de la plainte a fait l'objet d'un examen de façon appropriée dans une autre instance. Le Tribunal a rejeté la requête de la Commission, concluant que le fond de la plainte n'avait pas fait l'objet d'un examen de façon appropriée dans le cadre du processus de révision.

À l'issue d'un contrôle judiciaire, la juge siégeant en cabinet a annulé la décision du Tribunal, estimant que l'agent de révision avait déjà statué de façon définitive sur les mêmes questions et que le Tribunal n'avait pas dûment tenu compte des principes applicables en matière d'autorité de la chose jugée, de contestation indirecte et d'abus de procédure. La juge siégeant en cabinet a conclu que les plaintes déposées devant le Tribunal relevaient d'une tentative déguisée d'éluder le contrôle judiciaire. Les plaignants ont interjeté appel.

La Cour d'appel a rétabli la décision du Tribunal. La Cour d'appel a conclu que la norme de contrôle applicable était celle de la décision manifestement déraisonnable et que la décision du Tribunal n'était pas manifestement déraisonnable. La Commission a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Abella, J. (LeBel, Deschamps, Charron, Rothstein, JJ., souscrivant à son opinion) : La norme de contrôle applicable à la décision du Tribunal est celle de la décision manifestement déraisonnable. Parce que la décision du Tribunal de recevoir ces plaintes et de les entendre de nouveau reposait principalement sur des facteurs non pertinents et ne tenait pas compte du mandat véritable que lui conférait l'art. 27(1)(f) du Code, elle était manifestement déraisonnable. La décision du Tribunal devrait être annulée et les plaintes rejetées.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

L'article 27(1)(f) du Code codifie l'ensemble des principes sous-jacents des règles en matière de préclusion découlant d'une question déjà tranchée, de contestation indirecte et d'abus de procédure. Ces principes sont des facteurs primordiaux à prendre en compte dans l'exercice du pouvoir discrétionnaire d'entendre ou non une plainte conféré par l'art. 27(1)(f).
L'article 27(1)(f) ne codifie pas les doctrines elles-mêmes ou leurs explications techniques; il en englobe les principes sous-jacents afin d'assurer le caractère définitif des instances, l'équité et l'intégrité du système judiciaire en prévenant les incohérences, les dédoublements et les délais inutiles. En s'appuyant sur ces principes sous-jacents, le Tribunal est appelé à se demander s'il existe une compétence concurrente pour statuer sur les questions relatives aux droits de la personne, si la question juridique tranchée par la décision antérieure était essentiellement la même que celle qui est soulevée dans la plainte dont il est saisi et si le processus antérieur a offert la possibilité aux plaignants de connaître les éléments invoqués contre eux et de les réfuter. Ces questions visent à déterminer s'il « a été statué de façon appropriée » sur le fond de la plainte. En s'en tenant à l'application stricte de la préclusion découlant d'une question déjà tranchée, le Tribunal a donné une interprétation trop formaliste à la disposition et, plus particulièrement, aux mots [TRADUCTION] « a été statué de façon appropriée ».
Cromwell, J. (souscrivant au résultat des juges majoritaires) (McLachlin, J.C.C., Binnie, Fish, JJ., soucrivant à son opinion) : Le pourvoi devrait être accueilli. Conformément à la règle générale suivie en Colombie-Britannique, la requête de la Commission demandant le rejet des plaintes devrait être soumise de nouveau au Tribunal pour réexamen.
La décision du Tribunal était manifestement déraisonnable au sens de l'art. 59 de la Administrative Tribunals Act. Toutefois, on ne partageait pas l'interprétation des juges majoritaires quant à la discrétion conférée par l'art. 27(1)(f) du Code et la décision de ne pas renvoyer les plaintes devant le Tribunal pour réexamen. Compte tenu du texte, du contexte et de l'objectif de l'art. 27(1)(f), le pouvoir discrétionnaire qu'il conférait se voulait large.
Si le fond d'un dossier a fait déjà l'objet d'un examen, il devient nécessaire que le Tribunal exerce sa discrétion tout en attribuant un poids appréciable aux intérêts que revêtent le caractère définitif de la décision et le recours aux mécanismes de révision applicables. Le Tribunal doit établir si un élément des circonstances de l'affaire fait en sorte qu'il ne conviendrait pas d'appliquer le principe général du caractère définitif de la décision antérieure. Le facteur le plus important est celui de savoir si une injustice peut résulter de l'attribution d'une portée définitive et exécutoire à l'instance antérieure.
Le Tribunal a commis une erreur justifiant l'annulation de sa décision en fondant cette dernière sur le prétendu manque d'indépendance de l'agent de révision et en faisant abstraction de la possibilité de recourir au contrôle judiciaire pour corriger tout vice procédural. Plus fondamentalement encore, il n'a pas examiné s'il avait été statué sur le fond de la plainte, omettant ainsi de prendre en considération une condition imposée par la loi. De plus, il n'a pas pris en compte l'équité fondamentale de l'instance antérieure. Tout cela a fait en sorte que le Tribunal n'a accordé aucun poids aux intérêts en jeu en matière de caractère définitif de la décision, et qu'il a largement fondé son analyse sur des facteurs non pertinents rattachés à l'existence des stricts éléments constitutifs de la préclusion fondée sur une question déjà tranchée.

APPEAL by Workers' Compensation Board from judgment reported at *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2010), 2 B.C.L.R. (5th) 274, 2010 CarswellBC 330, 2010 BCCA 77, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 3 Admin. L.R. (5th) 49 (B.C. C.A.), allowing complainants' appeal from judgment quashing decision of Human Rights Tribunal.

POURVOI de la Workers' Compensation Board à l'encontre d'un jugement publié à *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)* (2010), 2 B.C.L.R. (5th) 274, 2010 CarswellBC 330, 2010 BCCA 77, 316 D.L.R. (4th) 648, 284 B.C.A.C. 50, 3 Admin. L.R. (5th) 49 (B.C. C.A.), ayant accueilli l'appel interjeté par les plaignants à l'encontre d'une décision ayant infirmé une décision du tribunal des droits de la personne.

***Abella J.*:**

1 Litigants hope to have their legal issues resolved as equitably and expeditiously as possible by an authoritative adjudicator. Subject only to rights of review or appeal, they expect, in the interests of fairness, to be able to rely on the outcome as final and binding. What they do not expect is to have those same issues relitigated by a different adjudicator in a different forum at the request of a losing party seeking a different result. On the other hand, it may sometimes be the case that justice demands fresh litigation.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2 In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

Background

3 Giuseppe Figliola, Kimberley Sallis, and Barry Dearden suffered from chronic pain. Mr. Figliola suffered a lower back injury while trying to place a sixty-pound, steel airshaft in the centre of a roll of paper. Ms. Sallis fell down a set of slippery stairs while delivering letters for Canada Post. Mr. Dearden, who also worked for Canada Post, developed back pain while delivering mail.

4 Each of them sought compensation from British Columbia's Workers' Compensation Board for, among other things, their chronic pain. The employers were notified in each case.

5 The Board's chronic pain policy, set by its board of directors, provided for a fixed award for such pain:

> Where a Board officer determines that a worker is entitled to [an] award for chronic pain ... an award equal to 2.5% of total disability will be granted to the worker.
>
> (*Rehabilitation Services and Claims Manual*, vol. I, Policy No. 39.01, Chronic Pain, at para. 4(b); later replaced by vol. II, Policy No. 39.02, Chronic Pain (online).)

6 Pursuant to this policy, the complainants received a fixed compensation award amounting to 2.5% of total disability for their chronic pain. The Workers' Compensation Board expresses partial disability as a percentage of the disability suffered by a completely disabled worker. This is intended to reflect "the extent to which a particular injury is likely to impair a worker's ability to earn in the future" (*Rehabilitation Services and Claims Manual*, vol. II, Policy No. 39.00).

7 Each complainant appealed to the Board's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional under s. 15 of the *Canadian Charter of Rights and Freedoms*, and discriminatory on the grounds of disability under s. 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210.

8 At the Review Division, the Review Officer, Nick Attewell, found that only the Workers' Compensation Appeal Tribunal ("WCAT") had the authority to scrutinize policies for patent unreasonableness. He also concluded that, since the combination of s. 44 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*") and s. 245.1 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, expressly deprived the WCAT of jurisdiction over constitutional questions, this meant that he too had no such jurisdiction.

9 The Review Officer accepted that he had jurisdiction over the *Human Rights Code* complaint. This authority flowed from this Court's decision in *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.), where the majority concluded that human rights tribunals did not have exclusive jurisdiction over human rights cases and that unless there was statutory language to the contrary, other tribunals had concurrent jurisdiction to apply human rights legislation.

10 In careful and thorough reasons, the Review Officer concluded that the Board's chronic pain policy was not contrary to s. 8 of the *Code* and therefore not discriminatory.

11 The complainants appealed Mr. Attewell's decision to the WCAT. Before the appeal was heard, the B.C. legislature amended the *Administrative Tribunals Act* and the *Workers Compensation Act*, removing the WCAT's authority to apply the *Code* (*Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14). The effect of this amendment on a Review Officer's authority to address the *Code* is not before us and was not argued by any of the parties.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

12 Based on the amendments, the complainants' appeal of the Review Officer's human rights conclusions could not be heard by the WCAT, but judicial review remained available. Instead of applying for judicial review, however, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board's chronic pain policy that they had made before the Review Division. They did not proceed with their appeal to the WCAT from the conclusions of the Review Officer dealing with whether he had jurisdiction to find the chronic pain policy to be patently unreasonable.

13 The Workers' Compensation Board brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the *Code* the Tribunal had no jurisdiction, and that under s. 27(1)(f) the complaints had already been appropriately dealt with by the Review Division. Those provisions state:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> . . . . .
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;

14 The Tribunal rejected both arguments (2008 BCHRT 374 (B.C. Human Rights Trib.)). Of particular relevance, it did not agree that the complaints should be dismissed under s. 27(1)(f). Citing *Matuszewski v. British Columbia (Ministry of Competition, Science & Enterprise)*, 2008 BCSC 915, 82 Admin. L.R. (4th) 308 (B.C. S.C.), and relying on this Court's decision in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), the Tribunal concluded that "the substance of the Complaints was not appropriately dealt with in the review process.... [T]he issue raised is an appropriate question for the Tribunal to consider and the parties to the Complaints should receive the benefit of a full Tribunal hearing" (para. 50).

15 On judicial review, the Tribunal's decision was set aside by Justice Stromberg-Stein (2009 BCSC 377, 93 B.C.L.R. (4th) 384 (B.C. S.C.)). She concluded that the same issues had already been "conclusively decided" by the Review Officer and that the Tribunal had failed to take into proper account the principles of *res judicata*, collateral attack, and abuse of process (paras. 40 and 54). She found that for the Tribunal to proceed would be a violation of the principles of consistency, finality and the integrity of the administration of justice. In her view, the complaints to the Tribunal were merely a veiled attempt to circumvent judicial review:

> The Tribunal would be ruling on the correctness of the Review Division decision. That is not the role of the Tribunal and to do so constitutes an abuse of process. [para. 56]

16 As for which standard of review applied, her view was that the Tribunal's decision ought to be set aside whether the standard was correctness or patent unreasonableness.

17 The Court of Appeal restored the Tribunal's decision (2010 BCCA 77, 2 B.C.L.R. (5th) 274 (B.C. C.A.)). It interpreted s. 27(1)(f) as reflecting the legislature's intention to confer jurisdiction on the Tribunal to adjudicate human rights complaints even when the same issue had previously been dealt with by another tribunal. This did not represent the Tribunal exercising appellate review over the other proceeding, it flowed from the Tribunal's role in determining whether the previous proceeding had substantively addressed the human rights issues.

18 On the question of the standard of review, the Court of Appeal concluded that the issue revolved around s. 27(1)(f). Since a decision under s. 27(1)(f) is discretionary, the appropriate standard according to the jurisprudence is patent unreasonableness: see *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129 (B.C. C.A.); *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 (B.C. C.A.); *Hines v. Canpar Industries Ltd.*, 2006 BCSC 800, 55 B.C.L.R. (4th) 372 (B.C. S.C.); and *Matuszewski*. This was based on s. 59(3) of the *ATA*, which sets out the relevant standard, and on s. 59(4), which sets out a number of indicia:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> **59** (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> . . . . .
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.

19 The Court of Appeal concluded that the Tribunal's decision was not patently unreasonable.

20 I agree with the conclusion that, based on the directions found in s. 59(3) of the *ATA*, the Tribunal's decision is to be reviewed on a standard of patent unreasonableness. In my respectful view, however, I see the Tribunal's decision not to dismiss the complaints in these circumstances as reaching that threshold.

Analysis

21 The question of jurisdiction is not seriously at issue in this appeal. Since *Tranchemontagne*, tribunals other than human rights commissions have rightly assumed that absent legislative intent to the contrary, they have concurrent jurisdiction to apply human rights legislation. That means that at the time these complaints were brought, namely, before the amendments to the *ATA* removed the WCAT's human rights jurisdiction, both the Workers' Compensation Board *and* the Human Rights Tribunal had ostensible authority to hear human rights complaints. Since the complainants brought their complaints to the Board, and since either the Board or the Tribunal was entitled to hear the issue, the Board had jurisdiction when it decided the complainants' human rights issues. But based on their concurrent jurisdiction when this complaint was brought to the Board, there is no serious question that the Tribunal, in theory, also had authority over these human rights complaints. This means that s. 27(1)(a) of the *Code* is not in play.

22 The question then arises: when two bodies share jurisdiction over human rights, what ought to guide the Tribunal under s. 27(1)(f) in deciding when to dismiss all or part of a complaint that has already been decided by the other tribunal?

23 In *Matuszewski*, Pitfield J. explored the contours and concepts of this provision. In that case, the collective agreement had banned the accrual of seniority while an employee was on long-term disability. The union grieved, alleging that the provision was discriminatory. The arbitrator concluded that it was not. The union did not seek judicial review from the arbitrator's decision. One of the employees in the bargaining unit filed a complaint with the Human Rights Tribunal alleging that the same collective agreement provision was discriminatory. The Human Rights Tribunal refused to dismiss this fresh complaint.

24 On judicial review of the Tribunal's decision, Pitfield J. concluded that the Tribunal's refusal to dismiss the complaint was patently unreasonable. In his view, s. 27(1)(f) is the statutory mechanism through which the Tribunal can prevent conflicting decisions arising from the same issues. This flows from the concurrent jurisdiction exercised over the *Code* by the Tribunal and other tribunals. While s. 27(1)(f) does not call for a strict application of the doctrines of issue estoppel, collateral attack, or abuse of process, the principles underlying all three of these doctrines are "factors of primary importance that must be taken into account when exercising discretion under s. 27(1)(f) of the *Human Rights Code* to proceed, or to refrain from proceeding, with the hearing of a complaint" (para. 31).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

25 I agree with Pitfield J.'s conclusion that s. 27(1)(f) is the statutory reflection of the collective principles underlying those doctrines, doctrines used by the common law as vehicles to transport and deliver to the litigation process principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice, all in the name of fairness. They are vibrant principles in the civil law as well (*Civil Code of Québec*, S.Q. 1991, c. 64, art. 2848; *Boucher c. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279 (S.C.C.); *Dominion Ready Mix Inc. c. Rocois Construction Inc.*, [1990] 2 S.C.R. 440 (S.C.C.), at p. 448).

26 As a result, given that multiple tribunals frequently exercise concurrent jurisdiction over the same issues, it is not surprising that the common law doctrines also find expression in the administrative law context through statutory mechanisms such as s. 27(1)(f). A brief review of these doctrines, therefore, can be of assistance in better assessing whether their underlying principles have been respected in this case.

27 The three preconditions of issue estoppel are whether the same question has been decided; whether the earlier decision was final; and whether the parties, or their privies, were the same in both proceedings (*Angle v. Minister of National Revenue (1974)*, [1975] 2 S.C.R. 248 (S.C.C.), at p. 254). These concepts were most recently examined by this Court in *Danyluk*, where Binnie J. emphasized the importance of finality in litigation: "A litigant ... is only entitled to one bite at the cherry.... Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided" (para. 18). Parties should be able to rely particularly on the conclusive nature of administrative decisions, he noted, since administrative regimes are designed to facilitate the expeditious resolution of disputes (para. 50). All of this is guided by the theory that "estoppel is a doctrine of public policy that is designed to advance the interests of justice" (para. 19).

28 The rule against collateral attack similarly attempts to protect the fairness and integrity of the justice system by preventing duplicative proceedings. It prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: see *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (S.C.C.), and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.).

29 Both collateral attack and *res judicata* received this Court's attention in *Boucher*. The Ontario Superintendent of Pensions had ordered and approved a partial wind-up report according to which members of the plan employed in Quebec were not to receive early retirement benefits, due to the operation of Quebec law. The employees were notified, but chose not to contest the Superintendent's decision to approve the report. Instead, several of them started an action against their employer in the Quebec Superior Court claiming their entitlement to early retirement benefits. LeBel J. rejected the employees' claim. Administrative law, he noted, has review mechanisms in place for reducing error or injustice. Those are the mechanisms parties should use. The decision to pursue a court action instead of judicial review resulted in "an impermissible collateral attack on the Superintendent's decision" (para. 35):

> Modern adjective law and administrative law have gradually established various appeal mechanisms and sophisticated judicial review procedures, so as to reduce the chance of errors or injustice. Even so, the parties must avail themselves of those options properly and in a timely manner. Should they fail to do so, the case law does not in most situations allow collateral attacks on final decisions.... [para. 35]

30 In other words, the harm to the justice system lies not in challenging the correctness or fairness of a judicial or administrative decision in the proper forums, it comes from inappropriately circumventing them (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 46).

31 And finally, we come to the doctrine of abuse of process, which too has as its goal the protection of the fairness and integrity of the administration of justice by preventing needless multiplicity of proceedings, as was explained by Arbour J. in *Toronto (City)*. The case involved a recreation instructor who was convicted of sexually assaulting a boy under his supervision and was fired after his conviction. He grieved the dismissal. The arbitrator decided that the conviction was admissible evidence but not binding on him. As a result, he concluded that the instructor had been dismissed without cause.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

32 Arbour J. found that the arbitrator was wrong not to give full effect to the criminal conviction even though neither *res judicata* nor the rule against collateral attack strictly applied. Because the effect of the arbitrator's decision was to relitigate the conviction for sexual assault, the proceeding amounted to a "blatant abuse of process" (para. 56).

33 Even where *res judicata* is not strictly available, Arbour J. concluded, the doctrine of abuse of process can be triggered where allowing the litigation to proceed would violate principles such as "judicial economy, consistency, finality and the integrity of the administration of justice" (para. 37). She stressed the goals of avoiding inconsistency and wasting judicial and private resources:

> [Even] if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality. [para. 51]
>
> (See also *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316 (S.C.C.), at para. 106, *per* Charron J.)

34 At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:

- It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
- Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
- The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
- Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
- Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

35 These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.

36 Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

37 Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

38 What I do *not* see s. 27(1)(f) as representing, is a statutory invitation either to "judicially review" another tribunal's decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

39 I see the discretion in s. 27(1)(f), in fact, as being limited, based not only on the language of s. 27(1)(f), but also on the character of the other six categories of complaints in s. 27(1) in whose company it finds itself. Section 27(1) states:

> (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> (a) the complaint or that part of the complaint is not within the jurisdiction of the tribunal;
>
> (b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;
>
> (c) there is no reasonable prospect that the complaint will succeed;
>
> (d) proceeding with the complaint or that part of the complaint would not
>
> (i) benefit the person, group or class alleged to have been discriminated against, or
>
> (ii) further the purposes of this Code;
>
> (e) the complaint or that part of the complaint was filed for improper motives or made in bad faith;
>
> (f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding;
>
> (g) the contravention alleged in the complaint or that part of the complaint occurred more than 6 months before the complaint was filed unless the complaint or that part of the complaint was accepted under section 22 (3).

40 Each subsection in s. 27(1) refers to circumstances that make hearing the complaint presumptively unwarranted: complaints that are not within the Tribunal's jurisdiction; allege acts or omissions that do not contravene the *Code*; have no reasonable prospect of success; would not be of any benefit to the complainant or further the purposes of the *Code*; or are made for improper motives or in bad faith. These are the statutory companions for s. 27(1)(f). The fact that the word "may" is used in the preamble to s. 27(1) means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints. But it strikes me as counterintuitive to think that the legislature intended to give the Tribunal a wide berth to decide, for example, whether or not to dismiss complaints it has no jurisdiction to hear, are unlikely to succeed, or are motivated by bad faith.

41 This is the context in which the words "appropriately dealt with" in s. 27(1)(f) should be understood. All of the other provisions with which s. 27(1)(f) is surrounded lean towards encouraging dismissal. On its face, there is no principled basis for interpreting s. 27(1)(f) idiosyncratically from the rest of s. 27(1). I concede that the word "appropriately" is, by itself, easily stretched into many linguistic directions. But our task is not to define the word, it is to define it in its statutory context so that, to the extent reasonably possible, the legislature's intentions can be respected.

42 Nor does the legislative history of s. 27(1)(f) support the theory that the legislature intended to give the Tribunal a wide discretion to re-hear complaints decided by other tribunals. Formerly, ss. 25(3) and 27(2) of the *Code* required the Tribunal to

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

consider the subject matter, nature, and available remedies of the earlier proceeding in deciding whether to defer or dismiss a complaint without a hearing. These factors were interpreted by the Human Rights Commission to include the administrative fairness of the earlier proceeding, the expertise of the decision-maker, which forum was more appropriate for discussing the issues, and whether the earlier proceeding could deliver an adequate remedy, factors which provided hurdles to the dismissal of complaints: see D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at pp. 100-101.

43 The legislature removed these limiting factors in 2002 in the *Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62. By removing factors which argued *against* dismissing a complaint, the legislature may well be taken to have intended that a different approach be taken by the Tribunal, namely, one that made it easier to dismiss complaints. This is consistent with the statement of the then Minister of Government Services, the Hon. U. Dosanjh, on second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, which included s. 22(1), the almost identically worded predecessor to s. 27(1). While he did not specifically refer to each of the subsections of s. 22(1) or their discrete purposes, it is clear that his overriding objective in introducing this legislative package, which included these provisions, was to reduce a substantial backlog and ensure "a system ... which will be efficient and streamlined":

> In this proposed legislation, you now have the power to defer consideration of a complaint pending the outcome of another proceeding, so that there is no unnecessary overlap in the proceedings
>
> . . . . .
>
> You have the power to dismiss the complaints, as I indicated, and that has been expanded.
>
> [Emphasis added.]
>
> (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 4th Sess., 35th Parl., June 22, 1995, at p. 16062)

44 This then brings us to the Tribunal's use of the *Danyluk* factors. Not only do I resist re-introducing by judicial fiat the types of factors that the legislature has expressly removed, it is not clear to me that the *Danyluk* factors even apply. They were developed to assist courts in applying the doctrine of issue estoppel. Section 27(1)(f), on the other hand, is not limited to issue estoppel. As Pitfield J. explained in *Matuszewski*, s. 27(1)(f) does not call for the technical application of any of the common law doctrines — issue estoppel, collateral attack or abuse of process — it calls instead for an approach that applies their combined principles. Notably, neither Stromberg-Stein J. nor the Court of Appeal referred to the *Danyluk* factors in their respective analyses.

45 Moreover, importing the *Danyluk* factors into s. 27(1)(f) would undermine what this Court mandated in *Tranchemontagne* when it directed that, absent express language to the contrary, all administrative tribunals have concurrent jurisdiction to apply human rights legislation. That means that *Danyluk* factors such as the prior decision-maker's mandate and expertise, are presumed to be satisfied. Encouraging the Tribunal to nonetheless apply a comparative mandate and expertise approach would erode Bastarache J.'s conclusion that human rights tribunals are not the exclusive "guardian or the gatekeeper for human rights law" (para. 39).

46 This brings us to how the Tribunal exercised its discretion in this case. Because I see s. 27(1)(f) as reflecting the principles of the common law doctrines rather than the codification of their technical tenets, I find the Tribunal's strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase "appropriately dealt with". With respect, this had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation. In acceding to the complainant's request for relitigation of the same s. 8 issue, the Tribunal was disregarding Arbour J.'s admonition in *Toronto (City)* that parties should not try to impeach findings by the "impermissible route of relitigation in a different forum" (para. 46).

47 "Relitigation in a different forum" is exactly what the complainants in this case were trying to do. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings before a

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

different tribunal in search of a more favourable result. This strategy represented, as Stromberg-Stein J. noted, a "collateral appeal" to the Tribunal (para. 52), the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent:

> ... this case simply boils down to the complainants wanting to reargue the very same issue that has already been conclusively decided within the same factual and legal matrix. The complainants are attempting to pursue the matter again, within an administrative tribunal setting where there is no appellate authority by one tribunal over the other. [para. 54]

48 The Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision and decision-making process. Its analysis represents a litany of factors having to do with whether it was comfortable with the process and merits of the Review Officer's decision.

49 To begin, it questioned whether the Review Division's process met the necessary procedural requirements. This is a classic judicial review question and not one within the mandate of a concurrent decision-maker. While the Tribunal may inquire into whether the parties had notice of the case to be met and were given an opportunity to respond, that does not mean that it can require that the prior process be a procedural mimic of the Tribunal's own, more elaborate one. But in any event, I agree with Stromberg-Stein J. that there were no complaints about the complainants' ability to know the case to be met or the Board's jurisdiction to hear it:

> Each of the complainants participated fully in the proceedings; each knew the case to be met and had the chance to meet it. Each of the complainants had the benefit of competent and experienced counsel who raised the human rights issues within the workers' compensation context. The issues were analyzed and addressed fully by the Review Division. It was implicit in their submissions to the Review Division that they accepted the Review Division had full authority to decide the human rights issue. [para. 52]
>
> (See also *Rasanen v. Rosemount Instruments Ltd.* (1994), 112 D.L.R. (4th) 683 (Ont. C.A.), at p. 705.)

As long as the complainants had a chance to air their grievances before an authorized decision-maker, the extent to which they received traditional "judicial" procedural trappings should not be the Tribunal's concern.

50 The Tribunal also criticized the Review Officer for the way he interpreted his human rights mandate:

> ... the Review Officer, who, in the absence of evidence, made findings about the appropriate comparator group, that the dignity of the Complainants was not impacted by the Policy, and that there was a [*bona fide* justification] for the Policy. There was no analysis regarding where the onus lay in establishing a [*bona fide* justification] or what the applicable interpretive principles with respect to human rights legislation are.... Further, any discriminatory rule must not discriminate more than is necessary; hence, there must be consideration given to possible alternatives to the impugned rule which would be less discriminatory while still achieving the objective.... [para. 46]

These too are precisely the kinds of questions about the merits that are properly the subject of judicial review, not grounds for a collateral attack by a human rights tribunal under the guise of s. 27(1)(f).

51 In addition, the Tribunal held that the decision of the Review Officer was not final. It is not clear to me what the Tribunal was getting at. "Final" means that all available means of review of appeal have been exhausted. Where a party chooses not to avail itself of those steps, the decision is final. Even under the strict application of issue estoppel, which in my view is not in any event what s. 27(1)(f) was intended to incorporate, the Review Officer's decision was a final one in these circumstances. Having chosen not to judicially review the decision as they were entitled to do, the complainants cannot then claim that because the decision lacks "finality" they are entitled to start all over again before a different decision-maker dealing with the same subject matter (*Danyluk*, at para. 57).

52 The Tribunal concluded that the parties were not the same before the Workers' Compensation Board as they were before the Tribunal. This, the Tribunal held, precluded the application of the doctrine of issue estoppel. This too represents the strict application of issue estoppel rather than of the principles underlying all three common law doctrines. Moreover, it is worth

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

noting, as Arbour J. observed in *Toronto (City)*, that the absence of "mutuality" does not preclude the application of abuse of process to avoid undue multiplicity (para. 37).

53 Finally, the Tribunal suggested that Review Officers lacked expertise in interpreting or applying the *Code*. As previously mentioned, since both adjudicative bodies had concurrent jurisdiction at the time the complaint was heard and decided, this is irrelevant. Bastarache J., in *Tranchemontagne*, expressly rejected the argument that the quasi-constitutional status of human rights legislation required that there be an expert human rights body exercising a supervisory role over human rights jurisprudence. As he explained, human rights legislation must be offered accessible application to further the purposes of the *Code* by fostering "a general culture of respect for human rights in the administrative system" (paras. 33 and 39; *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 54, [2003] 2 S.C.R. 504 (S.C.C.); and *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, [2007] 1 S.C.R. 650 (S.C.C.)).

54 Because the Tribunal based its decision to proceed with these complaints and have them relitigated on predominantly irrelevant factors and ignored its true mandate under s. 27(1)(f), its decision, in my respectful view, is patently unreasonable. Since it was patently unreasonable in large part because it represented the unnecessary prolongation and duplication of proceedings that had already been decided by an adjudicator with the requisite authority, I see no point in wasting the parties' time and resources by sending the matter back for an inevitable result.

55 I would therefore allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In accordance with the Board's request, there will be no order for costs.

***Cromwell J.*:**

I. Introduction

56 I agree with my colleague Abella J. that the decision of the Human Rights Tribunal was patently unreasonable (2008 BCHRT 374 (B.C. Human Rights Trib.)). However, I do not, with respect, share Abella J.'s interpretation of the discretion conferred by s. 27(1)(f) of the *Human Rights Code*, R.S.B.C. 1996, c. 210, nor do I agree with her decision not to remit the complaints to the Tribunal.

57 I do not subscribe to my colleague's understanding of what lies at the heart of the common law finality doctrines or of the principles underlying s. 27(1)(f) of the *Human Rights Code*. Abella J. writes that what is at the heart of these finality doctrines is preventing abuse of the decision-making process and that the discretion conferred by s. 27(1)(f) is a limited one, concerned only with finality, avoiding unnecessary relitigation and pursuing the appropriate review mechanisms. I respectfully disagree.

58 The common law has consistently seen these finality doctrines as being concerned with striking an appropriate balance between the important goals of finality and fairness, more broadly considered. Finality is one aspect of fairness, but it does not exhaust that concept or trump all other considerations. As for s. 27(1)(f), it confers, in very broad language, a flexible discretion on the Human Rights Tribunal to enable it to achieve that balance in the multitude of contexts in which another tribunal may have dealt with a point of human rights law. In my view, both the common law and in particular s. 27(1)(f) of the *Code* are intended to achieve the necessary balance between finality and fairness through the exercise of discretion. It is this balance which is at the heart of both the common law finality doctrines and the legislative intent in enacting s. 27(1)(f). In my respectful view, a narrow interpretation of the Tribunal's discretion under s. 27(1)(f) does not reflect the clear legislative intent in enacting the provision.

59 I would allow the appeal and remit the Workers' Compensation Board's motion to dismiss the complaints under s. 27(1)(f) to the Tribunal for reconsideration in light of the principles I set out.

II. Analysis

1. Common Law Finality Doctrines

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

60 The leading authorities from this Court on the application of finality doctrines in the administrative law context are *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.). Both emphasized the importance of balance and discretion in applying these finality doctrines.

61 In *Danyluk*, the question was whether Ms. Danyluk's court action for damages for wrongful dismissal was barred by issue estoppel arising from an adverse decision of an employment standards officer. Writing for a unanimous Court, Binnie J. noted that while finality is a compelling consideration, issue estoppel is a public policy doctrine designed to advance the interests of justice: para. 19. He noted that the common law finality doctrines of cause of action estoppel, issue estoppel, and collateral attack have been extended to the decisions of administrative officers. Importantly, however, he added that in the administrative law context, "the more specific objective [of applying these doctrines] is to balance fairness to the parties with the protection of the administrative decision-making process": para. 21. Thus, even when the traditional elements of the finality doctrines are present, the court must go on to exercise a discretion as to whether or not to allow the claim to proceed. He noted that this discretion existed even when the estoppel was alleged to arise from a court decision, but added that such discretion "is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers": para. 62 (emphasis added); see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (3rd ed. 2010), at pp. 227-29. Binnie J. quoted Finch J.A. (as he then was) to the effect that "[t]he doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case": *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1 (B.C. C.A.), at para. 32, cited in *Danyluk*, at para. 63. Binnie J. then held that it is "an error of principle not to address the factors for and against the exercise of the discretion .... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice": paras. 66-67.

62 To assist decision-makers in achieving the appropriate balance, the Court set out a detailed (although non-exhaustive) list of factors for a court to consider when exercising its discretion: the wording of the statute from which the power to issue the administrative order derives; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision-maker; the circumstances giving rise to the prior administrative proceedings; and the potential injustice (*Danyluk*, at paras. 68-80). I note in passing that this list reflects a much broader conception of the discretion at common law than my colleague Abella J. envisions under s. 27(1)(f). The three factors to be considered set out at para. 37 of her reasons are limited to whether the previous decision-maker had concurrent authority to decide the matter, whether the issue was essentially the same and whether in the earlier proceeding the parties (or their privies) had an opportunity to know the case and have a chance to meet it.

63 Nothing would be served by my reviewing the *Danyluk* factors in detail. It is particularly noteworthy, however, that in that case, the Court refused to apply issue estoppel even though Ms. Danyluk, represented by counsel, had not pursued an administrative review of the employment standards officer's decision and that her claim of substantial injustice turned largely on the facts that she had received neither notice of the employer's allegation nor an opportunity to respond: para. 80. Also of importance was that the legislation did not view the employment standards proceedings as an exclusive forum for complaints of this nature: para. 69. To characterize *Danyluk* as simply emphasizing the importance of finality in litigation is an incomplete account of the Court's approach in that case.

64 I turn next to *Toronto (City) v. C.U.P.E., Local 79*. It concerned the role of the abuse of process doctrine when an arbitrator reviewing an employee's dismissal decided to make his own assessment of the facts relating to the conduct giving rise to a criminal conviction and on which the dismissal was based. Front and centre in Arbour J.'s analysis (on behalf of a unanimous Court on this point) was the importance of maintaining a "judicial balance between finality, fairness, efficiency and authority of judicial decisions": para. 15. Referring to *Danyluk*, she acknowledged that there are many circumstances in which barring relitigation would create unfairness and held that "[t]he discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result": para. 53. She thus emphasized the importance of maintaining a balance between fairness and finality and the need for a flexible discretion to ensure that this is done.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

65 I conclude that the Court's jurisprudence recognizes that, in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness. This is done through the exercise of discretion, taking into account a wide variety of factors which are sensitive to the particular administrative law context in which the case arises and to the demands of substantial justice in the particular circumstances of each case. Finality and requiring parties to use the most appropriate mechanisms for review are of course important considerations. But they are *not* the *only*, or even the most important considerations.

66 The need for this "necessarily broader" discretion (to use Binnie J.'s words at para. 62 of *Danyluk*) in applying the finality doctrines in the administrative law setting is well illustrated by the intricate and changing procedural context in which the complainant workers found themselves in this case. I will use the facts of Mr. Figliola's case as an example.

67 As a result of a workplace injury, Mr. Figliola received a 3.5% functional disability award from the Workers' Compensation Board, consisting of 1% for lumbar spine and 2.5% for chronic pain, determined under the Board's Policy No. 39.01 He appealed the Board's decision to the Review Division which is an internal appeal body. He raised four issues. He complained that his injury had not been properly assessed under the policy and in addition that the policy was patently unreasonable, violated s. 15 of the *Canadian Charter of Rights and Freedoms* and was contrary to the *Human Rights Code*.

68 Subject to Board practices and procedures, the Review Officer may conduct a review as the officer considers appropriate: *Workers Compensation Act*, R.S.B.C. 1996, c. 492 ("Act"), s. 96.4(2). As I understand the record, the review in this case was a paper review on the basis of written submissions on behalf of Mr. Figliola. His employer did not participate and there was no oral hearing. Although the Review Officer was undoubtedly the only appropriate forum in which to review the application of the Board's policy to the facts of Mr. Figliola's case, the role of the Review Officer with respect to his other complaints is much less clear.

69 With respect to Mr. Figliola's claims that the policy was patently unreasonable, the Review Officer found that he had no authority at all. He noted that he was bound by s. 99 of the Act to apply a Board policy that applied to the case. While the appeals tribunal to which appeals lie from the Review Division had authority to consider the validity of a policy (s. 251 of the Act), even it had no authority "to make binding determinations as to the validity of policy. Rather, it is required to refer to the Board of Directors its determinations and is bound by the decision of the Board of Directors as to whether the policy should be maintained or changed" (A.R., vol. I, at p. 6). The Review Officer reasoned that "[i]t would be odd if [the appeals tribunal] was required to go through such a process but the Review Division had even greater authority of considering and deciding whether a policy was valid" (*ibid.*). He therefore concluded that the Review Division had no general jurisdiction to find a policy of the Board invalid on the basis that it was patently unreasonable.

70 As for Mr. Figliola's *Charter* claims, the Review Officer similarly found that he had no jurisdiction to consider them at all. As he put it,

> [a]mendments to the *Act* resulting from the *Administrative Tribunals Act* (the "*ATA*") took effect on December 3, 2004. Those amendments stated that [the appeals tribunal] has no jurisdiction over constitutional questions .... Although this change did not specifically refer to the Review Division, the Review Division considers that the change indicates a statutory intent that it does not have jurisdiction over constitutional questions, including *Charter* questions." [A.R., vol I, at p. 7]

71 Turning finally to Mr. Figliola's claims under the *Human Rights Code*, the Review Officer relied on *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)*, 2006 SCC 14, [2006] 1 S.C.R. 513 (S.C.C.), for his conclusion that he had authority to decline to apply the policy if it conflicted with the *Code*, given the provision in s. 4 of the *Code* that it prevails in the event of conflict with any other enactment. If I am reading the Review Officer's decision correctly, I understand him to reason that his statutory obligation to apply Board policies (s. 99 of the Act) conflicts with the *Code*'s prohibitions against discrimination. However, because the *Code* prevails in the event of conflict, the Review Officer can determine whether the policy is consistent with the *Code*. Assuming, without deciding, that this is the correct view and therefore that the Review Officer can assess the policy's compliance with the *Code*, there remains the question of what remedy

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the Review Officer can fashion if he or she concludes that the policy is not compliant. According to the Board's submissions, the process that was followed at the relevant time (although it was not formalized until later) was this: if the Review Officer found the *Code* challenge had merit, he or she would not apply the policy to the particular case. The policy itself would be referred to the Board "for inclusion in the Policy and Research Division's work plan as a high priority project" (A.F., at para. 59).

72 As noted earlier, the Review Officer's decisions are appealable to the Workers' Compensation Appeal Tribunal ("WCAT"), with certain exclusions not relevant here. Mr. Figliola pursued such an appeal and it was set down for an oral hearing. The WCAT, it should be noted, has extensive authority to review the matter, including hearing evidence; it is not simply an appeal in the usual sense: ss. 245 to 250 of the Act. However, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 ("*ATA*"), was amended effective October 18, 2007, removing the WCAT's jurisdiction to apply the *Code*: *Attorney General Statutes Amendment Act, 2007*, S.B.C. 2007, c. 14, s. 3. Thus in midstream, Mr. Figliola lost the right to a thorough, evidence-based review of the merits of the Review Officer's decision on the human rights issue.

73 The question of what this amendment did to the Review Officer's authority to address the *Code* issues is not before us. However, the amendment taking away the WCAT's jurisdiction would appear to engage the same reasoning that led the Review Officer to conclude that he had no jurisdiction with respect to the attacks on the Board's policy as being patently unreasonably and contrary to the *Charter*. As noted earlier, the Review Officer reasoned that as the WCAT did not have this jurisdiction, it followed that the Review Division did not have that jurisdiction either. Thus it seems (although I need not decide the point) that the *ATA* amendments taking away the WCAT's *Code* jurisdiction not only took away a right of review on the merits, but also had the effect of taking away the Review Officer's authority to test Board policies against the *Code* which he exercised in this case. I recognize that the Board takes the opposite view, maintaining that even though *Code* jurisdiction was removed from the WCAT, a review officer may still review Board policies for consistency with the *Code*. It is not my task to resolve this issue here. One thing is certain, however. The amendments were intended to reverse the effects of the Court's decision in *Tranchemontagne* in relation to the human rights jurisdiction of the WCAT (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 21, 3rd Sess., 38th Parl., May 16, 2007, at pp. 8088-93).

74 I simply wish to note the rather complex, changing and at times uncertain process available in the workers' compensation system to address the human rights issue in this case. To my mind, this underlines the wisdom of applying finality doctrines with considerable flexibility in the administrative law setting. The decision that is relied on by the Board in this case as being a final determination is in fact an internal review decision given after a paper review in which the employer did not participate. Whether the Review Officer had authority to consider the question is at least debatable. (Of course, Mr. Figliola's position before the Review Officer was that he did have authority.) The remedy available in the proceedings was a decision not to apply the policy and refer it to the Board for study. At the time Mr. Figliola raised the point before the Review Officer, there was a right of appeal to the WCAT which included the opportunity to call evidence. In the midst of the proceedings, that right was removed and indeed the whole authority of the WCAT to even consider *Code* issues was removed. It surely cannot be said that there was any legislative intent that the Review Officer was to have exclusive jurisdiction over the human rights questions. *[75]* It seems to me that whether a Review Officer's decision in these circumstances should bar any future consideration by the Human Rights Tribunal of the underlying human rights complaint cannot properly be addressed by simply looking at the three factors identified by my colleague, viz., whether the Review Officer had concurrent jurisdiction to decide a point that was essentially the same as the one before the Human Rights Tribunal and whether there had been an opportunity to know the case to meet and a chance to meet it. There is, as *Danyluk* shows, a great deal more to it than that. The kinds of complications we see in this case are not uncommon in administrative law, although this case may present an unusually cluttered jurisdictional and procedural landscape. The point, to my way of thinking, is that these are the types of factors that call for a highly flexible approach to applying the finality doctrines, a flexibility that in my view exists both at the common law and, as I will discuss next, under s. 27(1)(f) of the *Code*.

B. Statutory Interpretation

76 My colleague is of the view that s. 27(1)(f) confers a "limited" discretion, the exercise of which is to be guided uniquely "by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues": para. 36. Putting aside

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

for the moment whether the discretion is "limited" or "broad", I have difficulty with my colleague's treatment of the relevant factors which she identifies.

77 I repeat the three factors identified as those to be considered: whether the previous adjudicator had concurrent authority to decide the matter, whether the issue decided was essentially the same, and whether the previous process provided an opportunity to the parties or their privies to know the case to be met and have a chance to meet it (Abella J.'s reasons, at para. 37). However, at para. 49 of my colleague's reasons, the question of whether the Review Division's process met the "necessary procedural requirements" is dismissed as "a classic judicial review question and not one within the mandate of a concurrent decision-maker". Thus if I understand correctly, the Tribunal is to consider whether the earlier process was fair but cannot consider at all whether the earlier process met the "necessary procedural requirements." I would have thought that the "necessary procedural requirements" would include the obligation to act fairly. But if that is so, I do not understand how procedural fairness can be at the same time a question beyond the concurrent decision-maker's mandate (para. 49) and a proper factor for the Tribunal to consider in exercising its discretion under s. 27(1)(f) (para. 37).

78 It would also seem to me that whether the adjudicator had authority to decide the matter is generally the sort of issue that is raised on judicial review, but it figures here as a factor to be considered in exercising the Tribunal's discretion (para. 37). In my respectful view, relevant factors cannot simply be dismissed as "classic judicial review question[s]" and therefore "not one within the mandate of a concurrent decision-maker" (para. 49). This was not the approach in *Danyluk*. Rather, all relevant factors need to be considered and weighed in exercising the discretion.

79 Be that as may be, it remains that my colleague's conception of s. 27(1)(f) is that it confers a more limited discretion to apply the finality doctrines than has been recognized at common law with respect to decisions of administrative decisionmakers. With respect, and for the following reasons, I cannot accept this interpretation of the provision.

80 We must interpret the words of the provision "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21.

81 I turn first to the grammatical and ordinary sense of the words. It is difficult for me to imagine broader language to describe a discretionary power than to say the Tribunal may dismiss a complaint if the substance of it has been appropriately dealt with elsewhere. To my way of thinking, the grammatical and ordinary meaning of the words support an expansive view of the discretion, not a narrow one. I agree with my colleague that this provision reflects the principles of the finality doctrines rather than codifies their technical tenets: para. 46. However, as I discussed earlier, the "principles" of those doctrines, especially as they have developed in administrative law, include a search for balance between finality and fairness and a large measure of discretion to allow that balance to be struck in the wide variety of decision-making contexts in which they may have to be applied. The provision's focus on the "substance" of the complaint and the use of the broad words "appropriately dealt with" seem to me clear indications that the breadth of the common law discretion is expanded, not restricted.

82 I turn next to look at the provision in the context of the rest of the section in which it is found. It is suggested that s. 27(1)(f) should be read narrowly because the character of the other six categories of discretion conferred by s. 27(1) relates to clear circumstances in which dismissal would be appropriate. The premise of this view is that all of the other parts of s. 27(1) clearly call for a narrow discretion. Respectfully, I do not accept this premise. It is the case, of course, that some of the other grounds of discretionary dismissal set out in s. 27(1) do indeed arise in circumstances in which it would be demonstrably undesirable to proceed with the complaint: Abella J.'s reasons, at paras. 39-41. For example, it is hard to see how the Tribunal has discretion, in any meaningful sense of the word, to refuse to dismiss a complaint not within its jurisdiction (s. 27(1)(a)), or which discloses no contravention of the *Code* (s. 27(1)(b)). However, not all of the categories set out in s. 27(1) are of this character: see, for example, *Becker v. Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.*, 2006 BCSC 43, 42 Admin. L.R. (4th) 266 (B.C. S.C. [In Chambers]), at paras. 38-42. In my view, the nature of the discretion in the various paragraphs of s. 27(1) is influenced by the content of each paragraph rather than the use of "may" in the section's opening words.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

83 Section 27(1)(d) confers discretion to dismiss where the proceeding would not benefit the person, group or class alleged to have been discriminated against or would not further the purposes of the *Code*. Exercising this discretion requires the Tribunal to consider fundamental questions about the role of human rights legislation and human rights adjudication. The discretion with respect to these matters is thus wide-ranging, grounded in policy and in the Tribunal's specialized human rights mandate (*Becker*, at para. 42). It does not share the character of some of the other more straightforward provisions in s. 27(1), but is similar in breadth to the discretion set out in s. 27(1)(f). In s. 27(1)(f), the breadth of the discretion is apparent from the very general language relating to the "substance" of the complainant and whether it has been dealt with "appropriately". I see nothing in the structure of or the context provided by s. 27(1) read as a whole that suggests a narrow interpretation of the discretion to dismiss where the "substance" of a complaint has been "appropriately" dealt with.

84 A further element of the statutory context is the provision's legislative history. That history confirms that it was the legislature's intent to confer a broad discretion to dismiss or not to dismiss where there had been an earlier proceeding. It is significant that the *Human Rights Code* previously set out in s. 25(3) mandatory factors to take into account in the exercise of this discretion in *deferring* a complaint. The now repealed s. 27(2) provided that those same factors had to be considered when *dismissing* a complaint. These factors included the subject matter and nature of the other proceeding and the adequacy of the remedies available in the other proceeding in the circumstances. However, the legislature removed these specified factors (*Human Rights Code Amendment Act, 2002*, S.B.C. 2002, c. 62, ss. 11 and 12). This is consistent with an intention to confer a more open-ended discretion. That intention is explicit in the *Official Report of Debates of the Legislative Assembly (Handard)*. Indeed, in response to the question as to why the mandatory factors were removed, the Honourable Geoff Plant, then-Attorney General of British Columbia and responsible minister for this legislation, said the following:

> The fundamental issue in any attempt to seek the exercise of this power is whether there is another proceeding capable of appropriately dealing with the substance of the complaint. Our view is that the test is sufficient to ensure that the power is exercised in a case-by-case way in accordance with the principles and purposes of the code. It may well be that the panel members will consider the facts and factors that are now referred to in subsection (3), but we did not think it was necessary to tie the hands of a panel or a tribunal member with those specific criteria.
>
> . . . . .
>
> ... [What the amendment] does is express the principle or the test pretty broadly and pretty generally.
>
> [Emphasis added.]
>
> (*Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 9, 3rd Sess., 37th Parl., October 28, 2002, at p. 4094)

85 The intent was clearly to broaden, not to narrow, the range of factors which a tribunal could consider. I would also add, with respect, that the comments of the Minister of Government Services at second reading of the *Human Rights Amendment Act, 1995*, S.B.C. 1995, c. 42, cited by Abella J., at para. 43 of her reasons, have nothing to do with the scope of discretion under s. 27(1)(f) or its predecessor provisions.

86 A further aspect of the legislative context is the legal framework in which the legislation is to operate. I have developed earlier my understanding of the common law approach to the discretionary application of finality doctrines in the administrative law context. Read against that background, my view is that the provision may most realistically be viewed as further loosening the strictures of the common law doctrines.

87 It is also part of the pre-existing legal framework that under earlier legislation (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 27), the Commissioner of Investigation and Mediation had developed a policy about how to decide whether to proceed with a complaint that had been the subject of other proceedings. That policy called for consideration of factors such as these:

> (1) the administrative fairness of the other proceeding; (2) the expertise of the decision-makers and investigators; (3) whether the case involves important human rights issues which invoke the public interest enunciated by the Code; (4) which forum is more appropriate for discussion of the issues; (5) whether the other proceeding protects the complainant against the discriminatory practice; and (6) whether there is a conflict between the goals and intent of the Code and the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> other proceedings, and practical issues including the time which each procedure would take and the consequences in terms of emotional strain, personal relations and long term outcome of processes.
>
> (D. K. Lovett and A. R. Westmacott, "Human Rights Review: A Background Paper" (2001) (online), at p. 100, fn. 128)

88 The use of the broad language employed in s. 27(1)(f), introduced into the pre-existing practice, does not support the view that the discretion was narrowly conceived; it supports the opposite inference.

89 A final contextual element relates to the similarly worded power to defer a complaint pending its resolution in another forum under s. 25(2) of the *Code*. That provision reads as follows:

> **25.** ...
>
> (2) If at any time after a complaint is filed a member or panel determines that another proceeding is capable of appropriately dealing with the substance of a complaint, the member or panel may defer further consideration of the complaint until the outcome of the other proceeding.

90 The power to defer a complaint is not based on the finality doctrines because when deferral is being considered there has been no other final decision. Nonetheless, the legislature chose to use essentially the same language to confer discretion to defer as it did to confer the discretion to dismiss. The repetition of this language in s. 27(1)(f) suggests to me that a broad and flexible discretion was intended.

91 Looking at the text, context and purpose of the provision, I conclude that the discretion conferred under s. 27(1)(f) was conceived of as a broad discretion.

C. Exercising the Discretion

92 As I see it, s. 27(1)(f) broadens the common law approach to the finality doctrines in two main ways. By asking whether the substance of the complaint has been addressed elsewhere, the focus must be on the substance of the complaint — its "essential character" to borrow a phrase from *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.), at para. 52; and *Villella v. Vancouver (City)*, 2005 BCHRT 405, [2005] B.C.H.R.T.D. No. 405 (B.C. Human Rights Trib.), at para. 21. The focus is not on the technical requirements of the common law finality doctrines, such as identity of parties, mutuality, identity of claims and so forth. The section compels attention to the substance of the matter, not to technical details of pleading or form. If the Tribunal concludes that the substance of the complaint has not in fact been dealt with previously, then its inquiry under s. 27(1)(f) is completed and there is no basis to dismiss the complaint. Where the substance of the matter has been addressed previously, the important interests in finality and adherence to proper review mechanisms are in play. It then becomes necessary for the Tribunal to exercise its discretion, recognizing that those interests must be given significant weight.

93 Faced with a complaint, the substance of which has been addressed elsewhere, the Tribunal must decide whether there is something in the circumstances of the particular case to make it inappropriate to apply the general principle that the earlier resolution of the matter should be final. Other than by providing that the previous dealing with the substance of the complaint has been appropriate, the statute is silent on the factors that may properly be considered by the Tribunal in exercising its discretion to dismiss or not to dismiss. This exercise of discretion is "necessarily case specific and depends on the entirety of the circumstances": *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (Ont. C.A.), at paras. 38 and 43, cited with approval in *Danyluk*, at para. 63. *Danyluk*, however, provides a useful starting point for assembling a non-exhaustive group of relevant considerations.

94 The mandate of the previous decision-maker and of the Tribunal should generally be considered. Is there a discernable legislative intent that the other decision-maker was intended to be an exclusive forum or, on the contrary, that the opposite appears to have been contemplated? The purposes of the legislative schemes should also generally be taken into account. For example, if the focus and purpose of the earlier administrative proceeding was entirely different from proceedings before the Human Rights Tribunal, there may be reason to question the appropriateness of giving conclusive weight to the outcome of those earlier proceedings. The existence of review mechanisms for the earlier decision is also a relevant consideration. Failure

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum. However, as *Danyluk* shows, this is not always a decisive consideration: paras. 74 and 80. The Tribunal may also consider the safeguards available to the parties in the earlier administrative proceedings. Such factors as the availability of evidence and the opportunity of the party to fully present his or her case should be taken into account. A further relevant consideration is the expertise of the earlier administrative decision-maker. As Binnie J. noted in *Danyluk*, the rule against collateral attack has long taken this factor into account. While not conclusive, the fact that the earlier decision is "based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'etre*" may suggest that it did not appropriately deal with the matter: para. 77, citing *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), at para. 50. The circumstances giving rise to the prior administrative proceedings may also be a relevant consideration. In *Danyluk*, for example, the fact that the employee had undertaken the earlier administrative proceedings at a time of "personal vulnerability" was taken into account: para. 78.

95 The most important consideration, however, is the last one noted by Binnie J. in *Danyluk*, at para. 80: whether giving the earlier proceeding final and binding effect will work an injustice. If there is substantial injustice, or a serious risk of it, poor procedural choices by the complainant should generally not be fatal to an appropriate consideration of his or her complaint on its merits.

96 The Tribunal's approach to the s. 27(1)(f) discretion is in line with the *Danyluk* factors. For example, in *Villella*, the Tribunal discussed a number of the factors which it should consider. It emphasized that the question was not whether, in its view, the earlier proceeding was correctly decided or whether the process was the same as the Tribunal's process. The Tribunal recognized that it is the clear legislative intent of s. 25 that proceedings before the Tribunal are not the sole means through which human rights issues can be appropriately addressed. However, the Tribunal also noted that s. 27(1)(f) obliged it to examine the substance of the matter and not to simply "rubber stamp" the previous decision: para. 19. This requires looking at such factors as the issues raised in the earlier proceedings; whether those proceedings were fair; whether the complainant had been adequately represented; whether the applicable human rights principles had been canvassed; whether an appropriate remedy had been available; and whether the complainant chose the forum for the earlier proceedings. This flexible and global assessment seems to me to be exactly the sort of approach called for by s. 27(1)(f).

D. Application

97 At the end of the day, I agree with Abella J.'s conclusion that the Tribunal's decision not to dismiss the complaint under s. 27(1)(f) was patently unreasonable within the meaning of s. 59 of the *ATA*. For the purposes of that section, a discretionary decision is patently unreasonable if, among other things, it "is based entirely or predominantly on irrelevant factors" (s. 59(4)(c)), or "fails to take statutory requirements into account" (s. 59(4)(d)). While in my view, the Tribunal was entitled to take into account the alleged procedural limitations of the proceedings before the Review Officer, it committed a reversible error by basing its decision on the alleged lack of independence of the Review Officer and by ignoring the potential availability of judicial review to remedy any procedural defects. More fundamentally, it failed to consider whether the "substance" of the complaint had been addressed and thereby failed to take this threshold statutory requirement into account. It also, in my view, failed to have regard to the fundamental fairness or otherwise of the earlier proceeding. All of this led the Tribunal to give no weight at all to the interests of finality and to largely focus instead on irrelevant considerations of whether the strict elements of issue estoppel were present.

98 However, I do not agree with my colleague's proposed disposition of the appeal. In her reasons, Abella J. would allow the appeal, set aside the Tribunal's decision and dismiss the complaints. In my opinion, the appeal should be allowed and, in accordance with what I understand to be the general rule in British Columbia, the Workers' Compensation Board's application to dismiss the complaints under s. 27(1)(f) should be remitted to the Tribunal for reconsideration. As the Court of Appeal held in *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49, 299 B.C.A.C. 129 (B.C. C.A.) at para. 51: "the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a rehearing or reconsideration before the administrative decision-maker, unless exceptional circumstances indicate the court should make the decision the legislation has assigned to the administrative body" (see also *Allman v. Amacon Property Management Services*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Inc., 2007 BCCA 302, 243 B.C.A.C. 52 (B.C. C.A.)). This case does not present exceptional circumstances justifying diverging from this general rule.

99 I would therefore allow the appeal without costs and remit the Workers' Compensation Board's application under s. 27(1)(f) to the Tribunal for reconsideration.

Appeal allowed.

Pourvoi accueilli.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 15

2010 SCC 62
Supreme Court of Canada

Canada (Attorney General) v. TeleZone Inc.

2010 CarswellOnt 9657, 2010 CarswellOnt 9658, 2010 SCC 62, [2010] 3 S.C.R. 585, [2010] A.C.S. No. 62, [2010] S.C.J. No. 62, 108 O.R. (3d) 239, 13 Admin. L.R. (5th) 24, 196 A.C.W.S. (3d) 98, 273 O.A.C. 1, 327 D.L.R. (4th) 527, 410 N.R. 1, 56 C.E.L.R. (3d) 1, 96 C.L.R. (3d) 1, J.E. 2011-18

Attorney General of Canada, Appellant and TeleZone Inc., Respondent

Binnie, LeBel, Deschamps, Abella, Charron, Rothstein, Cromwell JJ.

Heard: January 20-21, 2010
Judgment: December 23, 2010
Docket: 33041

Proceedings: reversed in part *TeleZone Inc. v. Canada (Attorney General)* (2008), 245 O.A.C. 91, 40 C.E.L.R. (3d) 183, 86 Admin. L.R. (4th) 163, *(*sub nom. *G-Civil Inc. v. Canada (Minister of Public Works & Government Services))* 303 D.L.R. (4th) 626, 2008 ONCA 892, 2008 CarswellOnt 7826, 94 O.R. (3d) 19 ((Ont. C.A.)); affirming *TeleZone Inc. v. Canada (Attorney General)* (2007), 88 O.R. (3d) 173, 2007 CarswellOnt 7847 ((Ont. S.C.J.)); and affirming *Fielding Chemical Technologies Inc. v. Canada (Attorney General)* (2007), 30 C.E.L.R. (3d) 281, 2007 CarswellOnt 3263 ((Ont. S.C.J.)); and reversing *McArthur v. Canada (Attorney General)* (2006), 2006 CarswellOnt 9820 ((Ont. S.C.J.)); and reversing *G-Civil Inc. v. Canada (Minister of Public Works & Government Services)* (2006), 2006 CarswellOnt 8274, 58 C.L.R. (3d) 86 ((Ont. S.C.J.))

Counsel: Christopher M. Rupar, Alain Préfontaine, Bernard Letarte, for Appellant
Peter F.C. Howard, Patrick J. Monahan, Eliot N. Kolers, Nicholas McHaffie, for Respondent

Subject: Civil Practice and Procedure; Public; Estates and Trusts; Environmental; Torts; Contracts

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Lack of jurisdiction

T Inc. applied for telecommunications licence, in response to call for licence applications and pursuant to policy statement — Minister of Industry Canada issued order granting licences to four other applicants — T Inc. brought action against Crown in provincial Superior Court of Justice — Crown's preliminary motion to dismiss action for want of jurisdiction, on basis that quashing of Minister's order through judicial review was condition precedent to action, was dismissed — Crown's appeal was dismissed, in judgment also dealing with appeals from other cases in which Crown made similar motions — Crown appealed — Appeal dismissed — T Inc. should not be forced to detour to Federal Court for judicial review application if it was content to let Minister's order stand — Possibility of different damages claims proceeding in different provinces arising out of same federal government decision must have been considered by Parliament in granting concurrent jurisdiction to superior courts — Parliament's intent, as expressed in text, context and purposes of Federal Courts Act, did not require awkward and duplicative two-court procedure for all damages claims challenging federal decisions — Such derogation from jurisdiction of provincial superior courts would require clear and explicit statutory language that was not present in Federal Courts Act — T Inc.'s action was not collateral attack on Minister's order, as financial losses allegedly consequent on that order constituted foundation of damages claim — Whether Minister acted under statutory authority precluding compensation for consequent losses was matter of defence rather than jurisdiction.

Public law --- Crown — Practice and procedure involving Crown in right of Canada — Forum for proceedings — In proceedings against Crown — General jurisdiction of Federal Court

T Inc. applied for telecommunications licence, in response to call for licence applications and pursuant to policy statement — Minister of Industry Canada issued order granting licences to four other applicants — T Inc. brought action against Crown in provincial Superior Court of Justice — Crown's preliminary motion to dismiss action for want of jurisdiction, on basis that

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

quashing of Minister's order through judicial review was condition precedent to action, was dismissed — Crown's appeal was dismissed, in judgment also dealing with appeals from other cases in which Crown made similar motions — Crown appealed — Appeal dismissed — T Inc. should not be forced to detour to Federal Court for judicial review application if it was content to let Minister's order stand — Possibility of different damages claims proceeding in different provinces arising out of same federal government decision must have been considered by Parliament in granting concurrent jurisdiction to superior courts — Parliament's intent, as expressed in text, context and purposes of Federal Courts Act, did not require awkward and duplicative two-court procedure for all damages claims challenging federal decisions — Such derogation from jurisdiction of provincial superior courts would require clear and explicit statutory language that was not present in Federal Courts Act — T Inc.'s action was not collateral attack on Minister's order, as financial losses allegedly consequent on that order constituted foundation of damages claim — Whether Minister acted under statutory authority precluding compensation for consequent losses was matter of defence rather than jurisdiction.

Judges and courts --- Jurisdiction — Exchequer and Federal Courts — Concurrent jurisdiction

T Inc. applied for telecommunications licence, in response to call for licence applications and pursuant to policy statement — Minister of Industry Canada issued order granting licences to four other applicants — T Inc. brought action against Crown in provincial Superior Court of Justice — Crown's preliminary motion to dismiss action for want of jurisdiction, on basis that quashing of Minister's order through judicial review was condition precedent to action, was dismissed — Crown's appeal was dismissed, in judgment also dealing with appeals from other cases in which Crown made similar motions — Crown appealed — Appeal dismissed — T Inc. should not be forced to detour to Federal Court for judicial review application if it was content to let Minister's order stand — Possibility of different damages claims proceeding in different provinces arising out of same federal government decision must have been considered by Parliament in granting concurrent jurisdiction to superior courts — Parliament's intent, as expressed in text, context and purposes of Federal Courts Act, did not require awkward and duplicative two-court procedure for all damages claims challenging federal decisions — Such derogation from jurisdiction of provincial superior courts would require clear and explicit statutory language that was not present in Federal Courts Act — T Inc.'s action was not collateral attack on Minister's order, as financial losses allegedly consequent on that order constituted foundation of damages claim — Whether Minister acted under statutory authority precluding compensation for consequent losses was matter of defence rather than jurisdiction.

Public law --- Crown — Practice and procedure involving Crown in right of Canada — Miscellaneous

T Inc. applied for telecommunications licence, in response to call for licence applications and pursuant to policy statement — Minister of Industry Canada issued order granting licences to four other applicants — T Inc. brought action against Crown in provincial Superior Court of Justice — Crown's preliminary motion to dismiss action for want of jurisdiction, on basis that quashing of Minister's order through judicial review was condition precedent to action, was dismissed — Crown's appeal was dismissed, in judgment also dealing with appeals from other cases in which Crown made similar motions — Crown appealed — Appeal dismissed — T Inc. should not be forced to detour to Federal Court for judicial review application if it was content to let Minister's order stand — Possibility of different damages claims proceeding in different provinces arising out of same federal government decision must have been considered by Parliament in granting concurrent jurisdiction to superior courts — Parliament's intent, as expressed in text, context and purposes of Federal Courts Act, did not require awkward and duplicative two-court procedure for all damages claims challenging federal decisions — Such derogation from jurisdiction of provincial superior courts would require clear and explicit statutory language that was not present in Federal Courts Act — T Inc.'s action was not collateral attack on Minister's order, as financial losses allegedly consequent on that order constituted foundation of damages claim — Whether Minister acted under statutory authority precluding compensation for consequent losses was matter of defence rather than jurisdiction.

Procédure civile --- Jugement rendu sans procès — Arrêt des procédures ou rejet de l'action — Motifs — Absence de compétence

T Inc. a soumis une demande de licence en télécommunication, à la suite d'une invitation à soumettre des demandes de licence et en conformité avec un énoncé de politique — Ministre d'Industrie Canada a émis une ordonnance octroyant des licences à quatre autres candidats — T Inc. a déposé une action à l'encontre de la Couronne devant la Cour supérieure de la province — Requête préliminaire de la Couronne visant le rejet de l'action pour défaut de compétence, soutenant que l'on devait obtenir l'annulation de la décision du ministre par voie de contrôle judiciaire avant d'intenter un recours civil contre la Couronne, a été rejetée — Appel interjeté par la Couronne a été rejeté dans le cadre d'un jugement portant sur d'autres affaires dans lesquelles la Couronne avait déposé des requêtes similaires — Couronne a formé un pourvoi — Pourvoi rejeté — Si T Inc. ne s'opposait pas à

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

ce que la décision du ministre continue de s'appliquer, il n'existait aucune raison logique de lui imposer un détour devant la Cour fédérale pour le contrôle judiciaire de la décision — Législateur a sûrement tenu compte de la possibilité que différents recours en dommages-intérêts découlant des mêmes décisions de l'administration fédérale soient instruits dans différentes provinces lorsqu'il a conféré aux cours supérieures une compétence concurrente — Il n'était pas de l'intention du législateur, telle qu'elle se dégage du texte, du contexte et des objets de la Loi sur les Cours fédérales, d'exiger une procédure astreignante faisant appel à deux juridictions différentes pour tous les recours en dommages-intérêts qui mettent en cause la validité d'une décision fédérale — Compétence des cours supérieures provinciales ne pourrait être ainsi amoindrie que si une disposition législative claire le prévoyait expressément, ce qui n'était pas le cas de la Loi sur les Cours fédérales — Recours de T Inc. ne constituait pas une contestation indirecte de l'ordonnance du ministre, puisque les assises de sa demande de dommages-intérêts étaient les pertes pécuniaires qui en auraient résulté — Question de savoir si le ministre exerçait un pouvoir d'origine législative qui excluait l'indemnisation des pertes pouvant en résulter se rapportait à la théorie de la défense et non pas à la compétence.

Droit public --- Couronne — Procédure impliquant la Couronne du chef du Canada — Forum approprié — Pour les procédures à l'encontre de la Couronne — Compétence générale de la Cour fédérale

T Inc. a soumis une demande de licence en télécommunication, à la suite d'une invitation à soumettre des demandes de licence et en conformité avec un énoncé de politique — Ministre d'Industrie Canada a émis une ordonnance octroyant des licences à quatre autres candidats — T Inc. a déposé une action à l'encontre de la Couronne devant la Cour supérieure de la province — Requête préliminaire de la Couronne visant le rejet de l'action pour défaut de compétence, soutenant que l'on devait obtenir l'annulation de la décision du ministre par voie de contrôle judiciaire avant d'intenter un recours civil contre la Couronne, a été rejetée — Appel interjeté par la Couronne a été rejeté dans le cadre d'un jugement portant sur d'autres affaires dans lesquelles la Couronne avait déposé des requêtes similaires — Couronne a formé un pourvoi — Pourvoi rejeté — Si T Inc. ne s'opposait pas à ce que la décision du ministre continue de s'appliquer, il n'existait aucune raison logique de lui imposer un détour devant la Cour fédérale pour le contrôle judiciaire de la décision — Législateur a sûrement tenu compte de la possibilité que différents recours en dommages-intérêts découlant des mêmes décisions de l'administration fédérale soient instruits dans différentes provinces lorsqu'il a conféré aux cours supérieures une compétence concurrente — Il n'était pas de l'intention du législateur, telle qu'elle se dégage du texte, du contexte et des objets de la Loi sur les Cours fédérales, d'exiger une procédure astreignante faisant appel à deux juridictions différentes pour tous les recours en dommages-intérêts qui mettent en cause la validité d'une décision fédérale — Compétence des cours supérieures provinciales ne pourrait être ainsi amoindrie que si une disposition législative claire le prévoyait expressément, ce qui n'était pas le cas de la Loi sur les Cours fédérales — Recours de T Inc. ne constituait pas une contestation indirecte de l'ordonnance du ministre, puisque les assises de sa demande de dommages-intérêts étaient les pertes pécuniaires qui en auraient résulté — Question de savoir si le ministre exerçait un pouvoir d'origine législative qui excluait l'indemnisation des pertes pouvant en résulter se rapportait à la théorie de la défense et non pas à la compétence.

Juges et tribunaux --- Compétence — Cours d'échiquier et Cours fédérales — Compétence concurrente

T Inc. a soumis une demande de licence en télécommunication, à la suite d'une invitation à soumettre des demandes de licence et en conformité avec un énoncé de politique — Ministre d'Industrie Canada a émis une ordonnance octroyant des licences à quatre autres candidats — T Inc. a déposé une action à l'encontre de la Couronne devant la Cour supérieure de la province — Requête préliminaire de la Couronne visant le rejet de l'action pour défaut de compétence, soutenant que l'on devait obtenir l'annulation de la décision du ministre par voie de contrôle judiciaire avant d'intenter un recours civil contre la Couronne, a été rejetée — Appel interjeté par la Couronne a été rejeté dans le cadre d'un jugement portant sur d'autres affaires dans lesquelles la Couronne avait déposé des requêtes similaires — Couronne a formé un pourvoi — Pourvoi rejeté — Si T Inc. ne s'opposait pas à ce que la décision du ministre continue de s'appliquer, il n'existait aucune raison logique de lui imposer un détour devant la Cour fédérale pour le contrôle judiciaire de la décision — Législateur a sûrement tenu compte de la possibilité que différents recours en dommages-intérêts découlant des mêmes décisions de l'administration fédérale soient instruits dans différentes provinces lorsqu'il a conféré aux cours supérieures une compétence concurrente — Il n'était pas de l'intention du législateur, telle qu'elle se dégage du texte, du contexte et des objets de la Loi sur les Cours fédérales, d'exiger une procédure astreignante faisant appel à deux juridictions différentes pour tous les recours en dommages-intérêts qui mettent en cause la validité d'une décision fédérale — Compétence des cours supérieures provinciales ne pourrait être ainsi amoindrie que si une disposition législative claire le prévoyait expressément, ce qui n'était pas le cas de la Loi sur les Cours fédérales — Recours de T Inc. ne constituait pas une contestation indirecte de l'ordonnance du ministre, puisque les assises de sa demande de dommages-intérêts étaient les pertes

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

pécuniaires qui en auraient résulté — Question de savoir si le ministre exerçait un pouvoir d'origine législative qui excluait l'indemnisation des pertes pouvant en résulter se rapportait à la théorie de la défense et non pas à la compétence.

Droit public --- Couronne — Procédure impliquant la Couronne du chef du Canada — Divers

T Inc. a soumis une demande de licence en télécommunication, à la suite d'une invitation à soumettre des demandes de licence et en conformité avec un énoncé de politique — Ministre d'Industrie Canada a émis une ordonnance octroyant des licences à quatre autres candidats — T Inc. a déposé une action à l'encontre de la Couronne devant la Cour supérieure de la province — Requête préliminaire de la Couronne visant le rejet de l'action pour défaut de compétence, soutenant que l'on devait obtenir l'annulation de la décision du ministre par voie de contrôle judiciaire avant d'intenter un recours civil contre la Couronne, a été rejetée — Appel interjeté par la Couronne a été rejeté dans le cadre d'un jugement portant sur d'autres affaires dans lesquelles la Couronne avait déposé des requêtes similaires — Couronne a formé un pourvoi — Pourvoi rejeté — Si T Inc. ne s'opposait pas à ce que la décision du ministre continue de s'appliquer, il n'existait aucune raison logique de lui imposer un détour devant la Cour fédérale pour le contrôle judiciaire de la décision — Législateur a sûrement tenu compte de la possibilité que différents recours en dommages-intérêts découlant des mêmes décisions de l'administration fédérale soient instruits dans différentes provinces lorsqu'il a conféré aux cours supérieures une compétence concurrente — Il n'était pas de l'intention du législateur, telle qu'elle se dégage du texte, du contexte et des objets de la Loi sur les Cours fédérales, d'exiger une procédure astreignante faisant appel à deux juridictions différentes pour tous les recours en dommages-intérêts qui mettent en cause la validité d'une décision fédérale — Compétence des cours supérieures provinciales ne pourrait être ainsi amoindrie que si une disposition législative claire le prévoyait expressément, ce qui n'était pas le cas de la Loi sur les Cours fédérales — Recours de T Inc. ne constituait pas une contestation indirecte de l'ordonnance du ministre, puisque les assises de sa demande de dommages-intérêts étaient les pertes pécuniaires qui en auraient résulté — Question de savoir si le ministre exerçait un pouvoir d'origine législative qui excluait l'indemnisation des pertes pouvant en résulter se rapportait à la théorie de la défense et non pas à la compétence.

Industry Canada issued a call for applications for personal communication services (PCS) licences, and released a statement as to the applicable policy and procedural framework. T Inc. applied for a PCS licence. The Minister of Industry Canada issued an order granting PCS licences to four other applicants.

T Inc. brought an action against the federal Crown in the provincial Superior Court of Justice. The Crown's preliminary motion to dismiss the action for want of jurisdiction, on the basis that having the Minister's order quashed through judicial review was a condition precedent to a civil suit, was dismissed.

The Crown's appeal was dismissed, along with appeals from three other cases in which the Crown made similar motions. The Crown appealed.

Held: The appeal was dismissed.

Per Binnie J. (LeBel, Deschamps, Abella, Charron, Rothstein, Cromwell JJ. concurring): If T Inc. was content to let the Minister's order stand, there was no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application. Access to justice required that claimants be permitted to pursue their chosen remedies directly and as far as possible, without procedural detours. The possibility of different damages claims proceeding in different provinces arising out of the same federal government decision must have been considered by Parliament when it granted concurrent jurisdiction in such cases to the superior courts. Parliament's intent, as expressed in the text, context and purposes of the Federal Courts Act, did not require an awkward and duplicative two-court procedure for all damages claims directly or indirectly challenging the validity of federal decisions.

The public purposes of judicial review were fundamentally different from those underlying private law claims, and so there was no practical benefit to a two-court procedure for a litigant who wanted compensation rather than the reversal of a government decision. Any derogation from the jurisdiction of the provincial superior courts would require clear and explicit statutory language that was lacking in the Federal Courts Act on this issue. The Federal Courts Act allows parties to institute civil claims against the federal Crown in provincial courts, other than to seek judicial review remedies.

T Inc.'s action was not a collateral attack on the Minister's order, as the financial losses allegedly consequent on that order constituted the foundation of the damages claim. Whether the Minister acted under statutory authority precluding compensation for any consequent losses was a matter of defence rather than jurisdiction. Where a pleading alleged elements of a private cause of action, the provincial superior court should generally not decline jurisdiction. T Inc.'s action was dominated by private law considerations and there was nothing in the Federal Courts Act to prevent the provincial superior court from adjudicating the claim.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Industrie Canada a lancé une invitation à soumettre des demandes de licences de services de communications personnelles (SCP) et a publié l'énoncé de politique devant servir de cadre aux demandes des fournisseurs potentiels. T Inc. a soumis une demande. Le ministre d'Industrie Canada a émis une ordonnance octroyant des licences SCP à quatre autres candidats.

T Inc. a déposé une action à l'encontre de la Couronne fédérale devant la Cour supérieure de la province. La requête préliminaire de la Couronne visant le rejet de l'action pour défaut de compétence, soutenant que l'on devait obtenir l'annulation de la décision du ministre par voie de contrôle judiciaire avant d'intenter un recours civil contre la Couronne, a été rejetée.

L'appel interjeté par la Couronne a été rejeté, de même que ses appels dans trois autres affaires où elle avait déposé des requêtes similaires. La Couronne a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Binnie, J. (LeBel, Deschamps, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Si T Inc. ne s'opposait pas à ce que la décision du ministre continue de s'appliquer, il n'existait aucune raison logique de lui imposer l'étape supplémentaire d'un détour devant la Cour fédérale pour le contrôle judiciaire de la décision. L'accès à la justice exige que le demandeur puisse exercer directement le recours qu'il a choisi et, autant que possible, sans détours procéduraux. Le législateur a sûrement tenu compte de la possibilité que différents recours en dommages-intérêts découlant des mêmes décisions de l'administration fédérale soient instruits dans différentes provinces lorsqu'il a conféré aux cours supérieures une compétence concurrente dans de tels cas. Il n'était pas de l'intention du législateur, telle qu'elle se dégage du texte, du contexte et des objets de la Loi sur les Cours fédérales, d'exiger une procédure astreignante faisant appel à deux juridictions différentes pour tous les recours en dommages-intérêts qui mettent directement ou indirectement en cause la validité d'une décision fédérale.

Les objectifs publics d'un contrôle judiciaire se distinguaient fondamentalement de ceux qui sous-tendaient les instances en matière de droit privé, de sorte qu'il n'y avait aucun intérêt pratique, pour la partie qui demande une indemnité plutôt que l'annulation d'une décision de l'administration publique, à suivre la procédure faisant appel à deux juridictions. La compétence des cours supérieures provinciales ne pourrait être amoindrie que si une disposition législative claire le prévoyait expressément, ce qui n'était pas le cas de la Loi sur les Cours fédérales relativement à la présente question. La Loi sur les Cours fédérales permet d'intenter des poursuites civiles contre la Couronne fédérale devant les cours supérieures provinciales, plutôt que des demandes en contrôle judiciaire.

Le recours de T Inc. ne constituait pas une contestation indirecte de l'ordonnance du ministre, puisque les assises de sa demande de dommages-intérêts étaient les pertes pécuniaires qui en auraient résulté. La question de savoir si le ministre exerçait un pouvoir d'origine législative qui excluait l'indemnisation des pertes pouvant en résulter se rapportait à la théorie de la défense et non pas à la compétence. Lorsqu'on allègue les éléments d'une cause d'action en droit privé dans son argumentation devant une cour supérieure provinciale, celle-ci ne doit généralement pas décliner compétence. Le recours de T Inc. mettait principalement en jeu des questions de droit privé et aucune disposition de la Loi sur les Cours fédérales n'empêchait la cour supérieure provinciale de statuer sur la demande.

APPEAL by Crown from judgment reported at *TeleZone Inc. v. Canada (Attorney General)* (2008), 245 O.A.C. 91, 40 C.E.L.R. (3d) 183, 86 Admin. L.R. (4th) 163, *(*sub nom. *G-Civil Inc. v. Canada (Minister of Public Works & Government Services))* 303 D.L.R. (4th) 626, 2008 ONCA 892, 2008 CarswellOnt 7826, 94 O.R. (3d) 19 (Ont. C.A.), ruling on jurisdiction of provincial superior courts to hear civil suits involving federal government decisions that had not been quashed through judicial review.

POURVOI de la Couronne à l'encontre d'un jugement publié à *TeleZone Inc. v. Canada (Attorney General)* (2008), 245 O.A.C. 91, 40 C.E.L.R. (3d) 183, 86 Admin. L.R. (4th) 163, *(*sub nom. *G-Civil Inc. v. Canada (Minister of Public Works & Government Services))* 303 D.L.R. (4th) 626, 2008 ONCA 892, 2008 CarswellOnt 7826, 94 O.R. (3d) 19 (Ont. C.A.), ayant déterminé la compétence des cours supérieures provinciales d'instruire des poursuites civiles impliquant des décisions du gouvernement fédéral n'ayant pas fait l'objet d'un contrôle judiciaire.

***Binnie J.*:**

1 TeleZone Inc. claims it was wronged by the decision of the Minister of Industry Canada that rejected its application for a licence to provide telecommunications services. It seeks compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses of $250 million. It pleads breach of contract, negligence, and, in the alternative, unjust enrichment arising out of monies it had thrown away on the application.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2 The Attorney General challenges the jurisdiction of the Superior Court to proceed with the claim for compensation unless and until TeleZone obtains from the Federal Court of Canada an order quashing the Minister's decision. TeleZone's claim, he says, constitutes an impermissible collateral attack on the Minister's order. Such a collateral attack is barred, he argues, by the grant to the Federal Court of *exclusive* judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals — *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18. The Attorney General relies on a line of cases in the Federal Court of Appeal to this effect, giving particular prominence to *Grenier c. Canada (Procureur général)*, 2005 FCA 348, [2006] 2 F.C.R. 287 (F.C.A.), hence the "*Grenier* principle".

3 The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. The *Grenier* principle would shield the Crown from private law damages involving any of these people or entities in respect of losses caused by unlawful government decision making without first passing through the Federal Court. Such a bottleneck was manifestly not the intention of Parliament when it enacted the judicial review provisions of the *Federal Courts Act*.

4 The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts "in all cases in which relief is claimed against the Crown" as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the "lawfulness" of the government decision said to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction — not concurrent, i.e., subordinate to the Federal Court's decision on judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.

5 The Ontario Court of Appeal rejected the Attorney General's position, and in my respectful opinion, it was correct to do so. *Grenier c. Canada (Procureur général)* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.

6 In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. That being the case, the Superior Court has jurisdiction to proceed. The Ontario Superior Court ((2007), 88 O.R. (3d) 173 (Ont. S.C.J.)) and the Ontario Court of Appeal (2008 ONCA 892, 94 O.R. (3d) 19 (Ont. C.A.)) so held. I agree. I would dismiss the appeal.

I. Facts

7 The alleged faults of the Minister of Industry Canada in dealing with the application under the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are detailed in the amended Statement of Claim. For present purposes, we must take TeleZone's allegations as capable of proof.

8 TeleZone was created in 1992 with the ultimate goal of obtaining a licence to provide personal communication services ("PCS") — essentially a cell phone network. In December 1992, as a preliminary step toward this goal, TeleZone obtained a

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

licence to provide personal cordless telephone service ("PCTS"). Between 1993 and 1995, TeleZone alleges that it kept Industry Canada appraised of its efforts to raise capital and acquire the necessary expertise to provide PCS services. TeleZone says that Industry Canada encouraged it to continue these efforts.

9 In June 1995, Industry Canada issued a call for PCS licence applications ("the Call"), and released a document setting out the policy and procedural framework within which potential service providers could shape their applications (the "Policy Statement"). The Policy Statement provided that Industry Canada would grant up to six PCS licences on the basis of criteria it set out. TeleZone alleges that Industry Canada promoted a general policy in favour of awarding more rather than fewer licences to encourage competition and consumer choice. TeleZone governed itself accordingly.

10 Article 9.1 of the Call created a three-step application process: (1) expressions of interest by potential service providers; (2) detailed applications by potential service providers; and (3) the announcement and awarding of PCS licences by Industry Canada. Articles 9.4 to 9.5.6 set out the criteria that would be used to evaluate the applications. The Call did not explicitly reserve to Industry Canada the right to consider additional factors. TeleZone alleges that Industry Canada was prohibited from considering any criteria beyond the factors set out in the Call.

11 In September 1995 TeleZone submitted its detailed application for a PCS licence to Industry Canada, which was prepared, it says, at a cost of approximately $20 million. In December 1995, Industry Canada announced its decision regarding the PCS licence applications. There were only four successful applicants. TeleZone was not among them.

12 The amended statement of claim pleads that it was either an express or implied term of the Policy Statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria (para. 12). TeleZone says that its application satisfied all the criteria in the Call. Accordingly, it says, the Minister must have considered factors other than those in the Call when it rejected TeleZone's application (para. 17). These other factors were not disclosed to TeleZone.

13 On the contractual branch of its case, TeleZone argues that the tendering process gave rise to a tendering contract (Contract A) which imposed an obligation on Industry Canada to act in accordance with the Call and the Policy Statement and to treat all applicants fairly and in good faith in awarding the PCS licences (R.F., at para. 133). TeleZone submits that the Crown breached "Contract A" by (1) granting fewer licences than it represented would be awarded; (2) not adhering to the requirements of the Call including the listed criteria (para. 134); and (3) failing to conform to a duty of care and a duty to act in good faith (para. 135).

14 In its amended statement of claim, TeleZone does not seek to impugn the Minister's decision to award the licences. TeleZone does not seek a licence for itself or to remove licences from the successful applicants; it simply seeks damages. Accordingly, TeleZone submits that whether or not the licences were validly issued to the other applicants is irrelevant because under the Call and Policy Statement, there was still room for two more PCS licences and TeleZone only takes issue with the conduct of the Crown *vis-à-vis* TeleZone itself (para. 136).

II. Judicial History

A. Ontario Superior Court of Justice (Morawetz J.), (2007), 88 O.R. (3d) 173 (Ont. S.C.J.)

15 On a preliminary motion to dismiss TeleZone's action for want of jurisdiction, the Attorney General argued that TeleZone must first have the Minister's order quashed on judicial review in the Federal Court as a condition precedent to a civil suit against the Crown. TeleZone countered that its claim is based on causes of action that are distinct from an application for judicial review. It does not seek to set aside the licences. It seeks damages for negligence, breach of contract, or unjust enrichment. Morawetz J. dismissed the objection because, in his view, it was not plain and obvious that TeleZone's claim in the Superior Court would fail.

B. The Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19 (Ont. C.A.)

16 Borins J.A., writing for a unanimous court, held that s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown. The Ontario Superior Court, as a court of general and inherent jurisdiction, may entertain any cause of action in the absence of

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

legislation or an arbitration agreement to the contrary. Section 18 of the *Federal Courts Act* removed from the superior courts' jurisdiction the prerogative writs and extraordinary remedies listed (para. 94). Since the relief sought by TeleZone (damages) is not listed in s. 18, he concluded that the Superior Court continues to have jurisdiction. The appeal was dismissed.

III. Relevant Enactments

17 *Constitution Act, 1867*

> **101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Federal Courts Act, R.S.C. 1985, c. F-7

> **2.** (1) . . .
>
> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;
>
> **17.** [Relief Against the Crown] (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.
>
> [Cases] (2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which
>
> . . . . .
>
> (b) the claim arises out of a contract entered into by or on behalf of the Crown;
>
> . . . . .
>
> (d) the claim is for damages under the *Crown Liability and Proceedings Act*.
>
> [Relief in favour of Crown or against officer] (5) The Federal Court has concurrent original jurisdiction
>
> . . . . .
>
> (b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.
>
> **18.** [Extraordinary remedies, federal tribunals] (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> . . . . .
>
> [Remedies to be obtained on application] (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.
>
> **18.1** [Application for judicial review] (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

[Time limitation] (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

[Powers of Federal Court] (3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

18.4 [Hearings in summary way] (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

[Exception] (2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

3. [Liability] The Crown is liable for the damages for which, if it were a person, it would be liable

(a) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(b) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

8. [Saving in respect of prerogative and statutory powers] Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

21. [Concurrent jurisdiction of provincial court] (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

IV. Analysis

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

18 This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

19 If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

20 The Attorney General argues that a detour to the Federal Court is necessary because the damages action represents a "collateral attack" prohibited by "inferences" derived from s. 18 of the *Federal Courts Act*. His argument, in a nutshell, is:

> Simply pleading damages, or some other remedy that is not available by way of judicial review in the Federal Court, should not be accepted as a means to bypass the intention of Parliament that review of federal administrative decisions must take place in the Federal Court. (Attorney General factum [1], at para. 4)

21 The Attorney General accepts that judicial review is not required "for all proceedings that in any manner involve a decision or conduct of a federal board, commission or tribunal" (para. 29). However, the detour is required for claims that engage, directly or indirectly, the "validity and unlawfulness" of such decisions (para. 2). "Lawfulness" is a broad term. The Attorney General uses "invalid" and "unlawful" conjunctively (e.g., at para. 49). He seems to use the term "unlawful" to cover virtually any government order that could lay the basis for a finding of fault in the private law sense although he excludes such bureaucratic actions as providing erroneous information, performing a "physical task or activity" negligently, or breaching a duty to warn (Factum, at para. 50).

22 The Attorney General's concern is that permitting different damages claims to proceed in different provinces before a variety of superior court judges arising out of the same or related federal government decisions would re-introduce the spectre of inconsistency and uncertainty across Canada which the enactment of the *Federal Courts Act* was designed to alleviate. However, this concern must have been considered by Parliament when it granted concurrent jurisdiction in all cases in which relief is claimed against the federal Crown to the superior courts. Undoubtedly, the juxtaposition of ss. 17 and 18 of the *Federal Courts Act* creates a certain amount of subject matter overlap with respect to holding the federal government to account for its decision making. This degree of overlap is inherent in the legislative scheme designed to provide claimants with "convenience" and "a choice of forum" in the provincial courts (see statement of the Minister of Justice in Parliament, *House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414), reproduced below, at para. 58).

23 I do not interpret Parliament's intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.

A. The Nature of Judicial Review

24 The Attorney General correctly points to "the substantive differences between public law and private law principles" (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

25 Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that *do* occur will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.

26 The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs — despite ill-founded allegations of obscenity — than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.)). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

27 The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision, to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

28 Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 (S.C.C.), at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action. It is not necessary because a government decision that is perfectly valid may nevertheless give rise to liability in contract. *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 58 O.R. (3d) 321 (Ont. C.A.), leave to appeal refused, [2003] 1 S.C.R. vii (note) (S.C.C.)) or tort (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.)).

29 Nor is a breach of statutory power necessarily sufficient. Many losses caused by government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability" (Factum, at para. 28).

30 In *Kvello v. Miazga*, 2009 SCC 51, [2009] 3 S.C.R. 339 (S.C.C.), Charron J. wrote that "[a] person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or other prosecutorial duties with the result that the accused suffers damage. *However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion*" (para. 7 (emphasis added)). H. Woolf, J. Jowell and A. Le Sueur point out in *De Smith's Judicial Review* (6th ed. 2007), that "[u]nlawfulness (in the judicial review sense) and negligence are conceptually distinct" (pp. 924-25). Put another way, while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.

31 The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. See also *Edwards v. Law Society of*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Upper Canada, 2001 SCC 80, [2001] 3 S.C.R. 562 (S.C.C.); *Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*, 2008 SCC 42, [2008] 2 S.C.R. 551 (S.C.C.), at para. 8.

32 The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives. The *Grenier* approach does not do so, in my respectful opinion, as will now be discussed.

B. The Grenier Case

33 The shadow of the *Grenier* case perhaps extends beyond what was intended by the *Grenier* court itself.

34 *Grenier* did not concern a conflict between the Federal Court and a provincial superior court. It concerned which of two alternative Federal Court modes of procedure should be pursued by an inmate of a federal penitentiary. He complained of the adverse effects of administrative segregation for 14 days pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The inmate did not seek judicial review of the decision of the head of the institution to place him in administrative segregation. Instead, after waiting three years, he brought an action for damages against the federal Crown under s. 17 of the *Federal Courts Act*. At trial, the administrative segregation was found to be arbitrary. He was awarded $5,000 in compensatory and exemplary damages.

35 On appeal, the Attorney General objected that the inmate should have sought judicial review of his administrative segregation under s. 18 of the Act before bringing his action for damages under s. 17 of the Act. The argument, in essence, was that the *Federal Courts Act* has several procedural doors and the inmate had tried to enter the wrong one. He knocked on s. 17 whereas he should have gone through s. 18. The Federal Court of Appeal agreed, taking the view that "Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court. *This review must be exercised under section 18, and only by filing an application for judicial review*" (para. 24 (emphasis added)). The court reasoned that even within the same court, the s. 17 action for damages constituted an impermissible collateral attack on the decision of the prison authority (at paras. 32-33) because the trial court "had to review the lawfulness of the institutional head's decision ... and set it aside" (at para. 34), which could only be done under s. 18 of the same Act. It was thought that the judicial review jurisdiction of the Federal Court, with its unique statutory procedure, must be protected from erosion. Such a conclusion, in the *Grenier* court's view, was consistent with *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.).

36 Moreover, according to the *Grenier* court, it made no difference that the administrative segregation Mr. Grenier complained of had long since been served. "[A] decision of a federal agency, such as the one by the institutional head in this case", the court reasoned, "retains its legal force and authority, and remains juridically operative and legally effective so long as it has not been invalidated" (para. 19). Accordingly, the prison order, even in its afterlife, was still a complete answer to the s. 17 damages action.

37 More recently, the Federal Court of Appeal itself seems to be losing some enthusiasm for *Grenier's* "separate silos" approach. In *Hinton v. Canada (Minister of Citizenship & Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476 (F.C.A.), the court allowed an application for judicial review to be converted into an action for damages which was also certified as a class action, Sexton J.A. commenting that "[s]ometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review" (para. 50).

38 More recently in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568 (F.C.A.) (which, on appeal, was heard concurrently in this Court with the present appeal), Sharlow J.A., dissenting, took the view that "the *Grenier* principle was developed without taking into account certain aspects of the statutory scheme governing federal Crown litigation [including the *Crown Liability and Proceedings Act*] that in my view cast doubt on the *Grenier* analysis" (para. 41).

39 At the same time, some provincial courts have accepted the *Grenier* approach; see, e.g., *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116 (N.L. C.A.), *Lidstone v. Canada (Department of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244 (P.E.I. T.D.). Most provincial courts, however, have either not followed *Grenier* or

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

distinguished it: see, e.g., *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1 (Ont. C.A.), at para. 30; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379 (B.C. S.C.), at para. 24; *Leroux v. Canada (Revenue Agency)*, 2010 BCSC 865, 2010 D.T.C. 5123 (Eng.) (B.C. S.C. [In Chambers]), at para. 54; see also *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93 (Alta. C.A.), at para. 43; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182 (N.L. C.A.), at para. 34.

C. The Attorney General's Expansive View of the Grenier Decision

40 According to the Attorney General, *Grenier* denied the *jurisdiction* of either the Federal Court or a provincial superior court to proceed to adjudicate a damage claim without first passing through the "unique" judicial review procedure set out in s. 18 of the *Federal Courts Act* if the "lawfulness" of an administrative decision or order is in issue. The Attorney General uses the expression "invalidity or lawfulness" which, he points out, may extend even to contract claims. He cites *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works & Government Services)*, [1995] 2 F.C. 694 (Fed. C.A.), at pp. 703-706, where the Federal Court of Appeal concluded that the exercise by a Minister of a statutory power to seek tenders and to enter into contracts for the lease of land by the Crown could be subject to judicial review. See also *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340 (F.C.A.), at paras. 21-25, leave to appeal refused, [2009] 3 S.C.R. vii (note) (S.C.C.). However, in this Court's decision in *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), a tendering case, although in the end the claim was dismissed, there was no suggestion in the judgment that judicial review was a necessary preliminary step to the recovery of contract damages against the Crown.

41 Moreover, I do not think the Attorney General's position is supported by *Consolidated Maybrun* or its companion case of *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737 (S.C.C.). Those cases dealt with the narrow issue of whether a person facing penal charges for failing to comply with an administrative order can challenge the validity of the order by way of defence despite failure to take advantage of the appeal process provided for by the law under which the order was issued. In both cases, the Court paid close attention to the regulatory statute under which an order is made and concluded that to permit such a defence "would encourage conduct contrary to the [regulatory] Act's objectives and would tend to undermine its effectiveness" (*Consolidated Maybrun*, at para. 60). These cases thus stand for a rather nuanced view of where collateral attack is (or is not) permissible. The outcome largely depends on the court's view of the statute under which an order is made "and must be answered in light of the legislature's intention as to the appropriate forum" for resolving the dispute (*Consolidated Maybrun*, at para. 52). In my respectful view, having regard to these policy considerations, it would be adherence to the *Grenier* approach that "would tend to undermine [the] effectiveness" of the *Federal Courts Act* reforms which had as one of their objectives making the provincial superior courts an equally "appropriate forum" for resolving in an efficient way financial claims against the federal Crown.

D. The Jurisdiction of the Provincial Superior Courts

42 What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court ... requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.), at para. 46; see also *Pringle v. Fraser*, [1972] S.C.R. 821 (S.C.C.), at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.), at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.

43 The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84 (Eng. K.B.), at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.

44 The term "jurisdiction" simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to "the person and the subject matter in question and, in addition, has authority to make the order sought": *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.), *per* McIntyre J., at p. 960,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

quoting Brooke J.A. in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262 (Ont. C.A.), at p. 271, and *per* Lamer J., dissenting, at p. 890; see also *R. v. Rahey*, [1987] 1 S.C.R. 588 (S.C.C.), at p. 603; *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.), at para. 15; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.). The Attorney General does not deny that the Superior Court possesses *in personam* jurisdiction over the parties, or dispute the superior court's authority to award damages. The dispute centres on subject matter jurisdiction.

45 It is true that apart from constitutional limitations (see, e.g., *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), and cases under s. 96 of the *Constitution Act, 1867*, which are not relevant here), Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. It did so, for example, with respect to the judicial review of federal decision makers: *Paul L'Anglais Inc. v. Canada (Conseil canadien des relations de travail)*, [1983] 1 S.C.R. 147 (S.C.C.), at p. 154. However, the onus lies here on the Attorney General to establish the existence and extent of such a transfer of jurisdiction in statutory terms that are clear, explicit and unambiguous.

46 Nothing in the *Federal Courts Act* satisfies this test. Indeed, as mentioned, the explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes it. As Sharlow J.A., dissenting, pointed out in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & Agri-Food)* (appeal allowed and judgment released concurrently herewith, 2010 SCC 64 (S.C.C.)), s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the assessment of lawfulness would be made by the provincial superior court in the course of adjudicating a claim for damages (para. 39).

E. Claimed "Inferences" from Section 18 of the Federal Courts Act

47 An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), "[t]he genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals" (para. 34). Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself.

48 The Attorney General argues that a "remedies" oriented approach, similar to the view adopted by the Ontario Court of Appeal in this case, results in "a rigid, formalistic and literal interpretation" of s. 18 (Factum, at para. 66) and gives insufficient weight to context and, in particular, to the intention of Parliament. I agree that the context and Parliamentary purpose are essential to a proper interpretation of s. 18, but I do not think a broad and contextual approach assists the Attorney General's argument.

(i) The Parliamentary Context

49 The Parliamentary debates in 1971 took place in the context of the enormous growth of federal regulatory regimes, the perceived need for a "national perspective" on judicial review, and a concern about inconsistent supervision of federal public bodies by various provincial superior courts across the country (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 2:4100). Thus, Parliament radically transformed the old Exchequer Court into a new Federal Court and crafted a new procedure which resulted in the Federal Court's supervisory jurisdiction over federal decision makers.

50 The Minister of Justice in 1970 emphasized that Parliament's concern was supervision (not compensation) and in particular its concern was about fragmented judicial review of federal adjudicative tribunals. One provincial superior court might uphold as valid an important decision, e.g., by the National Energy Board, which a superior court in a different province might decide to quash. Thus:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> This multiple supervision [by the provincial courts], with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them.... It is for this reason ... that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.
>
> (*House of Commons Debates*, 2nd Sess., 28th Pari. March 25, 1970, at pp. 5470-71; see also Factum, at para. 79; *Khosa*, at para. 34.)

However, the very broad statutory definition in s. 2 of "federal board, commission or other tribunal" goes well beyond what are usually thought of as "boards and commissions" and its very breadth belatedly (and perhaps unintentionally) precipitated the *Grenier* controversy about how to prioritize the overlapping subject matter shared by judicial review and the trial of common law claims for compensation based on fault. The grant of concurrent jurisdiction in s. 17 does not negate the possibility of inconsistency, but Parliament has agreed to live with the possibility in the interest of easier access to justice.

(ii) The Statutory Text

51 The grant of *exclusive* jurisdiction to judicially review federal decision makers is found in s. 18 of the *Federal Courts Act* and is expressed in terms of particular remedies:

> **18.** (1) Subject to section 28, the Federal Court has *exclusive* original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> . . . . .
>
> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

52 All of the remedies listed in s. 18(1)(*a*) are traditional administrative law remedies, including the four prerogative writs — *certiorari*, prohibition, *mandamus* and *quo warranto* — and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

(iii) Reading the Act as a Whole

53 There is much internal evidence in s. 18 and s. 18.1 of the *Federal Courts Act* to indicate that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*.

54 As mentioned, the 30-day limitation period for judicial review applications under s. 18.1(2) of the *Federal Courts Act* is one such indication. Such a short limitation is consistent with a quick and summary judicial review procedure — but not a damages action. TeleZone's action in Ontario would have a six-year limitation. A 30-day cut off for a damages claimant would be unrealistic. The claimant may not be in a position to apply for judicial review within the limitation period. The facts necessary to ground a civil cause of action may not emerge until after 30 days have passed.

55 The 30-day limit can be extended by order of a Federal Court judge (s. 18.1(2)) but the extension is discretionary, and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

request for an extension of time for reasons that have to do with public law concerns, not civil damages. In practical terms, the effect of the *Grenier* argument would be to impose a discretionary limitation period (determined by the Federal Court) on actions for damages against the Crown in a provincial superior court, an outcome which, in my opinion, Parliament cannot have intended. Apart from anything else, it undermines s. 39 of the *Federal Courts Act*, which provides that, ordinarily, claims against the Crown in the Federal Court are subject to the limitation period applicable "between subject and subject" in the province where the claim arose, or six years in respect of a "cause of action arising otherwise than in a province".

56 As recently affirmed in *Khosa*, the grant of relief on judicial review is in its nature discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention:

> ... the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case". [para. 36]

See also *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at pp. 592-93; *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), at p. 372. Such an approach does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. In judicial review, "the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individual" (Brown and Evans, at para. 3:1100).

(iv) The 1990 Amendments to the Federal Courts Act

57 The current version of s. 17 of the *Federal Courts Act*, which only came into force on February 1, 1992, allows parties to institute civil claims against the Federal Crown in the superior courts of the provinces. For ease of reference, I repeat the operative language:

> **17.** (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

The grant of jurisdiction is thus framed in terms of relief, i.e., "*all* cases in which relief is claimed" except as otherwise provided. Section 18(1) otherwise provides in relation to the specific forms of relief listed therein. Section 18(3) of the Act expressly provides that *remedies in the nature of judicial review* "may be obtained only on an application for judicial review made under section 18.1". The *Federal Courts Act* lists no other relevant exclusions from s. 17, and we have not been referred to any other Act of Parliament having a bearing on this subject.

58 As the Minister of Justice stated in 1989 before the Legislation Committee examining Bill C-38, which resulted in, among other changes, today's version of s. 17:

> [W]e have made provision in the bill whereby ordinary common law and civil law actions for relief against the federal Crown, which are presently the exclusive jurisdiction of the Federal Court, may also be heard by provincial courts. Such provision acknowledges the fact that the Federal Court possesses no unique expertise in areas of ordinary contract and tort law. [The Minister here went on to describe the practical jurisdictional and procedural problems created by the Federal Court's prior exclusive jurisdiction over federal authorities.]
>
> (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38*, No. 1, 2nd Sess., 34th Parl., November 23, 1989, at pp. 14-15)

On second reading of the Bill, the Minister again emphasized that the purpose of the amendments was to allow the plaintiffs to sue the federal Crown in either the provincial superior courts or the Federal Court:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

> For example, a person should be able to sue the Crown in a suitably convenient court for breach of contract to purchase goods or for negligent driving by a Crown employee that causes injuries to another motorist. At the moment, such actions can only be brought in the Federal Court. However, it is not as available as provincial courts.
>
> . . . . .
>
> Moreover, for both citizen and lawyer alike, provincial courts, including their procedures and personnel, are much more familiar.
>
> Therefore, the Federal Court is often not the most convenient one for the private litigant. With this in mind, the government has proposed that both the provincial courts and the Federal Court share jurisdiction with respect to such actions, thereby generally giving a plaintiff a choice of forum.
>
> [Emphasis added.]
>
> (*House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414)

59 The effect of the argument of the Attorney General, if accepted, would be to undermine the purpose and intended effect of the 1990 amendment by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite the promise to give plaintiffs a "choice of forum" and to make available relief in the provincial superior courts that may be more "familiar" to litigants.

F. The Doctrine of Collateral Attack

60 The Attorney General contends that to permit TeleZone to proceed with its claim in the provincial superior court in the absence of prior judicial review would be to allow an impermissible "collateral attack" on the Minister's decision. The Court has described a collateral attack as

> an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
>
> (*R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599)

61 The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.), at para. 72:

> The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.
>
> [Emphasis added.]

62 In *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), the criminal case referred to in *Garland*, the Court declined to apply the rule against collateral attack. In *Garland* itself, class action plaintiffs brought a claim against a gas company seeking restitution on the grounds of unjust enrichment of late payment penalties previously approved by the Ontario Energy Board. In its defence, the gas company argued that the claim for restitution was a collateral attack on the Board's order. The defence failed.

63 I do not think the Attorney General's collateral attack argument can succeed on this appeal for three reasons. Firstly, as Borins J.A. pointed out in his scholarly judgment, the doctrine of collateral attack may be raised by the Attorney General in the provincial superior court as a defence if he or she believes that, in the particular circumstances, to do so is appropriate. However, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Nor does

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

it justify inserting the Federal Court into every claim for damages predicated on an allegation that the government's decision that caused the loss was "invalid or unlawful".

64 Secondly, TeleZone is not seeking to "avoid the consequences of [the ministerial] order issued against it" (*Garland*, at para. 72). On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim. This was the result in *Garland* itself, where Iacobucci J. held for the Court:

> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.
>
> [Emphasis added; para. 71.]

65 Similarly in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), Arbour J. declined to apply the collateral attack doctrine in a case arising out of a grievance arbitration where CUPE sought to challenge the underlying facts of a conviction of one of its members for sexual assault. Arbour J. reasoned that the Union's argument was "an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does" (para. 34).

66 Thirdly, the Attorney General's argument fails even if one takes a more expansive view of the doctrine of collateral attack, as does Professor David Mullan:

> The cause of action [in *Garland*] depended necessarily on establishing the invalidity of the Board's order on which the utility was relying in collecting interest. If the order had been valid, there would have been no cause of action. This was in every sense a collateral attack on the Board's orders. Collateral attack is not and never has been confined to situations where the challenge is by way of resistance to the enforcement of an order. It is also implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based.... [Emphasis added.]
>
> (D. J. Mullan, "Administrative Law Update — 2008-2009", Continuing Legal Education Conference, *Administrative Law Conference 2009*, October 2009, at p. 1.1.22)

In Professor Mullan's view, the Court in *Garland* should have taken what he sees as the more principled route of applying the factors in *Consolidated Maybrun* to determine whether the collateral attack was of a permissible variety. In that case, as set out in the judgment of L'Heureux-Dubé J., the appropriate factors to apply in determining whether the Court is confronted with an impermissible collateral attack on an administrative order are (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of the collateral attack in light of the tribunal's expertise and *raison d'être*, (including whether "the legislature intended to confer jurisdiction to hear and determine the question raised"), and (5) the penalty on a conviction for failing to comply with the order (paras. 45, 50-51 and 62). These factors have also been applied in the civil context; see, generally, K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 11-9.

67 Judicial doctrine necessarily yields to a contrary statutory enactment. Accepting, as Professor Mullan puts it, at p. 1.1.22, that the rule against collateral attack may be "implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based", the s. 17 statutory grant of concurrent jurisdiction again defeats the Attorney General's submission. This is because the claimant's "need to attack a law or order" is essential to its cause of action, and adjudication of that allegation (even if raised by way of reply) is a necessary step in disposing of the claim. Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of such a claim, not just part of it.

68 In summary, I agree with Borins J.A. that the *Grenier* approach cannot be justified by the rule against collateral attack.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

G. The Defence of Statutory Authority

69 It would also be open to the Crown, by way of defence to a damages action, to argue that the government decision maker was acting under a statutory authority which precludes compensation for consequent losses. This, again, is a matter of defence, not jurisdiction. It is a hurdle facing any claimant. Governments make discretionary decisions all the time which will inflict losses on people or businesses without conferring any cause of action known to the law.

70 In a case of nuisance, for example, the claimant property owner may have all the elements of a good common law action in nuisance yet be defeated by the defence that the government was authorized to do what it did and that collateral damage to the claimant was an inevitable result of the authority so provided. See, e.g., P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 139, and Horsman and Morley, at p. 6-41.

71 However, as stated earlier, the defence of "statutory authority" will not always provide a complete answer to a damages claim. In some cases, the outcome may depend on whether the statute either explicitly or implicitly authorized the act that caused the harm. In *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181 (S.C.C.), Sopinka J. pointed out, referring to the dictum of Viscount Dunedin in *Manchester (Borough) v. Farnworth* (1929), [1930] A.C. 171 (U.K. H.L.), that there may be "alternate methods of carrying out the work [that would have avoided the loss]. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance" (p. 1226). Reference should also be made to the qualifying observation of what is "practically impossible" made by Viscount Dunedin and quoted by Sopinka J., at p. 1224:

> The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.
>
> [Emphasis added.]

This caveat, also quoted by Wilson J., at p. 1213 of *Tock*, was the subject of some disagreement on the Court, an issue that need not detain us. The issue of statutory authority does not go to the jurisdiction of the provincial superior courts. That is all that needs to be decided here.

72 It is sufficient to say that it is always open to the Crown to argue the defence of statutory authority; see, e.g., in s. 8 of the *Crown Liability and Proceedings Act*:

> Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute.

The defence of statutory authority is regularly interpreted and applied by the provincial superior courts, see, e.g., *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1 (B.C. C.A.), leave to appeal refused, [2003] 1 S.C.R. xi (note) (S.C.C.) (*sub nom. Jones v. Attorney General of Canada*); *St. John's (City) v. Lake*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84 (Nfld. C.A.); *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161 (Alta. Prov. Ct.); *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130 (Ont. S.C.J.); *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212 (N.B. C.A.).

73 I give an example. In *Ryan v. Victoria (City)*, the "inevitable result" defence was tested in a claim for damages arising out of road works. Mr. Ryan, a motorcyclist, sued the municipality and a railway for negligence and nuisance after he was injured while crossing tracks in an urban area. The front wheel of the plaintiff's motorcycle got caught in the flangeway gap of the rail whose width was at the upper end of the allowed range set by the applicable regulation. The defence argued statutory authority. Writing for a unanimous Court, Major J. noted that "[s]tatutory authority provides, at best, a narrow defence to nuisance" (at para. 54), and rejected it on the facts of the case.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

74 For present purposes, we need go no further than to repeat that "statutory authority" is an argument that goes to defence, not jurisdiction. If the provincial superior court (or the Federal Court under s. 17) finds that the government has a good defence based on statutory authority, it will simply dismiss the claimant's action.

H. The Concern About "Artful Pleading"

75 The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damage claims. On this view the "artful pleader" will forum-shop by the way the case is framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.

76 Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

77 In the U.K., a similar position has been expressed by the House of Lords in *Roy v. Kensington*, [1992] 1 A.C. 624 (U.K. H.L.), *per* Lord Bridge, at pp. 628-29:

> [W]here a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

It is generally true here, as it is in the U.K., that a plaintiff is not required to bring an application for judicial review so long as private rights are legitimately engaged by the action. Under the English authorities, as in Canada, there is a special concern where the availability of judicial review depends on special leave, or is restricted by an abbreviated limitation period, or where the relief available on judicial review is discretionary (*Roy*, *per* Lord Lowry, at p. 654). See also P. P. Craig, *Administrative Law* (6th ed. 2008), at p. 869. These considerations echo the concerns already canvassed in rejecting the *Grenier* approach.

78 To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

I. Application to the Facts

79 TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.

80 To the extent that TeleZone's claim can be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), I conclude, for the reasons discussed, that the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negates any inference the Crown seeks to draw that Parliament intended the detour to the Federal Court advocated by *Grenier*. The TeleZone claim as pleaded is dominated by private law considerations.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

In a different case, on different facts, the Attorney General is free to raise "collateral attack" as a defence and the superior court will consider and deal with it.

V. Disposition

81 The Superior Court of Ontario has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating this claim. I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 The Attorney General's principal argument was filed in the companion case of *TeleZone Inc. v. Canada (Attorney General)*, 2010 SCC 63 (S.C.C.), and references herein are to that factum unless otherwise noted.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 16

2006 ABCA 337
Alberta Court of Appeal

Ernst & Young Inc. v. Central Guaranty Trust Co.

2006 CarswellAlta 1479, 2006 ABCA 337, [2006] A.J. No. 1413, [2007] 2 W.W.R. 474, [2007] A.W.L.D. 352, [2007] A.W.L.D. 353, [2007] A.W.L.D. 354, [2007] A.W.L.D. 355, [2007] A.W.L.D. 394, [2007] A.W.L.D. 395, [2007] A.W.L.D. 396, [2007] A.W.L.D. 397, [2007] A.W.L.D. 398, [2007] A.W.L.D. 433, 153 A.C.W.S. (3d) 971, 24 B.L.R. (4th) 218, 28 E.T.R. (3d) 174, 384 W.A.C. 225, 397 A.R. 225, 66 Alta. L.R. (4th) 231

Ernst & Young Inc. (Appellant / Plaintiff) and Central Guaranty Trust Company (Respondent / Defendant)

Fruman, Costigan, Slatter JJ.A.

Heard: October 30, 2006
Judgment: November 15, 2006
Docket: Edmonton Appeal 0503-0014-AC

Proceedings: reversing *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2001), 36 E.T.R. (2d) 200, 283 A.R. 325, 2001 CarswellAlta 151, 2001 ABQB 92, 12 B.L.R. (3d) 72 (Alta. Q.B.); additional reasons at *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2002), 304 A.R. 1, 2002 CarswellAlta 1124, 29 B.L.R. (3d) 222 (Alta. Q.B.); and reversing *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2004), 8 E.T.R. (3d) 169, 2004 ABQB 389, 2004 CarswellAlta 691, [2005] 3 W.W.R. 97, 29 Alta. L.R. (4th) 269, 365 A.R. 302 (Alta. Q.B.)

Counsel: D.R. Cranston, Q.C., C.L. Bailey for Appellant
R.B. White, Q.C., K.A. Ryan, W.A. Berkenbosch for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Contracts

Headnote

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

In mid 1980s, I Ltd. sold extended warranties to automobile purchasers pursuant to agreements it had with Importers — I Ltd. stopped carrying on business in 1987, leaving some warranty holders at risk and receiver was appointed — In 1988, order was made approving agreement which provided that Importers would assume most of I Ltd.'s warranty obligations in exchange for trust funds held by trust company — Order also directed trust company to pay trust funds to receiver and receiver to pay substantial portion of trust funds to Importers — Trust funds were distributed pursuant to 1988 order — Receiver was authorized to bring action against trust company — In 1992, trust company filed statement of defence in which it admitted validity of trusts — In 1995, trust company was released as trustee of trusts and receiver was ordered to act as trustee — In 2000, trust company amended statement of defence to allege that trusts were not validly constituted — At first phase of trial, trial judge concluded that issue of validity of trust was not settled by principles of res judicata, collateral attack or abuse of process and that all but one of trusts failed for lack of certainty of subject matter — At second phase of trial, trial judge concluded that one trust that had been deemed valid was invalid purpose trust — Receiver appealed — Appeal allowed — Judgments in both phases of trial were set aside and new trial was ordered — Determination of issue of validity of trusts was fundamental to 1988 order — Issue was decided in receivership proceedings and first precondition for issue estoppel was met — 1988 order directed how trust funds would be distributed — Payments were made pursuant to that order and Importers assumed liabilities to warranty holders — There was no suggestion that distribution could be undone or money returned and accordingly second precondition for issue estoppel was met — Third precondition was not in issue — Issue estoppel applied and trial judge erred in law in finding issue of validity of trust was not settled by principles of res judicata.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — General principles

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

In mid 1980s, I Ltd. sold extended warranties to automobile purchasers pursuant to agreements it had with Importers — I Ltd. stopped carrying on business in 1987, leaving some warranty holders at risk and receiver was appointed — In 1988, order was made approving agreement which provided that Importers would assume most of I Ltd.'s warranty obligations in exchange for trust funds held by trust company — Order also directed trust company to pay trust funds to receiver and receiver to pay substantial portion of trust funds to Importers — Trust funds were distributed pursuant to 1988 order — Receiver was authorized to bring action against trust company — In 1992, trust company filed statement of defence in which it admitted validity of trusts — In 1995, trust company was released as trustee of trusts and receiver was ordered to act as trustee — In 2000, trust company amended statement of defence to allege that trusts were not validly constituted — At first phase of trial, trial judge concluded that issue of validity of trust was not settled by principles of res judicata, collateral attack or abuse of process and that all but one of trusts failed for lack of certainty of subject matter — At second phase of trial, trial judge concluded that one trust that had been deemed valid was invalid purpose trust — Receiver appealed — Appeal allowed — Judgments in both phases of trial were set aside and new trial was ordered — Trial judge made extricable error of law in finding that there were special circumstances which warranted suspension of principles of res judicata — Trial judge failed to apply correct legal test — Special circumstances exception bars application of issue estoppel in second proceeding — In order to demonstrate special circumstances, party must show that he or she exercised reasonable diligence in first proceeding — Special circumstances did not exist where litigant knew of issue in first proceedings and did not raise it.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Finality of judgment or order — General principles

In mid 1980s, I Ltd. sold extended warranties to automobile purchasers pursuant to agreements it had with Importers — I Ltd. stopped carrying on business in 1987, leaving some warranty holders at risk and receiver was appointed — In 1988, order was made approving agreement which provided that Importers would assume most of I Ltd.'s warranty obligations in exchange for trust funds held by trust company — Order also directed trust company to pay trust funds to receiver and receiver to pay substantial portion of trust funds to Importers — Trust company and one of I Ltd.'s main secured creditors commenced appeals which were later abandoned as part of settlement agreement — Trust funds were distributed pursuant to 1988 order — Receiver was authorized to bring action against trust company on behalf of warranty holders and their heirs, successors and assigns — In 1992, trust company filed statement of defence in which it admitted validity of trusts — In 1995, trust company was released as trustee of trusts and receiver was ordered to act as trustee — In 2000, trust company amended statement of defence to allege that trusts were not validly constituted — At first phase of trial, trial judge concluded that issue of validity of trust was not settled by principles of res judicata, collateral attack or abuse of process and that all but one of trusts failed for lack of certainty of subject matter — At second phase of trial, trial judge concluded that one trust that had been deemed valid was invalid purpose trust — Receiver appealed — Appeal allowed — Judgments in both phases of trial were set aside and new trial was ordered — Trust company chose not to attack 1988 order directly when it abandoned its appeal from that order — Trial judge found that trust company was not trying to vary or nullify effects of 1988 order by raising trust invalidity defence — This was not test for determining whether trust company offended rule against collateral attack — Problem with trust invalidity defence was that it threatened to render 1988 order nonsensical — Trust invalidity defence amounted to collateral attack on 1988 order and trial judge erred in law in concluding that question of trust invalidity was not settled by rule against collateral attack.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — Where abuse of process

In mid 1980s, I Ltd. sold extended warranties to automobile purchasers pursuant to agreements it had with Importers — I Ltd. stopped carrying on business in 1987, leaving some warranty holders at risk and receiver was appointed — In 1988, order was made approving agreement which provided that Importers would assume most of I Ltd.'s warranty obligations in exchange for trust funds held by trust company — Order also directed trust company to pay trust funds to receiver and receiver to pay substantial portion of trust funds to Importers — Trust company and one of I Ltd.'s main secured creditors commenced appeals which were later abandoned as part of settlement agreement — Trust funds were distributed pursuant to 1988 order — Receiver was authorized to bring action against trust company on behalf of warranty holders and their heirs, successors and assigns — In 1992, trust company filed statement of defence in which it admitted validity of trusts — In 1995, trust company was released as trustee of trusts and receiver was ordered to act as trustee — In 2000, trust company amended statement of defence to allege that trusts were not validly constituted — At first phase of trial, trial judge concluded that issue of validity of trust was not settled by principles of res judicata, collateral attack or abuse of process and that all but one of trusts failed for lack of certainty of

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

subject matter — At second phase of trial, trial judge concluded that one trust that had been deemed valid was invalid purpose trust — Receiver appealed — Appeal allowed — Judgments in both phases of trial were set aside and new trial was ordered — It was abuse of process for trust company to attempt to relitigate issue of validity of trusts — It was simply too late — Trust company had been involved in receivership proceedings from outset and had participated while agreements were reached and orders granted varying trusts and distributing trust proceeds — To allow trust company to raise that defence more than decade later in these circumstances would violate principles of judicial economy and certainty and seriously undermine administration of justice — Trial judge erred in law in concluding that doctrine of abuse of process did not preclude trust company from raising trust invalidity defence in receiver's action.

APPEAL by receiver from judgments reported at *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2001), 36 E.T.R. (2d) 200, 283 A.R. 325, 2001 CarswellAlta 151, 2001 ABQB 92, 12 B.L.R. (3d) 72 (Alta. Q.B.) and *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2004), 8 E.T.R. (3d) 169, 2004 ABQB 389, 2004 CarswellAlta 691, [2005] 3 W.W.R. 97, 29 Alta. L.R. (4th) 269, 365 A.R. 302 (Alta. Q.B.).

***Per curiam*:**

I. Introduction

1 In the mid 1980s, International Warranty Company Limited ("IW") sold extended warranties to automobile purchasers pursuant to agreements it had with several automobile importers (the "Importers"). Those warranties covered items not covered by the Importers' warranties for up to five years.

2 At first, IW insured its warranty obligations. Later, it put some of the warranty monies it received into trust. IW deposited some of its warranty monies with Central Guaranty Trust Company ("Central Guaranty") pursuant to various trust agreements.

3 The trust agreements contemplated that IW would draw down the trust funds to reimburse itself for the cost of repairs as it did warranty work. They also contemplated that, at the end of the warranty period, any trust surpluses would belong to IW.

4 At some point, IW began withdrawing actuarially projected surpluses from the trusts. It also refrained on occasion from depositing warranty monies with Central Guaranty.

5 IW stopped carrying on business in December 1987, leaving some warranty holders at risk. A receiver was appointed to determine the extent of IW's warranty obligations and make a recommendation to the Court regarding the most appropriate way to deal with the warranty holders (the "Receiver").

6 Miller A.C.J. case managed the receivership. The Receiver filed a report and a series of orders were issued. As a result of the receivership proceedings, the Importers assumed most of IW's warranty obligations, the trust funds held by Central Guaranty were paid to the Receiver, the Receiver paid a substantial portion of the funds it received to the Importers, and the Receiver was authorized to bring an action against Central Guaranty to determine whether it had breached its obligations as trustee. Central Guaranty was involved in the receivership proceedings from the outset.

7 In 1992, pursuant to Miller A.C.J.'s order, the Receiver commenced this action alleging breaches of the trust agreements by Central Guaranty. On the eve of trial, in May 2000, Central Guaranty amended its statement of defence to allege, for the first time, that the trusts were invalid for uncertainty. The Receiver replied that many orders had been made on the assumption that the trusts were valid and it was too late for Central Guaranty to raise a trust invalidity defence. The trial judge found the issue of the validity of the trusts was not settled by principles of *res judicata*, collateral attack or abuse of process. He also found the trusts invalid and determined no other form of relief was called for. The Receiver appeals.

8 Many grounds of appeal were raised. It is unnecessary for us to consider most of them because we conclude that Central Guaranty is precluded from attacking the validity of the trusts in this litigation.

II. The Receivership Proceedings

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

9 In the report it prepared in March 1988, the Receiver made a number of recommendations. Those recommendations were based upon certain explicit assumptions, including an assumption that the trusts were valid. The Receiver's report estimated that IW owed its creditors (excluding the warranty holders) between $5.85 and $10.85 million, and that IW's unsecured creditors would recover nothing from IW because they had no access to the funds in trust for the warranty holders. Central Guaranty was given an opportunity to review and comment upon the Receiver's report before it was filed.

10 In April 1988, Central Guaranty was made aware by its lawyers of the existence of a possible defence that the trusts were invalid. It did not, however, raise such a defence at that time.

11 In June 1988, Miller A.C.J. directed that the following issues be tried: whether certain payments Central Guaranty made out of the trust funds were improper; whether Central Guaranty was required to repay any amounts it improperly paid out of the trust funds; and, who would be the beneficiaries of any monies Central Guaranty was required to repay (the "June 1988 Order").

12 In July 1988, Miller A.C.J. made an order that accomplished a number of things (the "July 1988 Order"). The July 1988 Order approved an agreement which provided that the Importers would assume most of IW's warranty obligations in exchange for trust funds held by Central Guaranty. It also directed Central Guaranty to pay virtually all the trust funds it held to the Receiver, and the Receiver to pay most of those funds to the Importers. In addition, it varied the trusts so that: the rights vested in Central Guaranty as trustee were vested in the Receiver for the benefit of the Importers; the Importers replaced the warranty holders as beneficiaries of the trusts; and, upon the trusts' termination, any remaining trust funds would be paid to the Importers.

13 Both Central Guaranty and Lloyds Bank, one of IW's main secured creditors, commenced appeals from the July 1988 Order. Those appeals were later abandoned as part of a settlement agreement reached between the Importers, the Receiver, Lloyds Bank and Central Guaranty.

14 The trust funds were distributed pursuant to the July 1988 Order.

15 In January 1992, Miller A.C.J. authorized the Receiver to bring an action against Central Guaranty on behalf of the warranty holders and their heirs, successors and assigns. The Receiver commenced that action in October 1992 alleging that, in breach of the trust agreements, Central Guaranty made several improper payments to IW from the trust funds and consented, agreed or acquiesced to IW's failure to pay certain warranty monies into the trusts.

16 In December 1992, Central Guaranty filed a statement of defence in which it admitted the validity of the trusts.

17 In March 1995, Miller A.C.J. released Central Guaranty as trustee of the trusts and ordered the Receiver to act as trustee.

18 Central Guaranty retained new counsel a month before the trial of the Receiver's action was scheduled to commence. Consequentially, the trial was delayed by three weeks. In May 2000, just before the trial commenced, Central Guaranty amended its statement of defence to allege, for the first time, that the trusts were not validly constituted because they lacked certainty of subject matter and objects. The Receiver replied that the issue of the validity of the trusts was *res judicata*, and that Central Guaranty's trust invalidity defence was a collateral attack on Miller A.C.J.'s orders and an abuse of process. It also asserted the trusts were valid and, in the alternative, claimed relief for breach of fiduciary duty and negligence.

III. Decisions Below

19 The trial took place in two phases. The parties made submissions on liability in the first phase and submissions on remedies in the second phase.

20 In the first phase decision, reported at 283 A.R. 325, 2001 ABQB 92 (Alta. Q.B.) [Phase I], the trial judge concluded that the issue of the validity of the trusts was not settled by principles of *res judicata*, collateral attack or abuse of process. He also concluded that all but one of the trusts failed for lack of certainty of subject matter and objects, and that grounds were not made out for breach of fiduciary duty or negligence.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

21 In the second phase decision, reported at 365 A.R. 302, 2004 ABQB 389 (Alta. Q.B.) [Phase II], the trial judge concluded that the one trust he had deemed valid in the first phase was an invalid purpose trust. Because he concluded all the trusts were invalid, the trial judge declined to consider most of the issues relating to whether the trusts had been breached by Central Guaranty and, if they had, what the appropriate remedies were.

22 The trial judge accepted Central Guaranty's argument that the July 1988 Order was interlocutory, rather than final, and was made without an adjudication of the validity of the trusts. He concluded the issue of trust validity was not central to the receivership proceedings and was left, by Miller A.C.J., to be determined in other proceedings. In his view, once the June 1988 Order was issued any trust invalidity defence most properly belonged to the separate trial contemplated by that Order, rather than the receivership proceedings. Accordingly, the trial judge concluded the doctrine of *res judicata* was inapplicable: Phase I at paras. 17-18.

23 The trial judge also concluded that, even if the doctrine of *res judicata* was applicable, there were special circumstances that made it necessary not to apply the doctrine. Among the special circumstances he found was the fact the court might be called upon to administer uncertain trusts if the doctrine of *res judicata* was applied: Phase I at paras. 19-21.

24 The trial judge found Central Guaranty was not attempting to vary or nullify the July 1988 Order by raising a trust invalidity defence. In his view, because Central Guaranty was not seeking to undo the arrangements and distributions which flowed from the July 1988 Order, its trust invalidity defence was not a collateral attack: Phase I at para. 22.

25 The trial judge also concluded it was not an abuse of process for Central Guaranty to raise a trust invalidity defence: Phase I at paras. 4 and 11.

IV. Standard of Review

26 The applicability of the doctrine of *res judicata* is a question of law reviewable on the correctness standard: *Saggers v. Alberta (Human Rights Commission)* (2000), 271 A.R. 352, 2000 ABCA 259 (Alta. C.A.) at para. 19.

27 Whether special circumstances exist which warrant the suspension of the principles of *res judicata* is a question of mixed fact and law reviewable on the standard of palpable and overriding error. However, where the alleged error is an extricable error of law, the applicable standard of review is correctness.

28 The applicability of the rule against collateral attack and the applicability of the doctrine of abuse of process are questions of law reviewable on the correctness standard.

V. Analysis

A. Res Judicata

29 The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. Issue estoppel precludes the litigation of an issue previously decided in another court proceeding, and cause of action estoppel precludes the litigation of a cause of action which was adjudged in a previous court proceeding: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Ontario: LexisNexis Canada Inc., 2004) at 1 [*Res Judicata*]. We need not consider the applicability of cause of action estoppel because issue estoppel precludes Central Guaranty from attacking the validity of the trusts in this litigation.

(i) Issue Estoppel

30 For issue estoppel to be successfully invoked, the issue must be the same as the one decided in the prior judicial decision, the prior judicial decision must have been final, and the parties to both proceedings must be the same, or their privies: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.) at para. 23 [*Toronto*].

(a) 'Same Issue' Precondition

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

31 The first precondition for issue estoppel requires that the same issue was decided, rather than could have been decided, in the prior decision: *Res Judicata*, *supra* at 40. Issue estoppel only "extends to the material facts and the conclusions of law or of mixed fact and law ... that were necessarily (even if not explicitly) determined in the earlier proceedings": *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.) at para. 24 [*Danyluk*]. Put another way, the first precondition for issue estoppel is only met when "[t]he question out of which the estoppel is said to arise [was] 'fundamental to the decision arrived at' in the earlier proceedings": *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.) at 255, citing Lord Shaw in *Hoystead v. Commissioner of Taxation* (1925), [1926] A.C. 155 (Australia P.C.).

32 Miller A.C.J. was not explicitly called upon to determine the issue of the validity of the trusts in the receivership proceedings, and none of the Orders he made contain an express pronouncement on that issue. Nonetheless, we conclude that a finding that the trusts were valid was fundamental to, and made in, the receivership proceedings.

33 The Orders of Miller A.C.J. were all based on the existence of valid trusts. Trust validity was a foundational underpinning of the Orders. The trial judge acknowledged this when he said: "[s]o much was done in the Receivership in the long lead time to this action, all of which appears from the recital to have been on the assumption by all concerned, including the Receiver ... that these arrangements were formal trusts": Phase I at para. 5. Therefore, a finding that the trusts were valid was at the heart of Miller A.C.J.'s decisions. It is illogical to suggest otherwise. This is demonstrated by the trial judge's acknowledgment that "one should not vary a trust without finding that one exists": Phase I at para. 17. It also follows that one would not direct how trust funds should be distributed without finding that a trust exists.

34 Had it not been found that valid trusts existed, neither the warranty holders nor the Importers would have had any preferred claim on the funds held by Central Guaranty. Those funds would have been shared with IW's other creditors. Thus, the direction of payment to the Importers had to be based on a trust foundation.

35 Central Guaranty argued the issue of the validity of the trusts could not have been finally determined in the receivership proceedings because Miller A.C.J.'s Orders contemplated there would be further litigation on the issues of whether it breached the trusts and, if it did, what remedies should follow. We do not find this argument convincing. The issues Miller A.C.J. directed to be tried, and contemplated would be tried, were all based on the existence of valid trusts. An invalid trust cannot be breached. Had Miller A.C.J. thought the issue of the validity of the trusts still needed to be determined, he would have said so.

36 The determination of the issue of the validity of the trusts was fundamental to Miller A.C.J.'s Orders, particularly the July 1988 Order. Therefore, that issue was decided in the receivership proceedings and the first precondition for issue estoppel is met.

(b) 'Final Decision' Precondition

37 The second precondition for issue estoppel is met if a decision is final in the sense that it determines the question between the parties conclusively. A decision is final if the court that made it "has no further jurisdiction to rehear the question or to vary or rescind the finding": *Res Judicata*, *supra* at 85-86.

38 A decision need not determine the entire subject matter of the relevant litigation in order to meet the second precondition. Rather, the precondition is met where a decision finally disposes of a substantive right between the parties. Consequentially, "a final disposition in an interlocutory proceeding may give rise to issue estoppel in a different proceeding:" *Res Judicata*, *supra* at 86 and 182.

39 The July 1988 Order directed how the trust funds would be distributed. Payments were made pursuant to that Order and the Importers assumed liabilities to warranty holders. There has been no suggestion that this distribution can be undone or that monies can be returned. Accordingly, the second precondition for issue estoppel was met in this case.

(c) 'Same Parties' Precondition

40 The third precondition for issue estoppel is not in issue. Neither party argued it was not met in this case.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

41 As all its preconditions are met in this case, we conclude issue estoppel applies and the trial judge erred in law in finding the issue of the validity of the trusts was not settled by principles of *res judicata*.

(ii) Special Circumstances Exception

42 The special circumstances exception bars the application of issue estoppel in a second proceeding. In order to demonstrate special circumstances, a party must show that he or she exercised reasonable diligence in the first proceeding. The standard of reasonable diligence is an objective standard: *Res Judicata*, *supra* at 232-234.

43 The special circumstances exception is not applicable "when all the relevant facts were known to the applicant's solicitor and he, for reasons unknown, did not advance them in argument": *Bernier v. Bernier* (1989), 62 D.L.R. (4th) 561, 70 O.R. (2d) 372 (Ont. C.A.) at para. 13. Nor is it applicable simply because the court that made the decision in the first proceeding may have reached a wrong conclusion: *Hennig v. Northern Heights (Sault) Ltd.* (1980), 116 D.L.R. (3d) 496, 30 O.R. (2d) 346 (Ont. C.A.) at paras. 33-36, leave to appeal to S.C.C. refused (1980), 30 O.R. (2d) 346n (S.C.C.).

44 The types of circumstances that have been held to constitute special circumstances include allegations that the decision in the first proceeding was obtained by fraud, the discovery of new evidence which could not have been discovered by the exercise of reasonable diligence in the first proceeding, changes in the law, public policy considerations and circumstances amounting to a denial of natural justice: *Res Judicata*, *supra* at 231 and 280-282. Special circumstances do not exist when the litigant knew of the issue in the first proceedings and did not raise it. Therefore, there were no such circumstances in this case.

45 It is not necessary for us to decide if the trusts are uncertain, but we have reservations about the trial judge's analysis of this issue. In any event, while it is true that courts are reluctant to supervise and enforce uncertain trusts, once the trusts are found to be valid the court must (with the assistance of the Receiver) administer those trusts as best it can.

46 Accordingly, we are of the view that the trial judge made an extricable error of law in finding there were special circumstances in this case which warranted the suspension of the principles of *res judicata*. He failed to apply the correct legal test.

B. Collateral Attack

47 In *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.) at 599, the Supreme Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

48 The rule against collateral attack seeks to ensure "that a judicial order pronounced by a court of competent jurisdiction [is] not ... brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it": *Danyluk*, *supra* at para. 20.

49 Central Guaranty chose not to attack the July 1988 Order directly when it abandoned its appeal from that Order.

50 The trial judge found Central Guaranty was not trying to vary or nullify the effects of the July 1988 Order by raising a trust invalidity defence. This is not the test for determining whether Central Guaranty offended the rule against collateral attack. The fact Central Guaranty does not take issue with how the trust funds were distributed is irrelevant. The problem with the trust invalidity defence is that it threatens to render the July 1988 Order nonsensical. If the July 1988 Order did not finally dispose of the issue of the validity of the trusts, the trusts should not have been varied and the trust funds should not have been distributed. IW had many creditors who might have been entitled to some or all of the funds Central Guaranty held if the trusts were not valid.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

51 Accordingly, the trust invalidity defence amounted to a collateral attack on the July 1988 Order and the trial judge erred in law in concluding that the question of trust validity was not settled by the rule against collateral attack.

C. Abuse of Process

52 Courts enjoy an inherent and residual discretion to prevent an abuse of process: *Toronto*, *supra* at para. 35. In *Toronto*, *supra* at para. 37, at the Supreme Court noted:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel ... are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

The Court also said: "[t]he attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process": *Toronto*, *supra* at para. 42.

53 Accordingly, it was within the trial judge's discretion to find Central Guaranty's attempt to relitigate the issue of the validity of the trusts was an abuse of process notwithstanding that he concluded the doctrine of *res judicata* was inapplicable.

54 In our view, it was an abuse of process for Central Guaranty to attempt to relitigate the issue of the validity of the trusts. It is simply too late. Central Guaranty was involved in the receivership proceedings from the outset. It participated while agreements were reached and orders were granted varying the trusts and distributing the trust proceeds. It watched unsecured creditors' claims go unpaid as the trusts were administered. It stood by as the Importers assumed IW's obligations to the warranty holders. All of this transpired while Central Guaranty knew there was a potential defence that the trusts were invalid. To allow Central Guaranty to raise that defence more than a decade later in these circumstances would violate principles of judicial economy and certainty and seriously undermine the administration of justice in this province.

55 Accordingly, the trial judge erred in law in concluding the doctrine of abuse of process did not preclude Central Guaranty from raising the trust invalidity defence in the Receiver's action.

VI. Disposition

56 Our conclusion that the issue of the validity of the trusts was settled by the principles of *res judicata*, collateral attack and abuse of process disposes of this appeal. The judgments in both phases of the trial are set aside and a new trial is ordered to determine whether Central Guaranty breached the trusts and, if it did, what remedies should be imposed.

57 As a result of this disposition, it is not necessary for us to consider the trial judge's conclusions relating to the validity of the trusts, the existence of a fiduciary duty and negligence. However, we have reservations about the trial judge's conclusions on those issues and the disposition of this appeal on a narrow ground is not an endorsement of those conclusions.

58 The Receiver will have costs of the appeal and of the proceedings below.

Appeal allowed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 17

2015 BCSC 1878
British Columbia Supreme Court

Forrest v. Vriend

2015 CarswellBC 2979, 2015 BCSC 1878, [2015] B.C.W.L.D. 8125, [2015] B.C.W.L.D. 8129, 259 A.C.W.S. (3d) 295

Clifford Roy Forrest, Plaintiff and John Vriend, Toronto-Dominion Bank, Daryl Martz, and Manulife Securities Investment Services Inc., Defendants

W.F. Ehrcke J.

Heard: September 8, 2015
Judgment: October 15, 2015
Docket: Vancouver S138862

Counsel: A.A. Macdonald, for Plaintiff
C.J. Munroe, for Defendants, J. Vriend and Toronto Dominion Bank
J.K. Lamb, for Defendants, D. Martz and Manulife Securities Investment Services Inc.

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

Headnote

Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Action frivolous, vexatious or abuse of process — Miscellaneous

Defendant V was employed by defendant bank as mobile mortgage specialist — Defendant M was investment advisor employed by defendant M Inc. — Plaintiff met with V and M and took out home equity line of credit (HELOC) with bank, secured by mortgage on his home — Plaintiff used proceeds to purchase investments with M Inc. — After failing to make minimum payments required by HELOC agreement, plaintiff lost his home in foreclosure — Plaintiff filed notice of civil claim against defendants, claiming, among other things, that V negligently and in breach of fiduciary duty gave him poor advice about risk — Bank and V brought application for order that action against them be struck and proceedings dismissed on ground that they were abuse of process — Application dismissed — It was not agreed that issues raised in civil claim should properly have been raised in foreclosure proceeding.

Civil practice and procedure --- Pleadings — Amendment — Grounds for amendment — To raise new cause of action or defence — Miscellaneous

APPLICATION by plaintiff for order granting leave to amend notice of civil claim; APPLICATION by certain defendants for order that action against them be struck and proceedings dismissed.

***W.F. Ehrcke J.*:**

I. Introduction

1 The defendant John Vriend ("Vriend") is employed by the defendant Toronto-Dominion Bank ("TD") as a mobile mortgage specialist. The defendant Daryl Martz ("Martz") is an investment advisor employed by the defendant Manulife Securities Investment Services Inc. ("Manulife').

2 In 2006 the plaintiff, Clifford Roy Forest, met individually with Vriend and with Martz, and took out a home equity line of credit ("HELOC") with TD secured by a mortgage on his home, and he used the proceeds to purchase investments with Manulife.

3 After failing to make the minimum payments required by the HELOC agreement, the plaintiff lost his home in a foreclosure.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

4 On November 28, 2013, the plaintiff filed a notice of civil claim against the defendants, claiming, among other things, that Vriend negligently and in breach of fiduciary duty gave him poor advice about risk.

5 I now have before me two applications in relation to the plaintiff's action.

6 One is an application by the plaintiff for an order pursuant to Rule 6-1(1)(b)(i) granting leave to amend his notice of civil claim.

7 The other is an application by the defendants TD and Vriend for an order pursuant to Rule 9-5(1) that the action against them be struck and the proceedings dismissed on the ground that they are an abuse of process.

II. Background

8 On May 15, 2006, the plaintiff entered into a HELOC agreement with TD. The HELOC agreement had a credit limit of $185,250 and was secured against the plaintiff's home in Chilliwack.

9 In January 2012, the plaintiff failed to make the minimum payments required by the HELOC agreement.

10 On July 12, 2012, TD filed a petition in the Chilliwack registry of this Court under No. 024789 commencing foreclosure proceedings against the plaintiff pursuant to the HELOC agreement (the "Foreclosure Proceedings").

11 On July 22, 2013, an *order nisi* was granted in the Foreclosure Proceedings.

12 On November 28, 2013, the plaintiff filed a notice of civil claim under number S138862 containing a variety of allegations against TD, Vriend, Martz, and Manulife (the "Civil Claim").

13 On May 7, 2014, TD and Vriend filed an amended response to the Civil Claim arguing, amongst other things, that the issues raised by the plaintiff in the Civil Claim have already been determined in the Foreclosure Proceedings.

14 On June 23, 2014, TD was granted conduct of sale of the plaintiff's home.

15 On October 27, 2014, TD was granted an order approving the sale for the sum of $267,500. The sale took place on December 1, 2014.

III. The Application for Leave to Amend the Notice of Civil Claim

16 The plaintiff seeks to amend his notice of civil claim to add, amongst other things, a tort claim for damages, including damage to his health, as a result of his reliance on the advice he received. The claims are based on negligence, breach of fiduciary duty, and vicarious liability.

17 Martz and Manulife have consented to the application to amend. TD and Vriend have said that they take no position on the application to amend if their application to strike the claim is dismissed.

18 The application to amend the pleadings ought properly to be considered before the application to strike the claim: *Drummond v. Drummond Estate*, 2012 BCSC 496 (B.C. S.C.) at para. 22.

19 I am satisfied that there should be an order pursuant to Rule 6-1(1) granting the plaintiff leave to amend the notice of civil claim as set out in Schedule "A" of his notice of application.

IV. The Application to Strike the Claim Against TD and Vriend

20 TD and Vriend's application to have the Civil Claim dismissed or struck out as against them is brought pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*. They submit that the issues raised on the Civil Claim are either the same as, or so

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

closely related to, the issues determined on the Foreclosure Proceedings that they are *res judicata*, and the Civil Claim amounts to an abuse of process.

21 At para. 39 of *Reliable Mortgages Investment Corp. v. Chan*, 2014 BCCA 14 (B.C. C.A.), our Court of Appeal, citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.), set out three preconditions to the operation of issue estoppel:

> Issue estoppel may be invoked where:
>
> 1. the same question as that before the court has been previously decided;
>
> 2. the judicial decision said to create the estoppel was final; and
>
> 3. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised.

22 Citing *Singh (Banns) v. Bank of Montreal* (1979), 109 D.L.R. (3d) 117 (B.C. C.A.), TD and Vriend say that the order *nisi* in the Foreclosure Proceeding was a final judgment of this Court which could not have been granted unless the Court was satisfied that the mortgage was both valid and legally enforceable, and therefore, it is not open to the plaintiff to challenge the validity of the mortgage by way of a separate action.

23 TD and Vriend rely on *HSBC Bank Canada v. Ba-Oose Inc.*, 2011 BCCA 511 (B.C. C.A.), where our Court of Appeal said at para. 22:

> Once an order *nisi* is pronounced, it is not open to a mortgagor to challenge the validity of the mortgage by way of a separate action. Because the validity and enforceability of the mortgage are prerequisites to the granting of an order *nisi*, the facts necessary to determine that the mortgage is enforceable become *res judicata.*

24 The plaintiff submits that his Civil Claim, as amended, does not impugn the validity and enforceability of the mortgage or the HELOC agreement; rather, it claims damages for negligence and breach of trust. The plaintiff says that since the issues to be decided on the Civil Claim are distinct from the issues that were determined in the Foreclosure Proceeding, TD and Vriend cannot rely on issue estoppel to say that the *order nisi* is a bar to the Civil Claim.

25 TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (N.S. C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "...prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

26 TD and Vriend contend that even if the Civil Claim does not directly impugn the validity or enforceability of the mortgage and HELOC agreement, the issues raised on the Civil Claim are so closely related that they should properly have been raised in the Foreclosure Proceeding. They rely on *Ba-Oose* at para. 26 for the proposition that, if a matter is closely related to the issues before a court in a foreclosure proceeding, and could have affected the judgment, cause of action estoppel will preclude the raising of those matters in a new action, even though they may not be matters covered by issue estoppel.

27 I do not agree that the judgment of our Court of Appeal in *Ba-Oose* goes that far. In *Ba-Oose* the bank sought to strike out all of the plaintiffs' claims, including a claim that the plaintiffs had given up an opportunity to sell the property on the basis of

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

a false representation that the bank would renew the mortgage. In dealing with the question of whether that issue should have been struck by the chambers judge, the Court of Appeal wrote at paras. 26-27:

> [26] It was not necessary for the court, in issuing an *order nisi* of foreclosure, to examine the question of whether a misrepresentation by the bank as to its readiness to renew the mortgage induced the plaintiffs to forego the sale of the property. Nonetheless, it would have been sensible for the matter to have been raised in the foreclosure proceeding, as it was closely tied to the issues that were before the court in that proceeding, and could have affected the judgment. It is strongly arguable, therefore, that cause of action estoppel would preclude the raising of that issue in a new action, even though it is not a matter covered by issue estoppel (see, for example, *420093 BC Ltd. v. Bank of Montreal*(1995), 128 D.L.R. (4th) 488, particularly at para. 42).
>
> [27] In my view, it is unnecessary to reach any final conclusion on the question of whether that part of the plaintiffs' action is barred by cause of action estoppel. I say this because the evidence that was before the court on the summary trial application makes it apparent that the claim could not succeed.
>
> [Emphasis added.]

28 Thus, any comment by the Court of Appeal that the issue may have been barred by cause of action estoppel was, in the circumstances of that case, *obiter dicta*.

29 In any event, *Ba-Oose* is distinguishable, because the issues raised by the plaintiff in the amended Civil Claim in the present case are quite different from the issue in *Ba-Oose*, and are much further removed from the question of the validity and enforceability of the mortgage.

30 It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30, and 37, he wrote:

> 25 The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
>
> . . .
>
> 30 The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> . . .
>
> 37 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.
>
> [Underline in original.]

31 The *order nisi* obtained by TD against Mr. Forrest was an *in rem* remedy granted by a Master of this Court. The Civil Claim, as amended, seeks damages in tort. The Master would not have had jurisdiction to entertain a tort issue, had the plaintiff

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

attempted to raise it in the Foreclosure Proceeding: *Mulligan v. Stephenson*, 2013 BCSC 1384 (B.C. S.C.) at para. 35. As well, Vriend is one of the defendants in the Civil Claim, although he was not a party in the Foreclosure Proceeding. I do not accept the argument of TD and Vriend that Vriend was a "privy" to the Foreclosure Proceeding: *XY, LLC v. Canadian Topsires Selection Inc.*, 2014 BCSC 2017 (B.C. S.C.) at paras. 88-91.

32 In all the circumstances, I do not agree that the issues raised in the Civil Claim as amended ought properly to have been raised in the Foreclosure Proceeding. The application of TD and Vriend to strike the Civil Claim as against them is dismissed.

33 The plaintiff is entitled to its costs of this application in the cause as against TD and Vriend.

34 I make no order for costs with respect to Martz and Manulife.

Plaintiff's application granted and defendants' application dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 18

2006 BCSC 1192
British Columbia Supreme Court

Royal Bank v. United Used Auto & Truck Parts Ltd.

2006 CarswellBC 1943, 2006 BCSC 1192, [2006] B.C.W.L.D. 5536, [2006] B.C.W.L.D. 5549, [2006] B.C.W.L.D. 5550, [2006] B.C.J. No. 1178, 151 A.C.W.S. (3d) 931, 24 C.B.R. (5th) 102

Royal Bank of Canada (Petitioner) and United Used Auto & Truck Parts Ltd. and Others (Respondents)

Century Services Inc. (Petitioner) and VECW Industries Ltd. and Others (Respondents)

E. Rice J.

Heard: June 5-8, 2006
Judgment: August 3, 2006 *
Docket: Vancouver H990076, H990085

Counsel: W.A. Pearce, QC for Applicant, Mr. Mott
K. Jackson, D. Westgeest (Articled Student) for PricewaterhouseCoopers Inc.

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Administration of estate — Trustees — Removal

Bankrupt had acquired almost 150 acres of land prior to bankruptcy — In 2000, bankrupt was declared bankrupt and trustee in bankruptcy was appointed — Certain portions of bankrupt's lands were sold, all with vigorous opposition from bankrupt — Bankrupt commenced two actions against purchasers and trustee claiming damages for breach of trust, deceit and conspiracy, alleging that court-approved sales were not made in good faith for valuable consideration and that purchasers were not bona fide purchasers for value — First action was dismissed as abuse of process, and second action, which was identical to first action in all material respects, was dismissed on basis of res judicata — Bankrupt sought removal of trustee so that new trustee could advance claim on bankrupt's behalf — Bankrupt brought application for removal of trustee for alleged breaches of fiduciary duty — Application dismissed — Cause of action proposed and issues sought to be advanced arose from same relationship and same subject matter as was adjudicated in previous proceedings — Bankrupt had opportunity to raise issues as interested party during sale approval applications — Bankrupt was unsuccessful in seeking leave to appeal approvals of sale — Evidence in hands of bankrupt was discoverable with reasonable diligence prior to sale approval proceedings and bankrupt's two unsuccessful actions — Evidence offered by bankrupt in opposition to proposed sales included all allegations in case at bar, and would constitute re-litigation of same issues — Proposed action barred in its entirety by doctrine of issue estoppel — If requirements of issue estoppel had not been strictly met, proposed action would have been dismissed as abuse of process and impermissible collateral attack on previous judgments — Special circumstance did not exist to warrant refusal to apply estoppel.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Introduction — Where abuse of process

Bankrupt had acquired almost 150 acres of land prior to bankruptcy — In 2000, bankrupt was declared bankrupt and trustee in bankruptcy was appointed — Certain portions of bankrupt's lands were sold, all with vigorous opposition from bankrupt — Bankrupt commenced two actions against purchasers and trustee claiming damages for breach of trust, deceit and conspiracy, alleging that court-approved sales were not made in good faith for valuable consideration and that purchasers were not bona fide purchasers for value — First action was dismissed as abuse of process, and second action, which was identical to first action in all material respects, was dismissed on basis of res judicata — Bankrupt sought removal of trustee so that new trustee could advance claim on bankrupt's behalf — Bankrupt brought application for removal of trustee for alleged breaches of fiduciary duty — Application dismissed — Cause of action proposed and issues sought to be advanced arose from same relationship and same

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

subject matter as was adjudicated in previous proceedings — Bankrupt had opportunity to raise issues as interested party during sale approval applications — Bankrupt was unsuccessful in seeking leave to appeal approvals of sale — Evidence in hands of bankrupt was discoverable with reasonable diligence prior to sale approval proceedings and bankrupt's two unsuccessful actions — Evidence offered by bankrupt in opposition to proposed sales included all allegations in case at bar, and would constitute re-litigation of same issues — Proposed action barred in its entirety by doctrine of issue estoppel — If requirements of issue estoppel had not been strictly met, proposed action would have been dismissed as abuse of process and impermissible collateral attack on previous judgments.

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles Bankrupt had acquired almost 150 acres of land prior to bankruptcy — In 2000, bankrupt was declared bankrupt and trustee in bankruptcy was appointed — Certain portions of bankrupt's lands were sold, all with vigorous opposition from bankrupt — Bankrupt commenced two actions against purchasers and trustee claiming damages for breach of trust, deceit and conspiracy, alleging that court-approved sales were not made in good faith for valuable consideration and that purchasers were not bona fide purchasers for value — First action was dismissed as abuse of process, and second action, which was identical to first action in all material respects, was dismissed on basis of res judicata — Bankrupt sought removal of trustee so that new trustee could advance claim on bankrupt's behalf — Bankrupt brought application for removal of trustee for alleged breaches of fiduciary duty — Application dismissed — Cause of action proposed and issues sought to be advanced arose from same relationship and same subject matter as was adjudicated in previous proceedings — Bankrupt had opportunity to raise issues as interested party during sale approval applications — Bankrupt was unsuccessful in seeking leave to appeal approvals of sale — Evidence in hands of bankrupt was discoverable with reasonable diligence prior to sale approval proceedings and bankrupt's two unsuccessful actions — Evidence offered by bankrupt in opposition to proposed sales included all allegations in case at bar, and would constitute re-litigation of same issues — Requirements of issue estoppel met for each issue raised in proposed claim and sufficient connection existed to create privity — Proposed action barred in its entirety by doctrine of issue estoppel.

APPLICATION by bankrupt for order removing trustee in bankruptcy for alleged breaches of fiduciary duty.

***E. Rice J.*:**

Introduction

1 This is an application for an order pursuant to s. 14.04 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), removing PricewaterhouseCoopers ("PWC") as trustee in bankruptcy for United Used Auto & Truck Parts Ltd., Seiler Holdings Ltd., and VECW Industries Ltd., and United Used Auto Parts (Storage Div.) Ltd. (together "United"), and appointing George Abakhan, licensed trustee, in its place.

2 The applicant is Ian Mott, an officer, director, major shareholder, and creditor of one or more of the United companies. The sole purpose of the application is to provide creditors of United with a trustee that has the capacity to sue PWC for alleged breaches of fiduciary duty as trustee of the bankrupt estate and court-appointed receiver of the assets of the estate.

3 The application arises from the court-approved sales of certain lands owned by United in Surrey, B.C. (the "United Lands"). In particular, it concerns a sale in 2001 to the Pacific National Exhibition (the "PNE") of lots 3 to 6 and 8 to 20 of the United Lands (the "PNE Lands").

4 It is alleged that PWC, as United's trustee and receiver, failed in a fiduciary duty owed to United's creditors to maintain and enhance the value of the United Lands and to obtain a fair price on the sales. PWC denies these allegations and contends in any event that any legal action commenced now on those claims is *res judicata* and so barred either because the claims have been adjudicated in this Court before or because Mr. Mott should have but failed to raise them in earlier court proceedings.

5 The parties sought and obtained directions from Mr. Justice Tysoe on April 12, 2006. His Lordship directed that PWC was at liberty to raise the issue of *res judicata* on this application in advance of determining whether to replace PWC as United's trustee.

Background

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

6 For many years, United operated a used auto parts business in Surrey, B.C. near the Patullo Bridge. It managed at the same time to assemble about 150 acres of land, some of which it used in its auto parts business, and some it kept vacant for redevelopment. This activity all took place under the direction of Mr. Mott.

7 As far back as 1994, United was under pressure of foreclosure of the United Lands from the Royal Bank. In May of that year, to forestall foreclosure, United entered into a forbearance agreement whereby the bank agreed to forbear from foreclosing until May of 1997. The agreement was extended a number of times through to 1998.

8 Beginning in about June 1997, the PNE and United had discussions on and off about the sale to PNE of the PNE Lands.

9 In March 1998, United entered into another forbearance agreement with another charge holder on the United Lands, R.A. Aziz. By that agreement, United was required to put the United Lands on the market for sale and undertake an aggressive sales and marketing program. United entered into a one-year listing agreement with Colliers.

10 Meanwhile, in about January 1998, United had made an informal proposal to the secured creditors whereby United would sell $25 million worth of the United Lands by September 1998. In that time, however, there were no sales.

11 In September 1998, three years of taxes were unpaid on the United Lands, and United obtained financing through another charge holder, Century Services. With that, United owed the Royal Bank about $6 million, Century Services about $5 million, Aziz about $6 million, and there were also other charges over the United Lands.

12 The Royal Bank and Century commenced foreclosure proceedings in January 1999. They obtained orders nisi on February, 4 1999.

13 United resisted applications for conduct of sale by the mortgagees in early 1999. It entered into another forbearance agreement with Aziz. The agreement included a repayment plan that required United to achieve various sales targets or a refinancing of the property by July 1999. United failed to meet the targets and sold none of the properties. In about July 1999, United consented to an order granting joint conduct of sale of the United Lands to the Royal Bank, Century, and Aziz.

14 On August 16, 1999, Century and the Royal Bank obtained an appraisal from Burgess, Austin, Cawler & Associates valuing the United Lands at $44.4 million based on industrial-salvage zoning. The appraisal was updated on September 23, 1999, valuing the lands at $23 million to $25 million if sold en bloc and $30.5 million if sold in individual lots. Century and the Royal Bank then agreed to list the United Lands for $32 million en bloc. Accordingly, on October 12, 1999, they entered into a listing agreement putting the asking prices at $49.6 million in total based on selling the lots individually and $32 million on an en bloc basis.

15 On November 8, 1999, United commenced proceedings under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Ernst & Young was appointed as a monitor and was granted conduct of sale of the United Lands.

16 On February 23, 2000, in the CCAA proceeding, the court approved a sale of the United Lands to Cape Developments, Oxford Properties, and GE Capital for $30 million. That sale was subject to two conditions: first, that Cape could rezone the property, and second, that Cape could be satisfied of the environmental condition of the property. Cape never cleared its conditions, and although an extension was negotiated, Cape failed to increase the deposit in accordance with the extension agreement. In the result, that transaction collapsed.

17 Meanwhile, on April 27, 2000, CB Richard Ellis provided a report for Mr. Mott valuing part of the United Lands, consisting of lots 22 through 32 (the "Group Five Lands"), at $28,400,000 based on highway-commercial zoning. A letter from Mr. Ellis to Mr. Mott on May 23, 2000, stated that the total United Lands excluding the Group Five Lands were worth $750,000 to $800,000 per acre.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

18 In May 2000, Ernst & Young issued its ninth monitor's report. It was negative about United's conduct and ability to organize. The report stated that the prospects for restructuring appeared to be significantly poorer than when the Cape offer had been accepted earlier in the year.

19 The monitor remained of the view that United's operations could be financially viable in due course under competent management. However, the monitor accused Mr. Mott of improperly dealing with funds generated from the sale of its "P.M.S.I." inventory, which should have been held strictly in trust. The report stated:

> It is common ground that the management of United lacks the skills to achieve the restructuring without significant professional assistance. However, even that professional assistance is without effect if management is not prepared to accept and execute professional advice it received in a prompt and efficient manner.

The report also alleged that United had filed a false affidavit and had breached a court order not to give further security.

20 In June 2000, Mr. Justice Tysoe granted the Royal Bank and Century conduct of sale of the United Lands, and they entered into a further listing agreement with Colliers to list the lands en bloc for $32 million as well as on an individual lot basis. The CCAA proceedings were terminated the next month. United was declared bankrupt, and PWC was appointed as the trustee in bankruptcy. United appealed, but the appeal was dismissed on August 8, 2000. PWC was later replaced as the trustee for United Used Auto Parts (Storage Div.) Ltd., but remained in that position for the rest of the United companies.

21 By this time, the administrative charges on the United Lands had risen to approximately $850,000. The interest costs on the mortgages were running at about $300,000 per month. In August 2000, Mr. Justice Tysoe approved the sale of lot 1 of the United Lands for $2.4 million, and on September 1, 2000, he appointed PWC as the receiver of the assets and undertaking of United with conduct of sale of all but lots 1, 7, and the Group Five Lands. Conduct of sale of lot 1 and the Group Five Lands remained with the Royal Bank and Century. Lot 7 was the subject of a separate foreclosure proceeding and was sold on November 27, 2000, to a numbered company owned by Advance Lumber for $2,525,000.

22 On February 6, 2001, PWC, acting as the receiver, filed applications under the Royal Bank and Century foreclosure actions for an order for sale of the PNE Lands and the right to purchase lot 2 for $12,572,600. The purchaser was a numbered company controlled by the PNE. PWC also applied for an order that lot 21 be sold to a numbered company related to Ralph's Auto Supply for $1,250,000.

23 Mr. Ritchie Clark appeared as counsel for Mr. Mott and for United itself on the sale applications. Although he brought no counter-application on behalf of United, Mr. Clark objected to the sale on several grounds, including alleged failures by PWC to adequately inform the other parties as to who were the purchaser's backers, to provide information on the negotiation history, to properly market the property, and to obtain a price at fair market value. Mr. Clark applied for an adjournment, which was refused, and Mr. Justice Shaw approved the sales on February 9, 2001. Later that month, Mr. Justice Tysoe granted PWC conduct of sale of the Group Five Lands.

24 On March 9, 2001, Mr. Mott sought leave to appeal the orders for sale granted by Mr. Justice Shaw. The application was dismissed.

25 The original sale of the PNE Lands to the PNE failed to close because the PNE wished to also acquire lot 7, which had been sold to Advance Lumber in a separate foreclosure proceeding. However, on May 11, 2001, PWC brought another application based on a renewed agreement with the PNE. It was for an order that the PNE Lands and the right to purchase lot 2 be sold to the PNE for $12,572,600 and that lots 27 to 32 (the "Replacement Lands"), which formed part of the Group Five Lands, be sold to a company related to Advance Lumber for $2,146,000. On May 15, 2001, after a hearing May 11 and 14, 2001, Mr. Justice Thackray approved these sales.

26 Mr. Mott and his son, Howard Mott, appeared at the hearing before Mr. Justice Thackray without counsel and made submissions opposing the sale. They requested an order directing a trial on the issue of constructive expropriation, but made

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

no formal application to support the order. Mr. Justice Thackray dismissed their request, saying that such an application was not technically before him. Mr. Justice Thackray found further that the Motts had failed to establish a foundation for their allegations of conspiracy and fraud.

27 Mr. Mott sought leave to appeal Mr. Justice Thackray's ruling, but his application was dismissed on May 18, 2001. A further application by Mr. Mott to vary the Court of Appeal's order of May 18, 2001, and to stay Mr. Justice Thackray's orders approving the sales was similarly dismissed by the Court of Appeal on May 20, 2001.

28 After completion of the sale of the PNE Lands, the court made further orders granting Aziz conduct of sale of the remainder of the Group Five Lands, being lots 22 to 26. In about August 2002, the court made a vesting order in the foreclosure actions, approving the sale of lot 24 to Ralph's Auto Supply for $1,130,000. On October 3, 2003, Mr. Justice Tysoe granted a vesting order approving the sale of the remaining lots 22, 23, 25, and 26 to R & R Trading Co. Ltd. for $2,644,800.

The First Mott Action

29 On May 31, 2000, Mr. Mott, on behalf of himself and Moe-Villa Investments Ltd., a fourth mortgagee of the United Lands, commenced B.C. Supreme Court Action No. S013035 (the "First Mott Action") against the PNE, PWC, and Advance Lumber. Concurrently, he filed certificates of pending litigation against 24 lots within the United Lands. His claim was for damages for breach of trust, deceit, and conspiracy. He alleged that the court-approved sales were not made in good faith for valuable consideration and that the defendant purchasers were not *bona fide* purchasers for value.

30 The endorsement on the writ provided:

> Moe-Villa Investments Ltd. claim a mortgage over the lands... and claim its security interest in the land which is being compromised by the tortuous [*sic*] and deceitful conduct of the Defendants in this action and in Supreme Court of B.C. action numbers H99076 and H99085. Ian Mott claims damages and title of the lands is being wrongfully [*sic*] transferred away by errors of the court and the parties to the action participated and wrongfully dealt in ways to deprive the Plaintiffs of their interest in the lands as set out in the attached schedules... These lands are being taken without proper compensation to the Plaintiffs. Fair market value was not paid by the purchasers presently on title... The Plaintiffs claim against the Defendants, and each of them, for damages [*sic*] and loss resulting from, breach of trust, deceit, and conspiring to transfer to the Defendant purchasers P.N.E...., 617548 B.C. LTD., ADVANCE LUMBER LTD. and 606703 B.C. LTD. the aforesaid interests in parcels of land unlawfully for less than fair market value, and contrary to the *Bankruptcy and Insolvency Act, R.S.C.* and the *Company Act, R.S.B.C.* The Defendants conspired to depress the market value of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and interests in the lands owned by the Plaintiffs for less than true market value. The said purchases of lands were not made in good faith for valuable consideration and the Defendant purchasers are not bona fide purchasers for value.

31 PWC applied to dismiss that action as an abuse of process, and the application was heard before Madam Justice Allan on August 23, 2001. Madam Justice Allan, upon reading the materials and hearing argument, ruled that all the issues in the new action had either been raised or should have been raised in the previous sale approval proceeding before Mr. Justice Thackray, who had dismissed the allegations of conspiracy as groundless.

32 Included in her findings of fact and law were the following:

> [para. 8]... Mr. Mott's son made extensive submissions on that application, alleging serious improprieties by the Receiver and the P.N.E. Specifically, Mr. Mott alleged a conspiracy between the Receiver and the P.N.E., to have the P.N.E. obtain land at price advantageous to the P.N.E., and disadvantageous to Mr. Mott.
>
> [para. 22]... In essence, the plaintiffs seek the return of the lands, and damages to compensate them for the Receiver selling those lands to the P.N.E. for less than fair market value, and deceitfully.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

[para. 25]... the plaintiffs filed additional affidavits asserting that Colliers did not permit prospective purchasers of the lands to make offers because Colliers was reserving certain parcels for purchase by the P.N.E.

[para. 26]... The plaintiffs suggest that numerous matters were not before Mr. Justice Thackray, and that with respect to some issues, he was confused and did not understand them.

[para. 31]... Mr. Mott seeks to pursue the claim that the defendants acted wrongfully and deprived the plaintiffs of their lands without proper compensation. He alleges the lands were "wrongfully transferred away by errors of the courts."

[para. 33] Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed.

[para. 34] These issues have all been raised in previous proceedings and litigated. There are no new parties to the litigation. There is no "fresh evidence" that was not or could not have been discovered in previous litigation. The proposed evidence of Mr. Seilor and Mr. Lutor who were apparently unsuccessful in making offers to purchase portions of the lands does not raise a new issue.

[para. 35] Mr. Justice Thackray devoted 18 paragraphs of his careful and lengthy reasons for judgment to the alleged conspiracy alleged by Mr. Mott, and dismissed it as groundless.

[para. 37] The PNE has been judicially determined to be a bona fide purchase for value. Allegations against Advance Lumber cooperating with PNE and Colliers, the realtor acting as agent for PWC, were canvassed before Thackray J. and have no merit.

[para. 38] I conclude that the plaintiff's application is an abuse of process and should be dismissed pursuant to Rule 19(24)(d).

[para. 45]... So, pursuant to Rule 19(24), there will be two orders of special costs.

The Second Mott Action

33 On June 13, 2001, Mr. Mott commenced another action, B.C. Supreme Court Action No. S013957 (the "Second Mott Action"), against the existing and additional defendants. He filed certificates of pending litigation against the Group Five Lands. A similar application was made to strike the action under Rule 19(24) as an abuse of process. It was heard on September 26, 2002, before Mr. Justice Davies, who found that the endorsement in the Second Mott Action was "virtually identical" to the endorsement on the First Mott Action. Mr. Justice Davies held that because the Second Mott Action was "in all material respects identical to an action which has already been struck by this court as an abuse of process, it must be dismissed on the basis of *res judicata*."

The Proposed Statement of Claim

34 In the proposed action underlying the application before me, the claims against PWC are detailed in a draft statement of claim submitted on behalf of Mr. Mott. As a pleading it is overloaded with redundancies, evidence, and conjecture, but it also manifests a number of allegations, which may be excerpted as follows:

Proposed Statement of Claim

Statement of Claim Para. No.	**Allegation:**
4-5	PWC accepted appointment as Trustee and failed to disclose to the court and United's creditors its conflict in dealing with the PNE sale when PWC was also the auditor for PNE. PWC should never have

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

	accepted an appointment as Receiver because of the conflict that existed between the interests of the secured creditors and unsecured creditors.
6-7, 18	PWC failed to exercise its duty to take reasonable care, supervision and control of the debtor's property, specifically by failing to preserve the values of the property and enhance those values where it would have been prudent and feasible, and by failing to market the properties in a manner which would achieve the best possible price. PWC failed to appear at a public hearing in Surrey, July 31, 2000, to oppose a down zoning to remove salvage use from land zoned "Industrial Salvage" ("I.S."). PWC could have opposed the down zoning successfully on the basis that the down zoning constituted contravention of an agreement between the United and the City of Surrey in 1985. PWC knew or ought to have known that the proposed down zoning was part of a plan by Surrey to upgrade the use of the area where the United Lands were situate for commercial use, and it knew that commercially zoned lands were much more valuable than lands zoned for salvage or lands zoned for industrial use.
8-9	PWC failed to take reasonable steps to enhance the value of the subject lands before placing them on the market for sale by applying for a rezoning of the subject lands for commercial use or by not requesting Surrey counsel on July 31, 2000 to postpone the final passage of the down zoning to give it an opportunity to prepare rezoning applications.
10, 18	PWC locked the doors of the twelve business operations of United and proceeded to liquidate the assets without any prior notice to United, knowing that closing the businesses would put into jeopardy the nonconforming use of the United Lands and the premium value associated with that use, and knowing that United was revitalizing its business and the CCAA monitor's forecast income from operations would amount to approximately $866,000. PWC caused United to lose profits from the time of business closure to the present and in the future.
11	PWC listed the properties of United for sale without first taking advantage of the material change in Surrey's planning objectives to upgrade the area for commercial use and when it set an en bloc listing price of $32 million dollars which was an unconscionably low price having regard to the fair market value of the properties if sold as individual lots.
12	PWC failed to list the properties on MLS in a timely fashion and discouraged offers from potential purchasers who were interested in acquiring individual lots, with a view to accommodating the wishes of PWC's client, the PNE, which needed a large assembly of land to stay in place while it was in the process of deciding on its own site relocation. PWC failed to obtain a fair and reasonable return for the sale of the United Lands over reasonable period of time on a program that would give the properties as broad exposure as possible and encourage sales of individual lots but at the same time allowing consideration of en bloc offers that included premiums for the value of large blocks of land.
13	PWC failed to secure access as to the individual lots or to commence proceedings to enforce contractual rights claiming damages,, with the result that the lots bordering on the perimeter road were sold for substantially less than fair market value.
17	PWC sold the PNE Lands to the PNE for $12,572,600 based on a price of $185,000 per acre, which was substantially less than fair market value, knowing at the time that the PNE had secured the necessary commitment from the City of Surrey to rezone the subject lands for commercial purposes, and that if the lands were rezoned, their value would more than triple the price that was agreed upon. PWC further failed to take into account the following: (a) the earlier expressions by the PNE of its willingness to pay full market value; (b) the scarcity of large blocks of land that would suit the needs of the PNE, and the fact that the PNE Lands were the PNE's first choice of all potential sites it had reviewed over a number of years; (c) the fact that the PNE was under a time constraint to acquire lands for a new site because of the expiry of an existing lease; (d) the fact that the Province of British Columbia, which owned the PNE, had the financial ability to pay not only full market value but a premium as well.
20	PWC entered into a tri-partite agreement with PNE and Advance Lumber whereby PWC sold six lots (the "Replacement Lands") from the Group Five area to Advance Lumber, and Advance sold lot 7 of the United Lands to the PNE, and failed to advise the court of the following: (a) its conflict of interest in dealing with the PNE, an important client of PWC; (b) information regarding the commitment that Surrey had made to rezone the lands to permit commercial use, including a casino; (c) the sale price of Lot 7, which would have provided the court with a good indicator of the value of the PNE Lands;

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(d) information about PWC's failure to take appropriate steps to preserve and enhance property values and to market the properties in a manner to achieve the best possible price;
(e) information as to its complete failure to drive a hard bargain with the PNE.

21 PWC also breached its fiduciary duty by:
(a) misinforming the court of the proper status for the zoning of the Replacement Lands and misinforming the court that salvage use on the subject lands would not likely be permitted by Surrey when PWC knew the opposite to be true;
(b) discouraging the court from placing any value on an offer for one of the lots in the Replacement Lands which reflected a premium value based on the intended salvage use;
(c) misinforming the court that United's inventory had been sold off;
(d) misinforming the court that the sale price for the Replacement Lands was approximately $10,000 below market value when in fact a fair price for the Replacement Lands may well had been in excess of $2 million above the actual sale price;
(e) misinforming the court that the Group Five Lands had been actively marketed for a long time before the agreement and purchase of sale to Advance was entered into.

22 PWC failed to make the PNE accountable for the difference between the fair market value of the Replacement Lands and the actual sale price of the same.

23 PWC failed to obtain the best possible price for the remaining lots by setting a low benchmark in the sale of the Replacement Lands, in causing those lots bordered on the perimeter road to lack access, and failing to secure commercial zoning or to commence salvage operations to preserve the nonconforming salvage premium.

The Doctrine of Res Judicata

35 In British Columbia, applications to have actions dismissed on the basis of *res judicata* are brought under Rule 19(24), which enables the court to dismiss an action if it is "unnecessary, scandalous, frivolous, or vexatious", or is "otherwise an abuse of the process of the court."

36 The doctrine of *res judicata* and the related rules against abuse of process and collateral attack are designed to ensure that once a cause of action or the issues within it have been finally determined by the courts, they cannot be brought forward again. The goal is to bring litigation between two parties to a definitive end and to prevent one party from pursuing the other in the courts more than once over the same cause or the same issues: *Fenerty v. Halifax (City)* (1920), 53 N.S.R. 457, 50 D.L.R. 435 (N.S. C.A.). Other policy reasons underlying the doctrine are to prohibit duplicative litigation and avoid potentially inconsistent results, undue costs, and inconclusive proceedings: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.).

37 In *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544 (S.C.C.) at p. 555, Dickson J. explained the operation of the doctrine of *res judicata* and its two main branches: cause of action estoppel and issue estoppel. He wrote:

> In earlier times *res judicata* in its operation as estoppel was referred to as estoppel by record, that is to say, estoppel by the written record of a court of record, but now the generic term more frequently found is estoppel *per rem judicatam*. This form of estoppel, as Diplock L.J. said in *Thoday v. Thoday* [[1964] P. 181.], at p. 198, has two species. The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction. ... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins J. of the High Court of Australia in *Hoystead v. Federal Commissioner of Taxation* [(1921), 29 C.L.R. 537.], at p. 561:
>
> > I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

(a) Cause of Action Estoppel

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

38 Cause of action estoppel applies to bar proceedings that allege the same cause of action between the same parties if that cause has already been determined by the courts. However, despite its name, it is not so strictly limited. Cause of action estoppel also applies to bar subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even though the second litigation may be based on a different legal description or conception of the cause: *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59, 109 D.L.R. (3d) 729 (B.C. C.A.), at pp. 64 -65, cited with approval in *Chapman v. Canada*, 21 B.C.L.R. (4th) 272, 2003 BCCA 665 (B.C. C.A.) at para. 17.

39 This broader definition of cause of action estoppel recognizes that parties to an action have a duty to bring their whole case to the court's attention and not to reserve some aspect of the matter against the possibility of a decision in the opponent's favour as a means of preserving a way to come at the opponent again. As Wigram V.C. explained in *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.), at 319:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties exercising reasonable diligence, might have brought forward at the time.

40 This description of the doctrine was quoted with approval by our Court of Appeal in *Lehndorff Management*, *supra*, where Carrothers J.A. gave the following further explanation of the doctrine's scope:

> The maxim *res judicata* does not apply to distinct causes of action (*Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638 (Alta.C.A.)), but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action, although based upon a different legal conception of the relationship between the parties (*Morgan Power Apparatus Ltd. v. Flanders Installations Ltd*. (1972), 27 D.L.R. (3d) 249 (B.C.C.A.)). It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (*Winter v. Dewar*, 41 B.C.R. 336, [1929] 2 W.W.R. 518, [1929] 4 D.L.R. 389 (C.A.)).

41 Where a party seeks to pursue a second action against the same foe, the court must be satisfied that the new cause of action alleged is truly separate and distinct from the old, and not merely a new portrayal of the same subject matter, such as tort rather than contract. Litigants may not simply characterize the facts of the first action in a different way to avoid the application of *res judicata.*

42 PWC cites *M.R.S. Trust Co. v. 374961 B.C. Ltd.*, 31 B.C.L.R. (3d) 247, [1997] B.C.J. No. 13 (B.C. S.C. [In Chambers]), for its similarities to the case at bar. M.R.S. brought foreclosure proceedings on a mortgage in default against Giovanni Zen, a covenantor under the mortgage. Zen was represented at the hearing for an order nisi and conduct of sale of the property. The court ordered personal judgment against Zen at that time.

43 Zen subsequently commenced an action claiming breach of contract, breach of trust, and breach of a duty of care arising from M.R.S.'s conduct during the foreclosure proceedings. Zen claimed that following the hearing, he had ceased to be a party to the foreclosure proceedings and was unable to protect his interest in seeing that the highest price possible was obtained for the property. M.R.S., in turn, sought a declaration that Zen's action was estopped by the doctrine of *res judicata*.

44 The court held that Zen did not cease to be a party to the foreclosure proceedings. As a party with a vital interest at stake, he had standing to seek the court's assistance in obtaining the maximum sale price. Because the same parties were involved,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the doctrine of *res judicata* could apply. The facts upon which Zen based his claims were all known before the order approving the sale was granted. Additionally, the issue that Zen sought to raise, that is, M.R.S.'s alleged failure to ensure the maximum possible price, was before the court at the earlier hearing. The court found that secondary issues relating to the sale price, such as waste, vandalism, and security issues, were relevant to the issues to be decided in the foreclosure and should have been raised at that time. The court stated at para. 37:

> To Zen's contention that his claim is in tort and is therefore a distinct cause of action from the issues on the foreclosure the short answer is that the subject matter, the sale of the property, and the duties of M.R.S. (if such they were) were all matters within the competence and purview of the Court in the foreclosure. Recasting these issues in positive terms as a "duty" on the part of M.R.S. does not create a fundamentally different cause which could be separately litigated.

(b) Issue Estoppel

45 The second branch of the doctrine of *res judicata* prevents litigants from attempting to re-litigate the same point or issue against the same party even though the overall cause of action now being pursued may be different. Where a material fact or issue in a proceeding has already been determined by a court of competent jurisdiction, that fact or issue may not be attacked or thrown into dispute in subsequent proceedings among the same parties: *Danyluk*, *supra*, at para. 54.

46 In *Danyluk* and *Angle*, *supra*, and the Supreme Court of Canada adopted the three-part test for issue estoppel first framed by Lord Guest in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2)* (1966), [1967] 1 A.C. 853 (U.K. H.L.) at p. 935:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

47 Issue estoppel applies to any issue of fact, law, and mixed fact and law that is necessarily bound up with the determination of that issue in a prior proceeding: *Danyluk*, *supra*, at para. 54. However, it acts to bar further proceedings on such issues only in circumstances where it is clear from the facts that the question has already been decided: *R. c. Van Rassel*, [1990] 1 S.C.R. 225, 53 C.C.C. (3d) 353 (S.C.C.) at para. 32.

Abuse of Process

48 As Madam Justice Allan did in the First Mott Action, the court may, in the alternative to applying the doctrine of *res judicata*, apply the doctrine of abuse of process, which was recently restated by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.) at para. 35:

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

49 The doctrine of abuse of process is more flexible than *res judicata* and is typically invoked where the requirements of issue estoppel are not strictly met, yet it is apparent that the applicant is attempting to re-litigate a matter or to otherwise undermine the consistency and finality of judicial decision-making.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Collateral Attack

50 Another closely related doctrine to that of *res judicata* or abuse of process is the rule against collateral attack on final judgments. In *R. v. Wilson*, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577 (S.C.C.), the Supreme Court of Canada stated the rule as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

51 In *Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784, [2005] B.C.J. No. 2830 (B.C. S.C.) at para. 23, Rogers J. stated:

> A proceeding is a collateral attack when it asserts facts inconsistent with a previous factual determination by a court that had jurisdiction to make it, or when the proceeding seeks relief that is inconsistent with a previous disposition by a similarly competent court. To be a collateral attack it is not necessary that the proceeding bluntly assert that the previous order should be set aside.

52 Thus, if the present proceedings are found to be a collateral attack on the orders of Justices Shaw, Tysoe, Thackray, Allan, or Davies, or on any of the orders of the Court of Appeal refusing Mr. Mott leave to appeal, the proposed action may be struck as an abuse of the court's process.

Discretion for Special Circumstances

53 The application of an estoppel to bar future litigation is not automatic, nor is it guaranteed. As Finch J.A. (as he then was) explained in *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1, 159 D.L.R. (4th) 50 (B.C. C.A.) at para. 32:

> It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of judicial discretion to achieve fairness according to the circumstances of each case.

54 The same principle applies to cause of action estoppel and the doctrines of *res judicata*, abuse of process, and collateral attack in general. A court must retain a residual discretion to refuse to apply any form of estoppel when do to so would be contrary to the requirements of justice. As the Supreme Court of Canada explained in *Danyluk*, *supra*, at para. 33: "The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."

Position of United

55 United argues that the breaches of fiduciary duty alleged against PWC have not been raised before now and so constitute a new cause or causes of action that must be brought before the court for resolution.

56 According to United, the only issue before Mr. Justice Thackray during the applications for approval of sales of the United Lands was whether or not a fair price had been secured in all of the circumstances. It says that the court was not asked to consider what duty of care the receiver had with respect to preserving the goodwill of the business and the property, nor was the court asked to consider the nature of the duty of the receiver to achieve the best possible price, a duty that United says was owed to all interested parties, including the bankrupt and the shareholders of the bankrupt. The court was not called upon to make a ruling whether the receiver had breached its fiduciary duty to preserve the property and to achieve the highest price for

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the property. Therefore, a person appearing at the applications for approval could not possibly succeed on a request for a trial so that such allegations could be judicially determined, and neither of the parties could have reasonably expected that that the outcome of the sale approval would bar a future action for breach of fiduciary duty. United relies on the comments of Finch J.A. (as he then was) in *Bugbusters*, *supra*, to argue that a reasonable expectation of that kind is required before a party can be estopped from pursuing further action.

57 Referring to *Bennett on Receiverships*, 2nd ed, (Toronto: Carswell, 1999) at p. 182-83 and p. 247, United says that the courts will generally follow the recommendation of a receiver and leave it to the receiver to assess offers to purchase a debtor's assets, accepting that the price put forward by the receiver is the best possible price obtainable. It is uncertain whether United means to imply that the court did not apply itself to the independent duty that it has to ensure a fair price during the sale approval proceedings. Certainly the implication seems to be that the court did not seriously consider the issues related to PWC's wrongful conduct, which Mr. Mott raised during the sale approval hearings.

58 United contends that due to the summary nature of the proceedings, which does not permit oral or documentary discoveries or interrogatories, Mr. Justice Thackray was not in a position to judge the sufficiency of the evidence relating to these allegations of wrongdoing. It is on this basis that United distinguishes the case of *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]), in which *res judicata* was found to apply to claims of breach of duty and negligence against a receiver that had been the subject of detailed evidence and full argument in an earlier proceeding.

59 United argues that it never had the opportunity to bring forward its claims of breach of fiduciary duty. Even if Mr. Justice Thackray had directed a trial as Mr. Mott had requested, the issue of breach of fiduciary duty could not have been tried at that time as it had no relationship whatever to constructive expropriation, which was the basis advanced for the deceit and conspiracy claims.

60 Moreover, United says that although Mr. Justice Thackray was entitled to refuse to order a trial of the issue, the reasons that he provided with respect to allegations of conspiracy and fraud had no judicial weight because he had already determined that the issue was not properly before him. United says that Madam Justice Allan was therefore wrong in her view that Mr. Justice Thackray had considered all of the issues, that it was wrong for Mr. Justice Davies to concur, and that it would be wrong for this court to make a similar finding with respect to the allegations and issues in the proposed statement of claim.

61 United argues that both Madam Justice Allan and Mr. Justice Davies should have recognized that the evidence required to succeed in the claim of constructive expropriation would not be sufficient to support a claim of conspiracy, which necessitated a new action against PWC. United claims that this was confirmed by Mr. Justice Thackray when he expressed his view that the matter was not before him. According to United, a tort of conspiracy requires collusion and an agreement of the parties acting together to injure an individual. That is distinct from what is required to prove a constructive expropriation, on the grounds advanced before Mr. Justice Thackray, and it is different again from what is required to prove a breach of fiduciary duty, on the grounds alleged in this action.

62 United cites *Caswan Environmental Services Inc., Re*, 287 A.R. 11, 2001 ABQB 240 (Alta. Q.B.) at p. 197, as support for its contention that the courts have recognized the impracticality, for the sake of justice, of forcing certain actions to be tried together:

> The principle of avoiding litigation by installment [*sic*] must be tempered by practical considerations. The plaintiff's original application for declaratory relief would have bogged down the judicial process if it were coupled with an action for resultant damages. Common sense dictates that a determination as to the validity of the competing security interests should have been made before a damage claim was advanced. ... It is unlikely that any court would have granted leave to sue an interim receiver for damages until a declaration as to the entitlement of the goods was made. In practical terms there was no way in which a damage claim could have proceeded contemporaneously with the declaratory relief sought.

63 United also says that Madam Justice Allan should have realized that she could dispose of the First Mott Action on the basis of lack of jurisdiction, and had she done so, *res judicata* would not arise to bar the proposed claims. According to United,

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

because it was bankrupt, the *BIA* dictates what proceedings could be brought to set aside a sale, and leave was required, but not obtained, to begin the First Mott Action. As the *BIA* provides a complete code on the subject, United says Madam Justice Allan could, and should, have concluded that there was no jurisdiction to hear the action. The same argument appears to be made against the decision of Mr. Justice Davies in the Second Mott Action.

64 On the question of mutuality of parties, United argues that the proposed action involves different parties in that Mr. Abakhan, as the new trustee for United, would bring the action against PWC itself for acts and omissions committed when acting as both receiver and trustee. United says that the previous actions involved PWC only as a representative of United. Moreover, on the application for a trial of the issue of constructive expropriation, Mr. Mott represented himself personally, and United was not represented at the hearings, thus according to United, the parties to the various proceedings are not the same and no estoppel may bar the proposed action.

65 Finally, United asserts that the proposed action is based on new evidence that could not have been discovered with reasonable diligence at or before the earlier proceedings. Alternatively, United argues that this new evidence constitutes a "special circumstance" sufficient to permit the court to refuse to apply an estoppel should grounds for one be made out. United describes the new evidence as follows:

> (a) information that prior to entering into the agreement of purchase and sale with the PNE, Surrey had made a commitment to the Province to re-zone the lands to permit commercial use of the PNE Lands including a casino;
>
> (b) information about the sale price of lot 7 from Advance Lumber to the PNE, which would have provided the court with a good indicator of value;
>
> (c) information showing the lack of any offers and counter-offers leading up to the agreement of purchase and sale with respect to the PNE which is evidence from which an inference can be drawn that PWC failed in its duty to aggressively seek the best possible price; and
>
> (d) evidence which demonstrates the ease with which PWC was able to commence a salvage parts operation on lot 24 to maintain salvage zoning for that lot and evience from which the court can infer the court was misled by PWC as to the non-salvage use of the Replacement Lands.

Position of PWC

66 PWC says that the complaints in the proposed statement of claim are essentially the same as those that were raised in the sale approval proceedings and also in both the First and Second Mott Actions. The Mott Actions were not confined to allegations of conspiracy. They included claims of breach of trust and deceit. PWC prepared a list of passages from the affidavits and submissions filed in the sale approval application before Mr. Justice Thackray and in the First Mott Action before Madam Justice Allan, as well as quotations from the learned justices' judgments, which demonstrate that the issues now raised were all before the court in those earlier proceedings. These passages are as follows:

> (a) "the receiver... is seemingly beholden to making a transaction with the P.N.E. to the detriment of the interest of the United Group creditors." (May 10, 2001, affidavit of Ian Mott, para. 49)
>
> (b) the Trustee seems only to be interested in serving only the interests of the secured creditors, the Royal Bank and Century Services and includes Aziz in this group. (May 10, 2001, affidavit of Ian Mott, para. 56; May 14, 2001, submissions of H. Mott, page 26, lines 2-5)
>
> (c) "The Trustee's actions, taken individually and as a whole unreasonably favor the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favoring the interests of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors." (May 10, 2001, affidavit of Ian Mott, para. 61; May 14, 2001, submissions of H. Mott, page 27, lines 32-39)

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(d) "... United's interests and those of the secured and unsecured creditors who will not be paid by the sale to the P.N.E. are not being properly served by the trustee who ought to be acting in good faith and without any appearance of conflict. The fact is that the trustee PricewaterhouseCoopers (P.W.C.) is both a trustee of the United Group of Companies in bankruptcy as well as the appointed auditors of the P.N.E." (May 10, 2001, affidavit of Ian Mott, para. 64; May 14, 2001, submissions of H. Mott, page 28, lines 29-37)

(e) "... we don't think the trustee is acting on behalf of the best interests of all the creditors. We feel he's acting only in the interest of the major secured creditors." (May 14, 2001, submissions of H. Mott, page 16, lines 19-23)

(f) "... it's not clear to me that the trustee is representing the unsecured creditors at all." (May 14, 2001, submissions of H. Mott, page 49, lines 25-27)

(g) "... the trustee and receiver, for any bankruptcy, never mind one as big as this, and as complex as this, should never be in conflict. They should be totally independent parties..." (May 14, 2001, submissions of I. Mott, page 49, lines 36-40)

(h) "the Motts questioned the propriety of the PricewaterhouseCoopers being both the receiver and the trustee." (May 15, 2001, reasons for judgment of Thackray J., para. 7)

(i) "[Mr. Mott's] submission was grounded upon assertions of improprieties. The Court on several occasions informed Mr. Mott that to establish the improprieties, that went so far as to allege fraud, it was necessary for him to produce evidence." (May 15, 2001, reasons for judgment of Thackray J., para. 50)

(j) Mr. Mott then deposed as to the 'inappropriate actions' of the trustee and concluded that the trustee was intent on raising quick liquid cash to finance his receivership and sought the easy route of disposing of the inventory and chattels of the businesses for a value 'well below its actual market value.' He added:

> 61. The Trustee's actions, taken individually and as a whole unreasonably favour the interests of the PNE and are a betrayal of his duty to the interests of the ordinary creditors. The Trustee as appointed auditor of the PNE is favouring the interest of the PNE and as Trustee in Bankruptcy of the United Group defrauding the ordinary and other creditors.

I asked Mr. Mott if I was correct in reading this to mean that Mr. Mott was alleging fraud on the part of the trustee. He said that I was. (May 15, 2001, reasons for judgment of Thackray J., paras. 65 and 66)

(k) "... in recommending this sale at what we now realize was a grossly inadequate sum, the Receiver had a duty to the Court to disclose its own conflict of interest. Unknown to Mr. Clark and his client and not disclosed to the Court was the fact that the Receiver was and remains this purchaser's auditors." (May 2001, Outline of I. Mott, page 6, par. 2(aa))

(l) "The Plaintiffs claim against the Defendants, and each of them, for damages and loss resulting from breach of trust, deceit, and conspiring to transfer to the Defendant purchasers... the aforesaid interests in parcels of land unlawfully for less than fair market value... The Defendants conspired to depress the maket [*sic*] of the lands and the Defendant purchasers obtained the lands the lands [*sic*] and intersts [*sic*] in the lands owned by the Plaintiffs for less than true market value." (Endorsement to Amended Writ of Summons dated August 15, 2001, in the First Mott Action)

(m) "The relief which the Plaintiffs seek in the present action is the return of the subject lands to the United Group... and for additional damages, including the loss of profits suffered by the Plaintiffs which resulted from wrongful interference with contractual arrangements, misrepresentations, deceit, breach of trust and other illegal actions on the part of the Defendants..." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 6)

(n) "... the PNE, Colliers International, the Receiver/Trustee (PricewaterhouseCoopers Inc.), the City of Surrey, the Province of B.C., Golders Associates, and others have worked in concert to frustrate and prevent fair value

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

marketing of the subject lands by delaying the public listing of the individual lots until December 200, by discouraging prospective purchasers from making offers, and by refusing to process offers on the subject lands from prospective purchasers." (August 18, 2001, affidavit of Ian Mott sworn in the First Mott Action, para. 14)

(o) "[Mr. Mott is] claiming damages, once the land's returned, for the improper conduct. He's alleging for the first time breach of trust, deceit. The word "conspiring" or "conspiracy" has come up in his mind and from his mouth before without him even knowing the meaning of that. The — what he's saying is that, according to his affidavit evidence, is that the Royal Bank, Century Services, the receiver, Advance Lumber, the Aziz group and the PNE in particular, have worked together to transfer the lands to the PNE, and of course to Advance in this case, for amounts that clearly are not anywhere near the fair market value, and they've done so deceitfully, and that is dishonestly." (August 22, 2001, submissions of P. Formby, counsel for Mr. Mott, in the First Mott Action, page 51, lines15-29)

(p) "And that history, I'd like to be very clear, I don't think it's ever been properly presented before the court. And — and to do it properly, It would take a trial, and the simply cases with respect to what there — what happened thereafter with the — I would say the powerful players as opposed to those that didn't have any power with respect to the conduct of the receiver in an application, what will be alleged obviously, you know, is that there's grave misgivings with respect to the duty, the fiduciary duty of the receiver being breached, where there's an application I believe where the Royal Bank to have this particular receiver appointed, PricewaterhouseCoopers. And this is a court appointed receiver that should know of its particular duty with respect to all interested parties, not just to secured creditors." (August 22, 2001, submissions of P. Formby in the First Mott Action, page 66, lines 32-45)

(q) "Both plaintiffs claim for damages as a result of the defendants' breach of trust, deceit, and conspiracy to depress the market values of the lands. Mr. Mott alleges a wrongful sale of the lands, and seeks to have those transactions reversed." (August 23, 2001, reasons for judgment of Allan, J., para. 33)

(r) "[PWC] had a duty to pursue... the contract that [the United Group] had with the City of Surrey." (September 26, 2002, submissions of I. Mott in the Second Mott Action, pages 32-33)

67 PWC submits that Mr. Mott should not be permitted to continue to litigate these same claims simply by recasting his grievance as a breach of fiduciary duty owed by PWC, or even by introducing some new fact. PWC argues that this amounts to litigating by instalment, and the court ought not to permit it or force PWC to bear the hardship resulting from having to defend further litigation: *Melcor Developments Ltd. v. Edmonton (City)* (1982), 37 A.R. 532, 136 D.L.R. (3d) 695 (Alta. Q.B.)

68 In response to Mr. Mott's argument before Madam Justice Allan that some of the allegations were never "properly framed in any type of claim other than in opposition to the sale of the lands" and so no cause of action was ever advanced against PWC in the prior proceedings, PWC argues that any of the issues now raised are issues that either were raised or should have been raised in any event because they formed part of the same subject matter of the earlier litigation: See *Henderson* and *Chapman*, *supra.*

69 PWC contends that each of the allegations of misconduct on the part of PWC as trustee and receiver were raised in affidavits and argument during the sale approval proceeding and that these allegations were fundamental to Mr. Justice Thackray's decision in that he could not have approved the sale if he found that any of these allegations had merit. As the sale was approved, the issues must be deemed to have been finally determined: *Toronto Dominion Bank*, *supra*, citing *Bank of America Canada v. Willann Investments Ltd.*, 23 C.B.R. (3d) 98, [1993] O.J. No. 3039 (Ont. Gen. Div.)

70 On the issue of mutuality of the parties, PWC says, firstly, that mutuality is not lost by replacing PWC with Mr. Abakhan as the trustee in bankruptcy for United. Regardless of what individual or company is acting as trustee, the trustee was a party to the foreclosure actions and certainly had the opportunity to appear on the relevant hearings. Whether or not it chose to do so is, according to PWC, irrelevant; a party is bound by a decision in which they could have participated: *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89, 47 D.L.R. (4th) 431 (B.C. S.C.), at 438.

71 PWC also argues that there is no loss of privity because of the fact that Mr. Mott purported to appear on his own behalf as a creditor and shareholder of United in some of the proceedings and on behalf of United itself in others. PWC argued that

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

according to the judgment of Mr. Justice Tysoe in *Lang Michener v. American Bullion Minerals Ltd.*, 2006 BCSC 504, [2006] B.C.J. No. 685 (B.C. S.C.), there is a residual power in the directors of a company to oppose the enforcement of security on behalf of a company, and this is clearly what Mr. Mott was doing. In doing so, Mr. Mott raised any and all arguments that could have been made on behalf of the trustee and the estates of the bankrupt companies.

72 Accordingly, PWC argues that the parties to the proposed action are the same as were parties to the previous proceedings, and mutuality is not lost. PWC relies on Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at p.1088, where the learned editors note that: "it is impossible to be categorical about the degree of interest which will create privity." Mutuality will arise where there is "a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party."

73 As regards any special circumstances, PWC cautions that the courts have treated the discretion to refuse to apply *res judicata* as a very limited one, and "the fact that harsh results follow the application of the doctrine has not deterred its application by the courts": *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385 (S.C.C.); *Manolescu v. Manolescu*, 47 C.B.R. (4th) 77, 2003 BCSC 1094 (B.C. S.C.) at para. 10.

Analysis

74 For all the details provided in the proposed Statement of Claim as to the wrongdoing of PWC, I agree with the submission of PWC that, essentially, the claims sought to be advanced boil down to the following:

> (a) PWC as receiver failed to obtain the best possible price for the sale of the United Lands, which were worth more than the amount for which they were sold;
>
> (b) the PNE was the audit client of PWC, and, as a result of that relationship, PWC was in a conflict of interest and participated in a conspiracy with the PNE and the City of Surrey (among others) to sell the United Lands to the PNE at less than fair market value;
>
> (c) PWC failed to preserve the industrial-salvage zoning of some of the lots in the United Lands, resulting in a reduction of the value of those lots;
>
> (d) PWC failed to apply for rezoning of some of the United Lands to highway-commercial, such that the potential value of the United Lands was not realized; and
>
> (e) PWC failed to market the United Lands properly.

75 In my view, the cause of action proposed in the draft statement of claim, and the issues sought to be advanced, arise from the same relationship and the same subject matter as was adjudicated in the proceedings before Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. The facts and issues now raised were squarely before the court in the sale approval proceeding and in both Mott Actions.

76 Mr. Mott admits that he had the opportunity to be heard, and was heard, as an interested party during the sale approval applications before Mr. Justice Thackray. Mr. Mott argued strenuously that the sale ought not to be approved. In his submissions and affidavit evidence, he put before the court each of the allegations regarding PWC's conduct that are set out above as being the issues to be determined in the proposed action, including specifically the alleged conflict of interest, conspiracy to sell at less than fair market value, and each failure to perform those actions that would have resulted in obtaining the best possible price for the United Lands. I cannot accede to United's contention that it had no opportunity to make these claims.

77 As Madam Justice Allan noted, Mr. Justice Thackray issued lengthy and carefully considered reasons for his decision to approve the sale. Leave to appeal was sought and dismissed. These same arguments were again brought before Madam Justice Allan and then again before Mr. Justice Davies. Both found that the issues had been litigated and determined such that it would be an abuse of the court's process to review them once again. No appeal was taken of either of these decisions.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

78 Mr. Mott now advances a few items of evidence that apparently did not come into his hands until after the two Mott Actions were concluded. I find that some of this evidence was discoverable with reasonable diligence prior to the sale approval proceedings and certainly prior to the Mott Actions. The rest I do not weigh as critical. Although it may not have been discoverable prior to the sale approval proceeding, it does not bring to light any new issue or cause of action formerly unknown or unpursued by Mr. Mott, nor is it likely that this evidence would have substantially altered the outcome of the previous proceedings.

79 While it is correct to say that breach of fiduciary duty, constructive expropriation, and conspiracy are each distinguishable as causes of action, the record shows that the evidence and argument offered to oppose the sale in the hearing before Mr. Justice Thackray included all of the allegations that Mr. Mott would now seek to prove in the case at bar. The same is true for both the Mott Actions, in which the claim alleged was not conspiracy alone but also breach of trust and deceit, which require much the same evidence as against PWC as the breaches of fiduciary duty now alleged. Any minor differences in the facts and issues raised in the proposed action belonged, in every case, to the subject matter of the earlier litigation. Mr. Mott has simply changed the legal description of his claim to facilitate re-litigation of the same issues.

80 I also accept PWC's argument that the requirements of issue estoppel are met for each issue now raised in the proposed statement of claim. There is sufficient connection to create privity. The appointment of a new trustee will not undermine the mutuality of parties required for the application of issue estoppel to the issues in the proposed action. The parties involved in all the previous proceedings include PWC, United, and Mr. Mott as either named parties or interested parties. The fact that Mr. Mott appeared variously in his capacity as shareholder, creditor, or director of United does not, in my view, seriously affect the mutuality requirement in this case. As Mr. Mott concedes that the previous decisions were final, and as I have found that the same issues were litigated, the proposed action is barred in its entirety by the doctrine of issue estoppel.

81 However, even if the requirements of issue estoppel were not strictly met, I would dismiss the proposed action as an abuse of process and impermissible collateral attack on the judgments of Mr. Justice Thackray, Madam Justice Allan, and Mr. Justice Davies. Many of United's arguments are directed at challenging various aspects of Madam Justice Allan and Mr. Justice Davies' reasons for judgment. Yet Mr. Mott does not appear to have attempted an appeal of either decision. He has chosen instead to recast his claim yet again to avoid the outcome of those judgments.

82 Mr. Mott raises an interesting argument that the summary nature of an application for sale ought to be considered a "special circumstance" leading the court to refuse to apply an estoppel that would bar a trial of an action where the evidence may be much more thoroughly tested. The record shows, however, that this same argument was presented to Mr. Justice Thackray and Madam Justice Allan and was not accepted by either of them. The court, by its own account, carefully addressed the issues arising between these parties, even though the issues were brought forward in a summary proceeding.

83 As regards the argument that Madam Justice Allan should have disposed of the action on the basis of lack of jurisdiction, clearly that is an issue that should have been put before Madam Justice Allan with resort to the Court of Appeal if necessary. It is not an issue for this court to resolve in the case at bar.

84 Similarly, as to the statements in Mr. Justice Thackray's reasons for judgment with respect to the allegations of fraud and conspiracy and his refusal to direct a trial on the issue of constructive expropriation, Mr. Mott was entitled to seek leave to appeal that decision and did so. The Court of Appeal dismissed his leave application. Mr. Mott then applied further to stay the decision and vary the order of the Court of Appeal. Again, his application was dismissed. It is not for this court to sit in further judgment of the sufficiency and accuracy of those reasons or the orders they support.

85 Nothing advanced in the current proceeding or sought to be advanced in the proposed action alters the fact that all the material facts and issues underlying the breaches of duty now alleged were raised, considered, and rejected either explicitly or implicitly in the finding that the sales of the United Lands were made for fair market value through an appropriate process approved by the court.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

86 Two judges of this court have declared that to adjudicate further on the matters brought before the court in the First and Second Mott Actions would be an abuse of process. Nothing arises in the present proceedings to change that view. I can find no special circumstances sufficient to militate against the application of the doctrines of *res judicata*, abuse of process, and collateral attack. Mr. Mott has had the opportunity to have his objections to the sale and his allegations of misconduct by PWC heard. This is a strong case for bringing finality to the litigation. To allow the trustee to commence the proposed action would be inconsistent with three previous orders of this court, and I can find no compelling reason for taking such a course.

Conclusion

87 Mr. Mott's overriding contention has been that the United Lands were sold at less than fair market value for wrongful reasons. The court rejected that contention expressly in the sale approval application before Mr. Justice Thackray. Two other judges have declined to permit that claim and its related issues to be re-litigated. In my view, the claims sought to be pursued are *res judicata* and an abuse of process.

88 The sole reason for the application to remove PWC as trustee was to provide United with a trustee that had the capacity to sue PWC so that these same issues could be re-opened. As there is no reason to re-open the claims, there is no reason to remove PWC as trustee at this time. The application is dismissed with costs as scale 3.

Application dismissed.

Footnotes

* A corrigendum issued by the court on August 16, 2006 has been incorporated herein.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 19

CLERK OF THE COURT
FILED
JAN 2 3 2020
JUDICIAL CENTRE
OF CALGARY

COURT FILE NUMBER	**1901-05089**
COURT	**COURT OF QUEEN'S BENCH OF ALBERTA**
JUDICIAL CENTRE	**CALGARY**
APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended** **IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, RSA 2000, c B-9, as amended** **AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF STRATEGIC OIL & GAS LTD. and STRATEGIC TRANSMISSION LTD.**
DOCUMENT	**FIFTH REPORT OF THE MONITOR** **JANUARY 22, 2020**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

MONITOR

KPMG Inc.
Suite 3100, Bow Valley Square II
205 - 5th Ave SW
Calgary, Alberta T2P 4B9
Neil Honess/Cameron Browning
Tel: (403) 691-8014/(403) 691-8413
neilhoness@kpmg.ca
cbrowning@kpmg.ca

COUNSEL

Torys LLP
525 - 8th Avenue SW
46th Floor - Eighth Avenue Place East
Calgary, Alberta T2P 1G1
Kyle Kashuba
Tel: (403) 776-3744
kkashuba@torys.com

Table of Contents

Listing of Appendices

Appendix “A” - JANUARY 2020 PLAN

Appendix “B” - AER TRANSITION ORDER

Appendix “C” - TRANSITION PLAN

Appendix “D” - CASH FLOW STATEMENT

1. INTRODUCTION AND PURPOSE OF REPORT

1. On April 10, 2019, Strategic Oil & Gas Ltd. and Strategic Transmission Ltd. (together, "**Strategic**" or the "**Company**") sought and obtained protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") pursuant to an order granted by this Honourable Court (the "**Initial Order**").

2. The Initial Order granted, *inter alia*, a stay of proceedings against Strategic until and including May 6, 2019 (the "**Initial Stay Period**") and appointed KPMG Inc. as Monitor (the "**Monitor**"). The proceedings commenced by the Company under the CCAA will be referred to herein as the "**CCAA Proceedings**".

3. Subsequent to the Initial Stay Period, the Company has obtained the following orders from the Court:

    a) On May 6, 2019, the Company obtained an order extending the stay of proceedings until and including June 5, 2019 and authorized and directed the Company to proceed with the First Installment of the KERP;

    b) On May 9, 2019, the Company obtained an order extending the stay of proceedings until and including September 30, 2019, and authorized and directed the Company to proceed with the outlined sale and investment solicitation process ("**SISP**");

    c) On September 20, 2019, the Company obtained an order extending the stay of proceedings until and including November 29, 2019;

    d) On October 11, 2019, the Company obtained an order extending the stay of proceedings until and including December 31, 2019 and approved the Amended KERP and Claims Procedure; and

    e) On December 3, 2019, the Company obtained an order (the "**Fifth Stay Extension Order**") extending the stay of proceedings until and including January 31, 2020.

4. Further background on the CCAA Proceedings, including a summary of the activities of the Company and the Monitor since the granting of the Initial Order was previously provided in the Monitor's first report dated April 29, 2019 (the "**First Report**"), the Monitor's first supplemental report dated May 3, 2019 (the "**First Supplemental Report**"), the Monitor's second supplemental report dated May 9,

2019 (the "**Second Supplemental Report**"), the Monitor's second report dated September 11, 2019 (the "**Second Report**"), the Monitor's third report dated October 4, 2019 (the "**Third Report**"), and the Monitor's fourth report dated November 27, 2019 (the "**Fourth Report**").

5. This is the Monitor's fifth report (the "**Fifth Report**" or this "**Report**") to the Court and should be read in conjunction with the First Report, the First Supplemental Report, the Second Supplemental Report, the Second Report, the Third Report, and the Fourth Report. The Fifth Report has been prepared and filed to advise this Honourable Court and provide the Monitor's summary and comments with respect to:

    a) The activities of the Company since the Fourth Report;

    b) The activities of the Monitor since the Fourth Report;

    c) Strategic's cash flow statement (the "**Cash Flow Statement**") budget to actual results for the weeks of November 25, 2019 to January 13, 2020 (the "**Reporting Period**") as compared to the cash flow projection filed in the Fourth Report;

    d) The details of the Company's Transition Plan (defined herein); and

    e) The Monitor's recommendations.

6. Further background and information regarding the Company and these CCAA Proceedings can be found on the Monitor's website at https://home.kpmg/ca/strategic (the "**Monitor's Website**").

7. In preparing this Fifth Report and making the comments herein, the Monitor has been provided with, and has relied upon certain unaudited, draft and/or internal financial information, Company records, Company prepared financial information and projections, discussions with management (the "**Management**") and employees, and information from other third-party sources (collectively, the "**Information**").

8. The Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. The Monitor has not audited, reviewed or otherwise attempted to verify the accuracy or completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards pursuant to the *Chartered Professional Accountants Handbook*, and accordingly the Monitor expresses no opinion or other form of assurance in respect of the Information.

9. Some of the information referred to in this Fifth Report consists of forecasts and projections, which were prepared based on Management's estimates and assumptions. Such estimates and assumptions are, by their nature, not ascertainable and as a consequence no assurance can be provided regarding the forecasted or projected results. The reader is cautioned that the actual results will likely vary from the forecasts or projections, even if the assumptions materialize, and the variations could be significant.

10. The information contained in this Fifth Report is not intended to be relied upon by any prospective purchaser or investor in any transaction with or in respect of the Company.

11. Capitalized terms not otherwise defined herein are as defined in the Company's application materials, including the First Affidavit of Remi Anthony (Tony) Berthelet sworn April 9, 2019 (the "**First Berthelet Affidavit**"), the Second Affidavit of Remi Anthony (Tony) Berthelet (the "**Second Berthelet Affidavit**") sworn April 29, 2019, the Third Affidavit of Remi Anthony (Tony) Berthelet (the "**Third Berthelet Affidavit**") sworn September 11, 2019, the First Affidavit of Amanda Reitenbach (the "**First Reitenbach Affidavit**") sworn October 4, 2019, the Second Affidavit of Amanda Reitenbach (the "**Second Reitenbach Affidavit**") sworn November 27, 2019, and the Third Affidavit of Amanda Reitenbach (the "**Third Reitenbach Affidavit**") sworn January 22, 2020. The Fifth Report should be read in conjunction with the First Report, the First Supplemental Report, the Second Supplemental Report, the Second Report, the Third Report and the First, Second, Third Berthelet Affidavits, the First, Second, and Third Reitenbach Affidavits as certain information has not been included herein to avoid unnecessary duplication.

12. Unless otherwise stated, all monetary amounts noted herein are expressed in Canadian dollars.

2. ACTIVITIES OF THE COMPANY SINCE THE FOURTH REPORT

13. Since the Fourth Report, the activities undertaken by the Company have included:

a) Communicating and consulting with the Monitor on a continual basis with respect to ongoing operations, including operational disbursements, and providing the Monitor with regular cash flow reporting;

b) Maintaining communication with various stakeholders, including GMT Capital Corp. ("**GMT**"), the Alberta Energy Regulator (the "**AER**"), the Government of the Northwest Territories (the "**GNWT**"), and various trade creditors;

c) Continuing to pro-actively engage with the AER and the GNWT regarding matters related to the ongoing operations of the Company;

d) Continuing to conduct environmental and regulatory compliance work in accordance with current regulatory guidelines in both Alberta and Northwest Territories and as detailed more fulsomely in the Third Reitenbach Affidavit. Certain highlights of the Company's activity since the Fourth Report as it relates to environmental and regulatory compliance include:

i. Submitting various compliance reports for operations in Cameron Hills to GNWT;

ii. Submitting abandonment programs to the NWT's Office of the Regulator of Oil and Gas Operations ("**OROGO**") for approval for the planned Q1 2020 program;

iii. Completing the final release report for the AER with respect to a spill that occurred in October 2018, which outlined soil sampling and electro-magnetic survey monitoring work that took place at the location of the spill in September 2019 and confirmed that there is no off-lease contamination;

iv. Communicating with northern communities regarding the planned winter abandonment and suspension program in the Northwest Territories;

v. Initiating construction of ice roads into Cameron Hills and the Jackpot area, respectively, to provide access for planned abandonment work in those areas;

vi. Continuing with ongoing AER Directive 13 inspections and reporting on suspended and shut-in wells; and

vii. Completing submission for and receiving approval from the AER for the 2020 Area Based Closure program;

e) Performing workovers on three wells to maintain production;

f) Completing various procedures related to the Claims Process including:

i. Reviewing all claims received prior to the Claims Bar Date of November 15, 2019 with the assistance of the Monitor and its counsel;

ii. Preparing a comprehensive reconciliation of all claims including a breakdown of secured, unsecured, disputed, and purported lien claims;

iii. Communicating with various creditors regarding their claims and sought amended claims for those that were erroneous; and

iv. Working with the Monitor on reconciling claim balances;

g) On or about January 7, 2020, the Company proposed to the AER a high level plan of compromise and arrangement to exit the CCAA Proceedings, in substantially the form attached as **Appendix "A"** (the "**January 2020 Plan**"). The January 2020 Plan is summarized below:

i. The Company would transfer assets located in the Northwest Territories (the "**NWT**") at Cameron Hills (the "**NWT Assets**") to a special purpose vehicle (the "**SPV**"). The Company would administer the SPV for eighteen months (the "**Administration Period**") and during Administration Period it would commit $1.5 million to the SPV for reclamation programs and would attempt to identify a purchaser acceptable to the GNWT. If such a purchaser would not be located, at the end of Administration Period, the GNWT or its designate would take control of the SPV (as a whole, the "**NWT Transaction**");

ii. The Company would transfer all of its assets, excluding those located in the Marlowe location (the "**Alberta Assets**"), to the Orphan Well Association (the "**OWA**") and

make a payment of $5 million to the OWA in respect of the Alberta Assets (as a whole, the "**Alberta Transaction**");

iii. All existing deposits would remain in place as additional security for the NWT Assets and the Alberta Assets, respectively;

iv. The January 2020 Plan would also:

a) Provide funds to compromise amounts owing to trade creditors (estimated to be $10.6 million) at approximately $0.10 on the dollar;

b) Consolidate all equity in GMT (or its nominee);

c) Release and discharge all claims against Strategic, GMT, and their respective directors and officers; and

d) Facilitate financial assistance for Strategic upon its emergence in the form of first priority financing from GMT (or its nominee), and directors & officers insurance from a third party insurer.

14. On January 13, 2020, the AER notified Strategic that they could not support the January 2020 Plan.

15. On or about January 10, 2020, the Company provided GNWT with the January 2020 Plan. As of the date of this Fifth Report, GNWT has not commented on the January 2020 Plan.

16. Accordingly, the Monitor understands that on January 14, 2020, the Company advised the OWA that it had exhausted its restructuring efforts and wished to work with the OWA to ensure an orderly transition of assets. Further, the Monitor understands that the Company resolved by way of Board resolutions to commence the orderly wind up of operations, including but not limited to facilitating the appointment of a receiver and manager over its assets undertakings and properties, located in Alberta and the NWT.

17. Subsequently, the Monitor understands that on January 20, 2020, the Company advised the AER and the GNWT of its intention to transition to a court-appointed receivership.

3. ACTIVITIES OF THE MONITOR SINCE THE FOURTH REPORT

18. Since the Fourth Report, the Monitor has:

a) Undertaken a weekly review of the Company's Cash Flow Statement and discussed any material variances with the Company and their counsel, within the Reporting Period;

b) Conducted reviews of the Company's cash flow projections, which included discussions with Management, as well as analysis of reasonableness of the Company's assumptions;

c) Dealt with inquiries from various of the Company's creditors and other stakeholders with respect to matters pertaining to the CCAA Proceedings;

d) Assisted the Company with the Claims Process by review of claims, weekly meetings regarding claim matters, and communication with various creditors;

e) Issued several Notices of Revision and Disallowance for certain creditor claims that required additional clarity in order to address discrepancies between the Company's records and those of various creditors;

f) Reviewed the January 2020 Plan and provided comments on the structure and the viability of the same;

g) Provided support and guidance for the Company's Transition Plan (defined herein);

h) Discussed with the Company various operational matters in preparation of the Transition Plan (defined herein);

i) Provided general assistance and information to the Company on matters related to the potential receivership appointment;

j) Assisted the Company with planning considerations for a potential receivership;

k) Consulted with its legal counsel with respect to the above, and with respect to ongoing issues arising in the course of the Company's CCAA Proceedings; and

l) Prepared this Fifth Report.

4. NEXT STEPS

19. Pursuant to the AER's confirmation that it could not support the January 2020 Plan and given the pending expiration of the Fifth Stay Extension Order, the Company determined that it had no further options with respect to a restructuring within the CCAA Proceedings.

20. The Monitor understands that the Company indicated to the AER that it believed that its next step was a cessation of the CCAA Proceedings and a transition to a court-appointed receivership.

21. The Monitor further understands that the Company also informed both the AER and the GNWT/OROGO that it intended to defer previously scheduled suspension and abandonment work in respect of both certain NWT Assets and certain Alberta Assets as:

    a) All of the Company's assets scheduled for abandonment work are currently in a safe situation and the Company believes that if it initiates any abandonment work then any such work might prejudice the safety of these assets;

    b) The Company has limited resources given its current insolvency and, if an asset becomes unsafe as a result of the initiation of any abandonment work, Strategic may lack the resources to remediate the issue and return any such assets to a safe state;

    c) Strategic does not believe it should spend its limited resources in either Alberta or the NWT given the potential for disagreements between the AER and the GNWT/OROGO as to the jurisdiction in which such funds should be spent;

    d) Vendors and suppliers might be unpaid given Strategic's limited resources and current situation;

    e) Current weather conditions in the Cameron Hills area in the first half of January could make it difficult to conduct operations safely; and

    f) The Company believes it should retain significant contingency funds to ensure that any issues that it may suddenly face in respect of the safety of its operations can be dealt with effectively.

22. On or about January 20, 2020, the AER issued order AD 2020-004 (the "**AER Transition Order**"). The AER Transition Order is attached as **Appendix "B"** and orders the Company to post a security deposit no later than January 27, 2020 in the amount of approximately $48.7 million.

23. The Company is unable to comply with the terms of the AER Transition Order.

24. The Monitor understands that the issuance of the AER Transition Order is a necessary prerequisite to the involvement of the OWA and an orderly transition into receivership.

25. Based on its understanding of the current position, the Monitor believes that there is currently no prospect of a restructuring within the CCAA Proceedings and that a transition to a court-appointed receivership is likely.

26. As a result of the above, and to ensure the safety of the Company's assets and as smooth a transition out of the CCAA Proceedings as possible, the Company, with the assistance of its counsel and the Monitor, has prepared a detailed plan to assist in managing the transition from the CCAA Proceedings into a potential court appointed receivership (the "**Transition Plan**"). A full version of the Transition Plan is attached as **Appendix "C"** and has been drafted to focus on the following matters:

    a) Maintaining the safety of all wells, pipelines, and facilities;

    b) Ensuring that any required maintenance of ongoing operations is scheduled and undertaken, subordinate only to any concerns regarding subparagraph (a) above; and

    c) Ensuring the retention of current employees as well as key consultants, operatives, suppliers and subcontractors to allow actions required to be undertaken pursuant to subparagraphs (a) and (b) above.

Safety

27. As at the date of this Report, all wells, pipelines, and facilities are in a safe state. Further, Strategic intends to maintain a significant contingency of working capital available during the receivership to maintain this state and deal with any matters that arise in this respect.

28. The Company has prepared a comprehensive maintenance schedule to ensure that the ongoing production is safe and the operations continue to generate cash flow.

Operations

29. Strategic's employees have exhaustive knowledge of the current operations and will most likely be retained in any receivership process as far as possible to ensure operations are maintained safely and efficiently.

30. Over the past years, the Company has made a series of staff reductions. As a result, the remaining Company staff are the minimum required for the Company's ongoing operations.

31. Strategic has certain contractors that are critical to the Company's operations and that must continue to provide services to ensure the safety, maintenance and ongoing production. Accordingly, to ensure a smooth transition, the Company intends to undertake the following:

    a) All suppliers will be contacted prior to any receivership appointment to ensure continuation of services without interruption; and

    b) The Company intends to prepay certain contractors for up to two weeks of services, depending on the contractor and the service being provided.

32. Pursuant to the requirement to maintain ongoing operations, any suppliers who have outstanding amounts as yet unpaid that relate to services or supplies provided to the Company during the CCAA Proceedings are to be paid in full as and when these amounts fall due. It is anticipated that a number of these payments will be made after the cessation of the CCAA Proceedings and therefore in the receivership period. This is essential to continuing ongoing operations and maintaining the Company's assets in a safe and consistent manner.

33. Strategic's property insurance coverage is due to expire on January 31, 2020 and will be renewed prior to the expiration of the CCAA Proceedings for a further twelve months. Additionally, the Company's liability insurance was extended for 30 days to February 16, 2020 and will be renewed prior to its expiration. Directors' and officers' insurance expires on January 31, 2020 and will not be renewed given the pending appointment.

5. CASH BUDGET TO ACTUAL RESULTS

34. The table below provides a summary of the Company's budget to actual results for the Reporting Period. An unconsolidated version is attached to this report in **Appendix "D"**.

STRATEGIC OIL & GAS LTD. and STRATEGIC TRANSMISSION LTD. Comparison of Budget to Actual Results for the Weeks of November 25, 2019 to January 13, 2020			
Unaudited ($100's CAD)	**Forecast**	**Actual**	**Variance**
Cash Receipts			
Production revenue, net of oil royalties and transportation	2,818	2,998	180
Other receipts	80	440	360
Total Cash Receipts	**2,898**	**3,438**	**540**
Cash Disbursements			
Royalties	22	-	(22)
Property taxes	220	236	16
Operating, capital, and regulatory expenditures	1,928	2,087	159
Payroll	422	414	(8)
General & administrative costs	169	161	(8)
Interest and taxes	450	450	0
Contingency	800	-	(800)
Total Cash Disbursements	**4,011**	**3,348**	**(663)**
Cash Flow From Operations	(1,113)	90	1,203
Restructuring Fees	-	294	294
Net Change in Cash	(1,113)	(204)	909
Opening Cash	5,302	5,302	-
Ending Cash	**4,192**	**5,098**	**906**

35. In summary, the Company's cash flow shows the following:

a) Production revenue for the Reporting Period is slightly higher than budgeted as a result of better than expected production volumes and commodity prices;

b) Other receipts relate to joint venture collections and other miscellaneous receipts including $400,000 from the Alberta government for a 2019 scientific research and experimental development claim;

c) Cash disbursements variances are immaterial; and

d) Restructuring fees variances are timing variances in the Reporting Period.

36. The variances occurring during the Reporting Period are not expected to have a material impact on the liquidity of the Company.

6. CONCLUSION AND RECOMMENDATIONS

37. Based on the Monitor's review of the CCAA Proceedings activities and subject to the Monitor's observations set forth above, the Monitor respectfully recommends that this Honourable Court make an order approving the activities of the Monitor and its counsel, Torys LLP, during the CCAA Proceedings, as set out in this Report.

This Report is respectfully submitted this 22nd day of January, 2020.

KPMG Inc.

In its capacity as Court-appointed Monitor of
Strategic Oil & Gas Ltd. and Strategic Transmission Ltd.
and not in its personal or corporate capacity.

Per: Neil Honess
Senior Vice President

APPENDIX “A”

JANUARY 2020 PLAN

CCAA Plan

Over the year-end hiatus Strategic has had an opportunity to consider its position. No alternatives offer a complete solution for any of Strategic's stakeholders but Strategic does believe that the following plan is superior to a wind-down scenario. Accordingly, we would like to meet with each stakeholder with a view towards adopting the plan set forth below.

1. Transfer NWT Assets to a special purpose vehicle subject to the following terms and conditions:

    (a) Strategic would administer the SPV for 1.5 years,

    (b) Strategic would commit $1.5 million (inclusive of any work executed in Q1 2020) to the SPV for reclamation programs over the 1.5 year period,

    (c) efforts would continue to sell the SPV to a purchaser acceptable to OROGO,

    (d) at the end of 1.5 years OROGO or its designate would take control of the SPV unless arrangements made between Strategic and OROGO to do otherwise.

    (collectively, the "**NWT Transaction**").

2. Transfer all Alberta Assets (other than Marlowe) (the "**Alberta Assets**") to the Orphan Well Association for payments by Strategic of $5 million, to be paid $4 million on emergence and $1 million on the first anniversary of emergence (the "**Alberta Transaction**").

3. All existing deposits and letters of credit would remain as additional security for the NWT Assets and the Alberta Assets, respectively.

4. In addition to endorsing the NWT Transaction and the Alberta Transaction, a CCAA Plan would need to receive the approval of the creditors and the court (the "**CCAA Plan**") which would:

    (a) compromise trade creditors (estimated to be $10.6 million) at approximately $0.10 on the dollar (in accordance with the existing plan);

    (b) consolidate all equity in GMT Capital (or its nominee);

    (c) release and discharge all claims against Strategic, GMT Capital, and their respective directors and officers, including:

        (i) claims for abandonment and reclamation for all undertaking, property and assets of Strategic (including any historical claims against Marlowe),

        (ii) all Orders issued by regulatory bodies, and

        (iii) claims considered "Equity Claims" as contemplated under the existing Plan.

    (d) facilitate financial assistance for Strategic upon its emergence in the form of:

(i) first priority financing from GMT Capital (or its nominee) as outlined in the existing plan, and

(ii) D&O insurance from a third party insurer, all in form and substance satisfactory to Strategic and its D&Os.

5. If the CCAA Plan as outlined above (or otherwise as may be acceptable to the parties) is not approved by OROGO, AER, OWA, Strategic's creditors and the court, Strategic will have exhausted all avenues of restructuring with minimal resources to continue as a going concern. In that regard it is contemplated that, given the lack of interest in Strategic's assets in the sales process that was conducted, Strategic would bring an application to wind up its CCAA proceedings in an orderly fashion.

APPENDIX “B”

AER TRANSITION ORDER

Order AD 2020-004

MADE at the City of Calgary, in the Province of Alberta, on **January 20, 2020**	ALBERTA ENERGY REGULATOR

Under section 1.100 of the *Oil and Gas Conservation Rules*

Strategic Oil & Gas Ltd. (A524)
1500, 850 – 2 Street SW
Calgary, AB T2P 0R8

("Strategic" or "the Licensee")

WHEREAS the Licensee is the holder of Alberta Energy Regulator (AER) well, facility and pipeline licences (collectively, the Strategic Licences);

WHEREAS on April 10, 2019, the Licensee filed for a stay of proceedings under the *Companies' Creditors Arrangement Act*, and KPMG Inc. was appointed as Monitor;

WHEREAS the stay of proceedings was extended, pursuant to Orders granted May 6, 2019, May 9, 2019, September 20, 2019, October 11, 2019 and December 4, 2019. The stay period remains in place until, and including, January 31, 2020;

WHEREAS the Licensee has submitted proposals to the AER to continue its operations;

WHEREAS the AER advised the Licensee that the proposals submitted did not fully address the Licensee's end of life obligations, specifically the abandonment and reclamation of the Strategic Licences;

WHEREAS on January 7, 2020, the Licensee advised it was unable to continue standard operations given its financial situation, and that receivership was likely to occur;

WHEREAS on January 20, 2020, the Licensee advised the AER of its intent to transition its operations into receivership proceedings (the Receivership Transition) on, or before, January 31, 2020;

WHEREAS the Licensee remains responsible for the closure of the Strategic Licences, including abandonment and reclamation;

WHEREAS the Licensee has been working proactively with the AER and has confirmed its intent to continue to provide care and custody, including emergency response, until a Receivership Transition occurs;

WHEREAS the Licensee has cooperated with the AER in generally complying with regulatory requirements to date;

WHEREAS while the Receivership Transition is expected to occur imminently, the AER has concerns about the Licensee's ability to meet its end of life obligations, specifically abandonment, and reclamation, for the Strategic Licences;

WHEREAS the AER may require a licensee to provide a security deposit at any time where the AER considers it appropriate to do so to be applied against the estimated costs of suspending, abandoning or reclaiming a well, facility, well site or facility site;

WHEREAS the estimated cost to abandon and reclaim the Licensee's deemed liabilities is $48,702,033.00, as determined by AER *Directive 011: Licensee Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs*;

WHEREAS Trevor Gosselin, Director, Licensee Management, has been appointed a Director for the purposes of issuing orders under section 1.100 of the *Oil and Gas Conservation Rules* (the Director);

THEREFORE, I, Trevor Gosselin, under section 1.100 of the *Oil and Gas Conservation Rules*, DO HEREBY ORDER the following:

1. The Licensee must post a security deposit, by no later than **January 27, 2020,** to be applied against the estimated cost to abandon and reclaim the Licensee's deemed liabilities, in the amount of $48,702,033.00.

Dated at the City of Calgary in the Province of Alberta, the 20th of January 2020.

Trevor Gosselin
Director, Licensee Management

In complying with this order, the Licensee must obtain all approvals necessary, notwithstanding the above requirements.

This order in no way precludes any enforcement actions being taken regarding this matter under the *Oil and Gas Conservation Rules* or any other provincial or federal legislation, or by any other regulator with jurisdiction.

All enforcement actions issued by the AER may be subject to a follow-up review to confirm previous commitments have been completed and measures have been implemented, to ensure similar noncompliances are prevented in the future. The AER may request any information that demonstrates steps have been taken to prevent repeat noncompliances from occurring.

Under the *Responsible Energy Development Act* (*REDA*), an eligible person may request an appeal of decisions that meet certain criteria. Eligible persons and appealable decisions are defined in section 36 of the *REDA* and section 3.1 of the *Responsible Energy Development Act General Regulation*. If you wish to file a request for regulatory appeal, you must submit your request according to the AER's requirements. You can find filing requirements and forms on the AER website, www.aer.ca, under Applications & Notices: Appeals.

APPENDIX “C”

TRANSITION PLAN

Strategic Oil & Gas Ltd. ("Strategic" or the "Company")

Draft Transition Plan – CCAA to Receivership

1.0 Overview

Given the inability to develop a plan that is satisfactory to all stakeholders in the restructuring proceedings of Strategic, the Company through its directors and officers believe the most likely and appropriate next step is a receivership. Accordingly, Strategic has been working on a Draft Transition Plan to allow the Company to move from CCAA to Receivership as smoothly as possible and with the least impact on its ongoing operations. Strategic is focused on ensuring the ongoing safety of its wells, pipelines and facilities moving forward.

Strategic has worked closely with its counsel, Dentons Canada LLP, and the CCAA Court-appointed Monitor, KPMG Inc., (the "**Monitor**") to outline the key transition steps required. Strategic has worked with the Monitor in transition matters on the assumption that the Monitor after the discharge of the CCAA process will be appointed as the court-appointed Receiver; notwithstanding this, this Draft Transition Plan will be valid and valuable irrespective of the identity of the Receiver although the Company believes that this transition will be quicker, more efficient, more cost effective and in the final analysis more successful if the Monitor becomes the Receiver given the level of knowledge the Monitor currently has of the Company and its operations and the successful working relationship developed between the Monitor and the Company, its directors and employees.

Strategic has during the course of the CCAA proceedings maintained close contact with the Monitor and kept the Monitor fully informed of all matters including, but not limited to:

1. Ongoing operations;
2. Cash flow matters;
3. Safety issues as they arise;
4. Compliance and abandonment matters; and
5. Ongoing communications with regulators.

In developing this Draft Transition Plan, Strategic has focused on three areas:

1. Maintaining the safety of all wells, pipelines and facilities;
2. Ensuring that any required maintenance of ongoing operations is scheduled and undertaken, subordinate only to any concerns regarding (1); and
3. Ensuring the retention of current employees as well as key consultants, operatives, suppliers and subcontractors to allow actions required in (1) and (2) above to be carried out.

Strategic believes that adopting the above general position should allow for continuity of all ongoing operations to allow any transition, and the receivership handover and process, to be swift and seamless.

2.0 General Operations

A general overview of Strategic's operations is summarized as follows:

1. Strategic's operations are focused on oil and gas development in northern Alberta. December 2019 total oil & gas production for Strategic was 1,072 boe/d. 100% of the Company's production is from the Marlowe field.
2. Strategic maintains control over its resource base through high working interest ownership in wells, construction and operation of its own processing facilities and a significant undeveloped land and opportunity base. Strategic owns and operates a number of different oil and gas properties in Alberta and the Northwest Territories (NWT), all of which are described in more detail below.

2.1 Alberta Operations

2.1.1 Prospects

Strategic's Alberta assets are primarily located in northwestern Alberta, and include the Bark, Bistcho, Cameron Hills (Alberta), Dizzy, Jackpot, Larne, Lessard, Marlowe, Ratz, Tate and Zama North prospects. Strategic is the operator in this area with 95.90% working interest in the acreage. Strategic's core producing field includes the Marlowe and Dizzy prospects and is located approximately 100 km north of the town of High Level, Alberta.

2.1.2 Light Oil

The field currently produces light oil from the Slave Point, Muskeg Stack and Keg River zones.

2.1.3 Gas Fields

Gas is produced from the Slave Point, Sulphur Point, Muskeg Stack and Keg River zones.

2.1.4 Facilities

Strategic is the 100% owner and operator of 2 sour gas plants and 2 oil batteries. These facilities provide Strategic with ample capacity to process fluids, water and raw natural gas from its fields.

All production is pipelined to 100% Strategic-owned processing facilities that include a sour service natural gas plant rated to 40 MMcf/d and fluid handling and treating facilities for oil production.

2.1.5 Pipelines

Strategic is also the 100% owner and operator of 500+ km of pipeline infrastructure. Processing facilities are tied into an extensive gathering system that carries products from pipeline-connected wells to facilities for processing.

Gas sales are directly tied into the NOVA pipeline system at the plant gate and processed gas is directly connected to TransCanada's NGTL system. Produced water and acid gas are both disposed of into a water disposal scheme and an acid gas injection scheme.

Oil sales are connected to the Rainbow pipeline system via a Company-owned oil sales pipeline completed in March 2014.

Processed light oil is pipeline-connected to sales points via 100+ km of Strategic owned and operated sales pipeline. Processed light oil can alternatively reach sales destinations via truck.

2.1.6 Roads

Strategic owns, operates, and maintains 50+ km of high-grade roads that provide all season access to its facilities, pipeline connections, and well sites. Roads are maintained year-round.

2.2 NWT Operations

The Cameron Hills assets are located in the southwestern part of the NWT, near the Alberta border. Strategic has an average 86% working interest in and operatorship of the Cameron Hills assets which have not been operating since 2015. Cameron Hills is pipeline connected via an interprovincial pipeline to the Bistcho 06-32-122-02W6 Plant in Alberta.

3.0 Transition Matters

3.1 Safety

Currently all wells, pipelines and facilities are in a safe state. Strategic intends to maintain a significant contingency of working capital available to it during the assumed limited receivership period to deal with any matters that arise to maintain this position. Specifically, we note the following:

1. The Cameron Hills I-73 well is deemed to be in a safe state currently. The Office of the Regulator of Oil and Gas Operations (OROGO) was notified of the surface casing vent flow on September 4, 2019 and correspondence regarding the I-73 well has been ongoing. In October 2019, with OROGO's approval, an AMGAS scrubber was installed to sweeten the sour surface casing vent flow to mitigate any risk to the public or environment. Monthly checks are performed on this well by Strategic's field operations staff to ensure a continued safe state. It is important to note that the AMGAS scrubber requires routine maintenance as the H_2S scrubbing (liquid) scavenger has a limited life (approximately one year for the H_2S percentage and flow rate measured) and must be changed out at the end of its life to keep the vent gas sweet. OROGO has directed the vent flow be repaired by April 1st, 2020 so that no gas flows from the surface casing vent.
2. The Bistcho 100/03-32-122-02W6 well is a downhole suspended acid gas injection well that has perforations that were previously cement-squeezed off (located above the tubing plug/packer assembly) that appear to be leaking. Integrity of the tubing plug/packer seal is currently intact as evidenced by the fact that there is no sour gas on the tubing or production casing and is therefore considered to be in a safe state. The well will be visited quarterly to verify pressures and ensure the well remains in a safe state. Although Strategic considers the well to be in a safe state, it is important to note that with the leaking perforations above the packer, the well cannot pass the required annual 7,000 kPa pressure test required by the Alberta Energy Regulator (AER). It is Strategic's opinion that it will be more cost effective to abandon the well than to attempt to repair the leaking perforations. The issue was self-disclosed to the AER on January 15, 2020. The AER may very likely direct Strategic to either repair the leaking perforations or abandon the well.

3.2 Abandonment and Suspension Matters

Strategic intends to defer previously scheduled suspension and abandonment work in the following matters:

3.2.1 Cameron Hills

A program to address points #1 and #2 of the OROGO Order dated October 4, 2019 was prepared with execution planned for Q1 2020 to meet the April 1, 2020 deadline. The program included the following key activities:

1. Construction of the Cameron Hills ice road to the H-03 Camp and Battery and construction of ice roads to the I-73, A-03 and J-62 wells. Construction activity on the Cameron Hills ice road was initiated in December 2019. By December 15, 2019, pick up access to the H-03 Camp, and the A-03, J-62 and I-73 wells was achieved;
2. Reactivation of the H-03 Camp;
3. I-73 Remediation of the surface casing vent flow and zonal abandonment. Remediation and zonal abandonment programs were submitted to and approved by OROGO;
4. A-03 Zonal abandonment. The zonal abandonment program was submitted to and approved by OROGO; and
5. J-62 Zonal abandonment. The zonal abandonment program was submitted to and approved by OROGO.

The I-73 surface casing vent flow remediation and the zonal abandonments of all three wells are required by April 1, 2020.

3.2.2 Alberta Inactive Well Compliance Program (IWCP)

The following wells require abandonment under the AER's Inactive Well Compliance Program:

1. Jackpot 100/07-25-124-20W5 well abandonment (winter access) – Construction of ice road access to the Jackpot area and the 07-25 well was initiated in December 2019 with pick up access achieved. An application for the non-routine zonal abandonment of the 07-25 well was made to the AER Well Operations Group and approved on December 17, 2019;
2. North Bistcho 100/07-35-123-02W6 well abandonment (winter access);
3. North Bistcho 100/07-32-123-01W6 well abandonment (winter access);
4. Marlowe 100/09-21-122-22W5 well abandonment (winter access);
5. Marlowe 102/16-29-122-21W5 well abandonment (winter access); and
6. Conrad 100/07-05-006-15W4 well abandonment – Abandonment work to be completed in conjunction with the Area Based Closure program planned for Conrad in Q3 2020.

3.2.3 Area Based Closure (ABC) Program

Strategic participated in the ABC Program in 2019 and completed abandonment work for the required spend amount in the Ratz area. Submission was made to the AER for the 2020 ABC program with a focus in Conrad. Approval for the program was granted on December 5, 2019. Strategic was actively planning for the abandonment of the following eight (8) wells in Conrad in Q3 2020 (in addition to 100/07-05-006-15W4 noted above):

1. Conrad 100/04-26-006-15W4/0
2. Conrad 102/06-23-006-15W4/2
3. Conrad 100/08-22-006-15W4/0

4. Conrad 100/06-26-006-15W4/0
5. Conrad 100/14-23-006-15W4/0
6. Conrad 100/11-23-006-15W4/0
7. Conrad 100/16-22-006-15W4/0
8. Conrad 100/14-34-006-15W4/0

3.2.4 Pipeline Discontinuations

As part of its planned Q1 2020 abandonment and suspension program, Strategic intended to discontinue the following pipelines:

1. Lessard pipeline discontinuations of 3 licenses; and
2. Bistcho pipeline discontinuation of main sales oil line from Bistcho 06-32 Plant to 16-09. This work was attempted in Q1 2019 as part of a broader program to discontinue all of the pipelines in the Bistcho and Larne areas, however Strategic was unable to complete the work on this segment of pipeline due to rapidly deteriorating conditions of the winter access roads that prevented safe travel and access to complete the work.

3.2.5 Other Abandonments

Additional abandonment work currently being planned by Strategic includes:

1. Bistcho 100/03-32-122-02W6 well abandonment (winter access).

3.2.6 Deferral of Q1 2020 Abandonment and Suspension Program

Strategic believes that in the present circumstances, deferring the Q1 2020 abandonment and suspension work detailed above was necessary for the following reasons:

1. All the Company's assets are currently in a safe situation; beginning any abandonment work may necessitate the assets being removed from this safe state;
2. The Company has limited resources given its current insolvency and if an asset becomes unsafe as a result of abandonment work commencing, Strategic may not have the resources to remediate the issue effectively;
3. Strategic can envisage arguments as to the appropriate abandonment work to be carried out as to between Alberta or Northwest Territories assets and believes that it should not unilaterally make such decisions given it's unable to complete all work;
4. Potential that vendors/suppliers could be compromised if Strategic was not able to pre-pay for all services (e.g. in the event a change in the proposed plan necessitates different equipment or services) just before or across the transition;
5. Extremely cold temperatures at Steen River in the first half of January would have made it very difficult to conduct all operations safely to protect workers and equipment; and
6. Contingency of funds needs to be maintained to ensure that if a new issue arose that impacted public safety or the environment, it could be dealt with.

The Government of the Northwest Territories (GNWT) was informed of the delay of the work on January 7, 2020. On January 10, 2020, Strategic conveyed to OROGO that it was being mindful of the work undertaken or not undertaken during the period of uncertainty leading up to the stay extension deadline of January 31, 2020 and that Strategic felt it was the most responsible and safe course of action to defer the work such that Strategic was not starting a project that would have taken the wells out of a safe state that, inf not seen through to its completion, would leave it in an unsafe state.

The AER was informed of the delay in execution of its Q1 2020 program on January 17, 2020.

3.3 Maintenance

The following table provides a summary of ongoing or planned maintenance work to be conducted. Strategic has funds available to complete this maintenance in a safe manner and incorporates some contingency to manage any unforeseen issues. The funds are included in the operating expense forecast that has been used in the generation of the cash flow analysis that Strategic provides to the Monitor on a weekly basis. The activities listed are required to maintain production and cash flow, as well as to ensure safe operations and comply with reporting requirements.

Maintenance Activity	Timing	Area
Water Injection Pump Replacement	Jan 2020	Steen 09-17
Gravel Hauling from Bistcho – required for road maintenance and safety	Feb 2020	Bistcho to Steen
Fuel Tank Replacement	Feb 2020	Cameron Hills H-03
Check Scrubber on the I-73 Well	Monthly	Cameron Hills I-73
Pump out containment ponds	Spring	Cameron Hills H-03
1-28 Containment Repair	June 2020	Steen 01-28
MOC for the T-740 Tank	Jan 2020	Steen 09-17
Swap engine on 5-33	Feb 2020	Steen
Pump jack inspection/maintenance	July	Steen
Cathodic survey	June	All areas
1-28 berm clean out	June	Steen
10-28 tank clean out	May	Steen
Turnaround	Sept 2020	Steen
1-28 gen set overhaul	Sept 2020	
9-17 gen 3 overhaul (top end)	Sept 2020	
9-17 K600 overhaul	Sept 2020	
9-17 K680 overhaul	Sept 2020	
ILIs on 8 Pipelines Segments	Feb 2020	Steen 122-22 and 123-22W5
05-18-122-22W5 Separator Repair/Replacement	Feb 2020	Steen
Fugitive Emissions Survey Annual Locations	July 2020	Steen
Fugitive Emissions Survey Tri -annual Locations (Tank Farms)	March, July, Nov 2020	Steen 9-17 Tanks Zama 10-28 Terminal
Test Compressor Seal Vent Gas Seals (MRRCP)	Every 9000 hours	Steen
Determine equipment specific vent gas rates (MRRCP)	Mar 2020 test May 2020 report	Steen

3.4 Retention of Current Employees, Key Consultants, Operators, Suppliers and Subcontractors

Strategic's employees have demonstrated their loyalty during the CCAA process and are important to the transition process if the intention is to leave the assets producing through the Receivership process.

The Company has over the past two years made a series of staff reductions and the remaining staff is the bare minimum required for operations. The existing staff have integral knowledge of the current operations and are critical to ensure safety, manage operational issues, maintain production and assist with a sales process in receivership

Due to the remote nature of Strategic's operations (approximately 140 km north of High Level), there are a limited number of suppliers that are available to provide goods and services to Strategic and it is vitally important to maintain good working relationships with these vendors to ensure the continued safety of Strategic's operations. Strategic's suppliers have been supportive of the Company during the CCAA process and the Company do not believe this will change in a Receivership subject only to certain assurances as below:

1. Certain contractors are integral to the Company's operations, providing equipment, fuel and labour support to Strategic's field operators. It is critical these contractors continue to provide equipment and services and as the timing of the transition to receivership approaches, the Company intends to prepay these contractors for 1-2 weeks of services before the appointment of the receiver, depending on the contractor and the service being provided. Given the pre-payment amount is approximately $200,000 and these contractors are essential to maintain safe operations, this is believed appropriate.
2. All other suppliers will be contacted prior to the receivership to ensure a continuation of services.
3. All suppliers will be retained to ensure safety is maintained.

3.5 Insurance

Strategic's property insurance coverage is due to expire on January 31, 2020 and will be renewed prior to the expiration of the CCAA Proceedings for a further twelve months. Additionally, the Company's liability insurance was extended for 30 days to February 16, 2020 and will be renewed prior to its expiration. Directors & officers insurance expires on January 31, 2020 and will not be renewed given the pending appointment. The current property and liability insurance coverage has been reviewed and the Company believes it is sufficient. The renewals are expected to be issued prior to entering receivership.

APPENDIX “D”

CASH FLOW STATEMENT

STRATEGIC OIL & GAS LTD. and STRATEGIC TRANSMISSION LTD.
Comparison of Budgeted to Actual Results for the Weeks of November 25, 2019 to January 13, 2020
Unaudited ($000's CAD)

	Week 1			Week 2			Week 3			Week 4		
Week Commencing	**Forecast 25-Nov**	**Actual 25-Nov**	**Variance 25-Nov**	**Forecast 2-Dec**	**Actual 2-Dec**	**Variance 2-Dec**	**Forecast 9-Dec**	**Actual 9-Dec**	**Variance 9-Dec**	**Forecast 16-Dec**	**Actual 16-Dec**	**Variance 16-Dec**
Cash Receipts												
Production Revenue, net of oil royalties and transportation	1,420	1,581	161	-	-	-	-	-	-	-	-	-
Other receipts	10	4	(6)	10	8	(2)	10	2	(8)	10	417	407
Total Cash Receipts	1,430	1,585	155	10	8	(2)	10	2	(8)	10	417	407
Cash Disbursements												
Royalties	11	-	(11)	-	-	-	-	-	-	-	-	-
Property taxes	-	-	-	110	121	11	-	-	-	-	-	-
Operating, capital & regulatory expenditures	473	491	18	159	118	(41)	302	350	48	159	569	410
Payroll	108	89	(19)	-	-	-	103	86	(17)	-	6	6
General & administrative costs	-	7	7	9	39	30	-	49	49	79	11	(68)
Interest and taxes	450	428	(22)	-	22	22	-	-	-	-	-	-
Contingency	100	-	(100)	100	-	(100)	100	-	(100)	100	-	(100)
Total Cash Disbursements	1,142	1,016	(126)	378	300	(78)	505	485	(20)	338	586	248
Cash Flow From Operations	**288**	**569**	**281**	**(368)**	**(292)**	**76**	**(495)**	**(483)**	**12**	**(328)**	**(168)**	**160**
Restructuring Fees	-	-	-	-	-	-	-	93	93	-	130	130
Net Change in Cash	**288**	**569**	**281**	**(368)**	**(292)**	**76**	**(495)**	**(576)**	**(81)**	**(328)**	**(299)**	**29**
Opening cash	5,302	5,302	-	5,591	5,871	280	5,225	5,579	354	4,730	5,003	273
Ending Cash	5,591	5,871	280	5,225	5,579	354	4,730	5,003	273	4,402	4,704	302
Key Employee Retention Plan												
Opening cash	1,005	1,005	-	1,005	1,005	-	1,005	1,005	-	1,005	1,005	-
Scheduled payment	-	-	-	-	-	-	-	-	-	-	1,005	1,005
Total Restricted Cash	1,005	1,005	-	1,005	1,005	-	1,005	1,005	-	1,005	-	(1,005)

Week 5			Week 6			Week 7			Week 8			Total		
Forecast 23-Dec	**Actual 23-Dec**	**Variance 23-Dec**	**Forecast 30-Dec**	**Actual 30-Dec**	**Variance 30-Dec**	**Forecast 6-Jan**	**Actual 6-Jan**	**Variance 6-Jan**	**Forecast 13-Jan**	**Actual 13-Jan**	**Variance 13-Jan**	**Forecast 8 Weeks**	**Actual 8 Weeks**	**Variance 8 Weeks**
1,398	1,417	19	-	-	-	-	-	-	-	-	-	2,818	2,998	180
10	1	(9)	10	6	(4)	10	-	(10)	10	2	(8)	80	440	360
1,408	1,418	10	10	6	(4)	10	-	(10)	10	2	(8)	2,898	3,438	540
11	-	(11)	-	-	-	-	-	-	-	-	-	22	-	(22)
-	-	-	-	-	-	110	116	6	-	-	-	220	236	16
257	-	(257)	119	-	(119)	295	279	(16)	164	280	116	1,928	2,087	159
103	141	38	-	-	-	108	-	(108)	-	92	92	422	414	(8)
-	0	0	9	10	1	-	22	22	72	22	(50)	169	161	(8)
-	-	-	-	-	-	-	-	-	-	-	-	450	450	0
100	-	(100)	100	-	(100)	100	-	(100)	100	-	(100)	800	-	(800)
471	141	(330)	228	10	(218)	613	417	(196)	336	394	58	4,011	3,348	(663)
937	**1,277**	**340**	**(218)**	**(4)**	**214**	**(603)**	**(417)**	**186**	**(326)**	**(392)**	**(66)**	**(1,113)**	**90**	**1,203**
-	-	-	-	-	-	-	71	71	-	-	-	-	294	294
937	**1,277**	**340**	**(218)**	**(4)**	**214**	**(603)**	**(488)**	**115**	**(326)**	**(392)**	**(66)**	**(1,113)**	**(204)**	**909**
4,402	4,704	302	5,339	5,981	642	5,121	5,978	857	4,518	5,491	973	5,302	5,302	(0)
5,339	5,981	642	5,121	5,978	857	4,518	5,491	973	4,191	5,099	908	4,192	5,098	906
1,005	-	(1,005)	1,005	-	(1,005)	503	-	(503)	503	-	(503)	1,005	1,005	-
-	-	-	502	-	(502)	-	-	-	-	-	-	-	1,005	-
1,005	-	(1,005)	503	-	(503)	503	-	(503)	503	-	(503)	1,005	-	-

TAB 20

2015 ONSC 124
Ontario Superior Court of Justice [Commercial List]

4519922 Canada Inc., Re

2015 CarswellOnt 178, 2015 ONSC 124, 22 C.B.R. (6th) 44, 249 A.C.W.S. (3d) 508

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

In the Matter of a Plan of Compromise or Arrangement of 4519922 Canada Inc.

Newbould J.

Heard: December 8, 2014; January 6, 2015
Judgment: January 12, 2015
Docket: CV-1410791-00CL

Counsel: Robert I. Thornton, John T. Porter, Lee M. Nicholson, Asim Iqbal for Applicant
Harry M. Fogul for 22, former CLCA partners
Orestes Pasparakis, Evan Cobb for Insurers
Avram Fishman, Mark Meland for German and Canadian Bank Groups, Widdrington Estate and Trustee of Castor Holdings Limited
James H. Grout for 22, former CLCA partners
Chris Reed for 8, former CLCA partners
Andrew Kent for 5, former CLCA partners
Richard B. Jones for one, former CLCA partne
John MacDonald for Pricewaterhouse Coopers LLP
James A. Woods, Sylvain Vauclair, Bogdan Catanu, Neil Peden for Chrysler Canada Inc. and CIBC Mellon Trust Company
Jay A. Swartz for proposed Monitor Ernst & Young Inc.

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately $1 billion in damages — Test case in this litigation resulted in judgment of $4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — C Inc., which had very large claim against accounting firm, had not been given notice of CCAA application — C Inc. brought motion to set aside initial order and to dismiss CCAA application — Motion dismissed — CCAA proceeding would permit applicant and its stakeholders means of attempting to arrive at global settlement of all claims — There was no issue as to good faith of applicant in CCAA proceeding — Initial order should not be set aside and CCAA application dismissed on basis of defence tactics in test case — Term sheet was supported by overwhelming number of creditors — C Inc. was seeking to impose its will on all other creditors by attempting to prevent them from voting on proposed plan — Court's primary concern under CCAA had to be for debtor and all of its creditors — There was no prejudice to C Inc. given that its contingent claim was not scheduled to be tried until 2017 at earliest — Issues raised by C Inc. with respect to term sheet were premature and could be dealt with later in proceedings as required.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2015 ONSC 124, 2015 CarswellOnt 178, 22 C.B.R. (6th) 44, 249 A.C.W.S. (3d) 508

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
Creditors' committee — Applicant was corporation and was partner in accounting firm — In 1993, 96 plaintiffs commenced negligence actions against accounting firm and 311 of its individual partners claiming approximately $1 billion in damages — Test case in this litigation resulted in judgment of $4,978,897.51, and leave to appeal this judgment was dismissed by Supreme Court of Canada in January 2014 — Applicant engaged in negotiations with remaining plaintiffs in negligence actions — These negotiations culminated with execution of term sheet outlining plan of arrangement under Companies' Creditors Arrangement Act (CCAA) that could achieve global resolution to outstanding litigation — In December 2014, applicant obtained initial order granting it and accounting firm protection under CCAA — Initial order provided for creditors' committee (committee), and it also provided that accounting firm should be entitled to pay reasonable fees and disbursements of legal counsel to committee — C Inc., which had very large claim against accounting firm, had not been given notice of CCAA application — C Inc. brought motion to vary initial order to delete appointment of committee and provision for payment of committee's legal fees and expenses — Motion dismissed — Committee was result of intensely negotiated term sheet that formed foundation of plan — Altering term sheet removing committee could frustrate applicant's ability to develop viable plan and could jeopardize existing support from majority of claimants — Other creditors had no objection if C Inc. wanted to join committee — C Inc.'s complaints about claim process proposed in term sheet was not reason to deny existence of committee, but rather would be matter for discussion when claims process came before court for approval — Costs of paying committee in relation to amounts at stake would be relatively minimal.
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Miscellaneous
Extending stay to include insurers of insolvent accounting firm.

MOTION by creditor of insolvent accounting firm to set aside or vary initial order issued under *Companies' Creditors Arrangement Act*; MOTION by partner of accounting firm to extend stay contained in initial order to include insurers of accounting firm.

***Newbould J.*:**

1 On December 8, 2014 the applicant 4519922 Canada Inc. ("451"), applied for an Initial Order granting it protection under the *Companies' Creditors Arrangement Act* ("CCAA"), extending the protection of the Initial Order to the partnership Coopers & Lybrand Chartered Accounts ("CLCA"), of which it is a partner and to CLCA's insurers, and to stay the outstanding litigation in the Quebec Superior Court relating to Castor Holdings Limited ("Castor") during the pendency of these proceedings. The relief was supported by the Canadian and German bank groups who are plaintiffs in the Quebec litigation, by the Widdrington Estate that has a final judgment against CLCA, by the insurers of CLCA and by 22 former CLCA partners who appeared on the application.

2 The material in the application included a term sheet which the applicant wishes to use as a basis of a plan and which provides for an injection of approximately $220 million in return for a release from any further litigation. The term sheet was supported by all parties who appeared.

3 I granted the order with a stay to January 7, 2015 for reasons to follow, but in light of the fact that Chrysler Canada Inc., with a very large claim against CLCA in the litigation, had not been given notice of the application, ordered that Chrysler be given notice to make any submissions regarding the Initial Order if it wished to do so.

4 Chrysler has now moved to set aside the Initial Order, or in the alternative to vary it to delete the appointment of a creditors' committee and the provision for payment of the committee's legal fees and expenses. On the return of Chrysler's motion, a number of other former CLCA partners and PricewaterhouseCoopers appeared in support of the granting of the Initial Order.

Structure of Coopers & Lybrand Chartered Accounts

5 The applicant 451 is a corporation continued pursuant to the provisions of the *Canada Business Corporations Act*, and its registered head office is in Toronto, Ontario. It and 4519931 Canada Inc. ("4519931") are the only partners of CLCA.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

6 CLCA is a partnership governed by the *Partnerships Act (Ontario*) with its registered head office located in Toronto, Ontario. It was originally established in 1980 under the name of "Coopers & Lybrand" and was engaged in the accountancy profession. On September 2, 1985, the name "Coopers & Lybrand" was changed to "Coopers & Lybrand Chartered Accountants" and the partnership continued in the accountancy profession operating under the new name. Until 1998, CLCA was a national firm of chartered accountants that provided audit and accounting services from offices located across Canada and was a member of a global network of professional firms.

7 In order to comply with the requirements of the various provincial Institutes of Chartered Accountants across Canada, many of which restricted chartered accountants providing audit services from being partners with persons who were not chartered accountants, Coopers & Lybrand Consulting Group ("CLCG") was established under the *Partnerships Act (Ontario)* in September 1985 to provide management consulting services. Concurrent with the formation of CLCG, Coopers & Lybrand ("OpCo") was established as a partnership of CLCA, CLCG and two other parties to develop and manage the CLCA audit and CLCG management consulting practices that had to remain separate. Until 1998, OpCo owned most of the operating assets of CLCA and CLCG. OpCo is governed by the Partnerships Act (Ontario) and its registered head office is in Toronto.

8 In 1998, the member firms of the global networks of each of Coopers & Lybrand and Price Waterhouse agreed upon a business combination of the two franchises. To effect the transaction in Canada, substantially all of CLCA's and CLCG's business assets were sold to PricewaterhouseCoopers LLP ("PwC"), which entity combined the operations of the Coopers & Lybrand entities and Price Waterhouse entities, and the partners of CLCA and CLCG at that time became partners of PwC. Subsequent to the closing of the PwC transaction, CLCA continued for the purpose of winding up its obligations and CLCA and CLCG retained their partnership interests in OpCo. By 2006, all individual CLCA partners had resigned and been replaced by two corporate partners to ensure CLCA's continued existence to deal with the continuing claims and obligations.

9 Since 1998, OpCo has administered the wind up of CLCA and CLCG's affairs, in addition to its own affairs, including satisfying outstanding legacy obligations, liquidating assets and administering CLCA's defence in the Castor litigation. In conjunction with OpCo, 451 and 4519931 have overseen the continued wind up of CLCA's affairs. The sole shareholders of 451 and 4519931 are two former CLCA partners. 451 and 4519931 have no assets or interests aside from their partnership interests in CLCA.

Castor Holdings litigation

10 Commencing in 1993, 96 plaintiffs commenced negligence actions against CLCA and 311 of its individual partners claiming approximately $1 billion in damages. The claims arose from financial statements prepared by Castor and audited by CLCA, as well as certain share valuation letters and certificates for "legal for life" opinions. The claims are for losses relating to investments in or loans made to Castor in the period 1988 to 1991. A critical issue in the Castor litigation was whether CLCA was negligent in doing its work during the period 1988-1991.

11 Fifty-six claims have either been settled or discontinued. Currently, with interest, the plaintiffs in the Castor litigation collectively claim in excess of $1.5 billion.

12 Due to the commonality of the negligence issues raised in the actions, it was decided that a single case, brought by Peter Widdrington claiming damages in the amount of $2,672,960, would proceed to trial and all other actions in the Castor litigation would be suspended pending the outcome of the Widdrington trial. All plaintiffs in the Castor litigation were given status in the Widdrington trial on the issues common to the various claims and the determination regarding common issues, including the issues of negligence and applicable law, was to be binding in all other cases.

13 The first trial in the Widdrington action commenced in September 1998, but ultimately was aborted in 2006 due to the presiding judge's illness and subsequent retirement. The new trial commenced in January 2008 before Madam Justice St. Pierre. A decision was rendered in April 2011 in which she held that Castor's audited consolidated financial statements for the period of 1988-1990 were materially misstated and misleading and that CLCA was negligent in performing its services as auditor to

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Castor during that period. She noted that that the overwhelming majority of CLCA's partners did not have any involvement with Castor or the auditing of the financial statements prepared by Castor.

14 The decision in the Widdrington action was appealed to the Quebec Court of Appeal which on the common issues largely upheld the lower court's judgment. The only common issue that was overturned was the nature of the defendant partners' liability. The Quebec Court of Appeal held that under Quebec law, the defendant partners were severally liable. As such, each individual defendant partner is potentially and contingently responsible for his or her several share of the damages suffered by each plaintiff in each action in the Castor litigation for the period that he or she was a partner in the years of the negligence.

15 On January 9, 2014, the defendants' application for leave to appeal the Widdrington decision to the Supreme Court of Canada was dismissed.

16 The Widdrington action has resulted in a judgment in the amount of $4,978,897.51, inclusive of interest, a cost award in the amount of $15,896,297.26 plus interest, a special fee cost award in the amount of $2.5 million plus interest, and a determination of the common issue that CLCA was negligent in performing its services as auditor to Castor during the relevant period.

17 There remain 26 separate actions representing 40 claims that have not yet been tried. Including interest, the remaining plaintiffs now claim more than $1.5 billion in damages. Issues of causation, reliance, contributory negligence and damages are involved in them.

18 The Castor Litigation has given rise to additional related litigation:

(a) Castor's trustee in bankruptcy has challenged the transfer in 1998 of substantially all of the assets used in CLCA's business to PwC under the provisions of Quebec's bulk sales legislation. As part of the PwC transaction, CLCA, OpCo and CLCG agreed to indemnify PwC from any losses that it may suffer arising from any failure on the part of CLCA, OpCo or CLCG to comply with the requirements of any bulk sales legislation applicable to the PwC transaction. In the event that PwC suffers any loss arising from the bulk sales action, it has the right to assert an indemnity claim against CLCA, OpCo and CLCG.

(b) Certain of the plaintiffs have brought an action against 51 insurers of CLCA. They seek a declaration that the policies issued by the insurers are subject to Quebec law. The action would determine whether the insurance coverage is costs-inclusive (i.e. defence costs and other expenses are counted towards the total insurance coverage) or costs-in-addition (i.e. amounts paid for the defence of claims do not erode the policy limits). The insurers assert that any insurance coverage is costs-inclusive and has been exhausted. If the insurers succeed, there will be no more insurance to cover claims. If the insurers do not succeed and the insurance policies are deemed to be costs-in-addition, the insurers may assert claims against CLCA for further premiums resulting from the more extensive coverage.

(c) The claim against the insurers was set to proceed to trial in mid-January 2015 for approximately six months. CLCA is participating in the litigation as a mis-en-cause and it has all the rights of a defendant to contest the action and is bound by the result. As a result of the stay in the Initial Order, the trial has been put off.

(d) There have been eight actions brought in the Quebec Superior Court challenging transactions undertaken by certain partners and parties related to them (typically a spouse) (the "Paulian Actions").

(e) There is a pending appeal to the Quebec Court of Appeal involving an order authorizing the examination after judgment in the Widdrington action of Mr. David W. Smith.

19 The next trial to proceed against CLCA and the individual partners will be in respect of claims made by three German banks. It is not expected to start until at the least the fall of 2015 and a final determination is unlikely until 2017 at the earliest, with any appeals taking longer. It is anticipated that the next trial after the three German banks trial will be in respect of Chrysler's claim. Mr. Woods, who acts for Chrysler, anticipates that it will not start until 2017 with a trial decision perhaps being given in 2019 or 2020, with any appeals taking longer. The remaining claims will not proceed until after the Chrysler trial.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

20 The fees incurred by OpCo and CLCA in the defence of the Widdrington action are already in excess of $70 million. The total spent by all parties already amounts to at least $150 million. There is evidence before me of various judges in Quebec being critical of the way in which the defence of the Widdrington action has been conducted in a "scorched earth" manner.

Individual partner defendants

21 Of the original 311 defendant partners, twenty-seven are now deceased. Over one hundred and fifty are over sixty-five years of age, and sixty-five more will reach sixty-five years of age within five years. There is a dispute about the number of defendant partners who were partners of CLCA at the material time. CLCA believes that twenty-six were wrongly named in the Castor litigation (and most have now been removed), a further three were named in actions that were subsequently discontinued, some were partners for only a portion of the 1988-1991 period and some were named in certain actions but not others. Six of the defendant partners have already made assignments in bankruptcy.

Analysis

(i) Applicability of the CCAA

22 Section 3(1) of the CCAA provides that it applies to a debtor company where the total claims against the debtor company exceed $5 million. By virtue of section 2(1)(a), a debtor company includes a company that is insolvent. Chrysler contends that the applicant has not established that it is insolvent.

23 The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* is commonly referred to for guidance although the BIA definition is given an expanded meaning under the CCAA. See Holden, Morawetz & Sarra, *the 2013-2014 Annotated Bankruptcy and Insolvency Act* (Carswell) at N§12 and *Stelco Inc., Re* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]) (per Farley J.); leave to appeal to the C of A refused 2004 CarswellOnt 2936 (Ont. C.A.).

24 The BIA defines "insolvent person" as follows:

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

25 The applicant submits that it is insolvent under all of these tests.

26 The applicant 451 is a debtor company. It is a partner of CLCA and is liable as a principal for the partnership's debts incurred while it is a partner.

27 At present, CLCA's outstanding obligations for which the applicant 451 is liable include: (i) various post-retirement obligations owed to former CLCA partners, the present value of which is approximately $6.25 million (the "Pre-71 Entitlements"); (ii) $16,026,189 payable to OpCo on account of a loan advanced by OpCo on October 17, 2011 to allow CLCA to pay certain defence costs relating to the Castor litigation; (iii) the Widdrington costs award in the amount of $18,783,761.66, inclusive of interest as at December 1, 2014, which became due and payable to the plaintiff's counsel on November 27, 2014; (iv) the special fee in the amount of $2,675,000, inclusive of interest as at December 1, 2014, awarded to the plaintiff's counsel in the Widdrington action; and (v) contingent liabilities relating to or arising from the Castor litigation, the claims of which with interest that have not yet been decided being approximately $1.5 billion.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

28 The only asset of the applicant 451 on its balance sheet is its investment of $100 in CLCA. The applicant is a partner in CLCA which in turn is a partner in OpCo. At the time of the granting of the Initial Order, Ernst & Young Inc., the proposed Monitor, stated in its report that the applicant was insolvent based on its review of the financial affairs of the applicant, CLCA and OpCo.

29 Mr. Peden in argument on behalf of Chrysler analyzed the balance sheets of CLCA and OpCo and concluded that there were some $39 million in realizable assets against liabilities of some $21 million, leaving some $18 million in what he said were liquid assets. Therefore he concluded that these assets of $18 million are available to take care of the liabilities of 451.

30 I cannot accept this analysis. It was unsupported by any expert accounting evidence and involved assumptions regarding netting out amounts, one of some $6.5 million owing to pre-1971 retired partners, and one of some $16 million owing by CLCA to OpCo for defence costs funded by OpCo. He did not consider the contingent claims against the $6.5 million under the indemnity provided to PWC, nor did he consider that the $16 million was unlikely to be collectible by OpCo as explained in the notes to the financial statements of 451.

31 This analysis also ignored the contingent $1.5 billion liabilities of CLCA in the remaining Castor litigation and the effect that would have on the defence costs and for which the applicant 451 will have liability and a contingent liability for cost awards rendered in that litigation against CLCA. These contingent liabilities must be taken into account in an insolvency analysis under the subsection (c) definition of an insolvent person in the BIA which refers to obligations due and accruing due. In *Stelco Inc., Re*, *supra*, Farley J. stated that all liabilities, contingent or unliquidated, have to be taken into account. See also *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (per Farley J.).

32 It is obvious in this case that if the litigation continues, the defence costs for which the applicant 451 will have liability alone will continue and will more than eat up whatever cash OpCo may have. As well, the contingent liabilities of CLCA in the remaining $1.5 billion in claims cannot be ignored just because CLCA has entered defences in all of them. The negligence of CLCA has been established for all of these remaining cases in the Widdrington test case. The term sheet provides that the claims of the German and Canadian banks, approximately $720 million in total, and the claim of the Trustee of CLCA of approximately $108 million, will be accepted for voting and distribution purposes in a plan of arrangement. While there is no evidence before me at this stage what has led to the decision of CLCA and its former partners to now accept these claims, I can only conclude that in the circumstances it was considered by these defendants that there was exceptional risk in the actions succeeding. I hesitate to say a great deal about this as the agreement in the term sheet to accept these claims for voting and distribution purposes will no doubt be the subject of further debate in these proceedings at the appropriate time.

33 As stated, the balance sheet of the applicant 451 lists as its sole asset its investment of $100 in CLCA. The notes to the financial statements state that CLCA was indebted to OpCo at the time, being June 30, 2014, for approximately $16 million and that its only asset available to satisfy that liability was its investment in OpCo on which it was highly likely that there would be no recovery. As a result 451 would not have assets to support its liabilities to OpCo.

34 For this reason, as well as the contingent risks of liability of CLCA in the remaining claims of $1.5 billion, it is highly likely that the $100 investment of the applicant 451 in CLCA is worthless and unable to fund the current and future obligations of the applicant caused by the CLCA litigation.

35 I accept the conclusion of Ernst & Young Inc. that the applicant 451 is insolvent. I find that the applicant has established its insolvency at the time of the commencement of this CCAA proceeding.

(ii) Should an Initial Order be made and if so should it extend to CLCA?

36 The applicant moved for a stay in its favour and moved as well to extend the stay to CLCA and all of the outstanding Castor litigation. I granted that relief in the Initial Order. Chrysler contends that there should be no stay of any kind. It has not expressly argued that if a stay is granted against the applicant it should not be extended to CLCA, but the tenor of its arguments would encompass that.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

37 I am satisfied that if the stay against the applicant contained in the Initial Order is maintained, it should extend to CLCA and the outstanding Castor litigation. A CCAA court may exercise its jurisdiction to extend protection by way of the stay of proceedings to a partnership related to an applicant where it is just and reasonable or just and convenient to do so. The courts have held that this relief is appropriate where the operations of a debtor company are so intertwined with those of a partner or limited partnership in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor company. See *Priszm Income Fund, Re* (2011), 75 C.B.R. (5th) 213 (Ont. S.C.J.) per Morawetz J. The stay is not granted under section 11 of the CCAA but rather under the court's inherent jurisdiction. It has its genesis in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and has been followed in several cases, including *Canwest Publishing Inc./Publications Canwest Inc., Re* (2010), 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) per Pepall J. (as she then was) and *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) per Romaine J.

38 The applicant 451's sole asset is its partnership interest in the CLCA partnership and its liabilities are derived solely from that interest. The affairs of the applicant and CLCA are clearly intertwined. Not extending the stay to CLCA and the Castor litigation would significantly impair the effectiveness of the stay in respect of 451. It would in fact denude it of any force at all as the litigation costs would mount and it would in all likelihood destroy any ability to achieve a global settlement of the litigation. CLCA is a necessary party to achieve a resolution of the outstanding litigation, and significant contributions from its interest in OpCo and from its former partners are anticipated under the term sheet in exchange for releases to be provided to them.

39 Chrysler relies on the principle that if the technical requirements for a CCAA application are met, there is discretion in a court to deny the application, and contends that for several reasons the equities in this case require the application to be met. It says that there is no business being carried on by the applicant or by CLCA and that there is no need for a CCAA proceeding to effect a sale of any assets as a going concern. It says there will be no restructuring of a business.

40 Cases under the CCAA have progressed since the earlier cases such as *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) which expressed the purpose of the CCAA to be to permit insolvent companies to emerge and continue in business. The CCAA is not restricted to companies that are to be kept in business. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para. 33 (per Brown J. as he then was). There are numerous cases in which CCAA proceedings were permitted without any business being conducted.

41 To cite a few, in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) the applicants sought relief under the CCAA principally as a means of achieving a global resolution of a large number of product liability and other lawsuits. The applicants had sold all of its operating assets prior to the CCAA application and had no remaining operating business. In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, 2013 QCCS 3777 (Que. Bktcy.) arising out of the Lac-Mégant train disaster, it was acknowledged that the debtor would be sold or dismantled in the course of the CCAA proceedings. The CCAA proceedings were brought to deal with litigation claims against it and others. In *Crystallex International Corp., Re*, 2011 ONSC 7701 (Ont. S.C.J. [Commercial List]) the CCAA is currently being utilized by a company with no operating business, the only asset of which is an arbitration claim.

42 Chrysler contends, as stated in its factum, that the pith and substance of this case is not about the rescue of a business; it is to shield the former partners of CLCA from their liabilities in a manner that should not be approved by this court. Chrysler refers to several statements by judges beginning in 2006 in the Castor litigation who have been critical of the way in which the Widdrington test case has been defended, using such phrases as "a procedural war of attrition" and "scorched earth" strategies. Chrysler contends that now that the insurance proceeds have run out and the former partners face the prospect of bearing the cost of litigation which that plaintiffs have had to bear throughout the 22-year war of attrition, the former partners have convinced the German and Canadian banks to agree to the compromise set out in the term sheet. To grant them relief now would, it is contended, reward their improper conduct.

43 Chrysler refers to a recent decision in Alberta, *Alexis Paragon Limited Partnership, Re*, 2014 ABQB 65 (Alta. Q.B.) in which a CCAA application was denied and a receiver appointed at the request of its first secured creditor. In that case Justice Thomas referred to a statement of Justice Romaine in *Alberta Treasury Branches v. Tallgrass Energy Corp*, 2013 ABQB 432

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(Alta. Q.B.) in which she stated that an applicant had to establish that it has acted and is acting in good faith and with due diligence. Justice Thomas referred to past failures of the applicant to act with due diligence in resolving its financial issues and on that ground denied the CCAA application. Chrysler likens that to the manner in which the Widdrington test case was defended by CLCA.

44 I am not entirely sure what Justice Romaine precisely had in mind in referring to the need for an applicant to establish that "it has acted and is acting with good faith and with due diligence" but I would think it surprising that a CCAA application should be defeated on the failure of an applicant to have dealt with its affairs in a diligent manner in the past. That could probably said to have been the situation in a majority of cases, or at least arguably so, and in my view the purpose of CCAA protection is to attempt to make the best of a bad situation without great debate whether the business in the past was properly carried out. Did the MM&A railway in Lac-Mégantic act with due diligence in its safety practices? It may well not have, but that could not have been a factor considered in the decision to give it CCAA protection.

45 I do understand that need for an applicant to act in the CCAA process with due diligence and good faith, but I would be reluctant to lay down any fixed rule as to how an applicant's actions prior to the CCAA application should be considered. I agree with the statement of Farley J. in *Muscletech Research & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) that it is the good faith of an applicant in the CCAA proceedings that is the issue:

> Allegations ... of bad faith as to past activities have been made against the CCAA applicants and the Gardiner interests. However, the question of good faith is with respect to how these parties are conducting themselves in these CCAA proceedings.

46 There is no issue as to the good faith of the applicant in this CCAA proceeding. I would not set aside the Initial Order and dismiss the application on the basis of the defence tactics in the Widdrington test case.

47 The Castor litigation has embroiled CLCA and the individual partners for over 20 years. If the litigation is not settled, it will take many more years. Chrysler concedes that it likely will take at least until 2020 for the trial process on its claim to play out and then several more years for the appellate process to take its course. Other claims will follow the Chrysler claim. The costs have been enormous and will continue to escalate.

48 OpCo has dedicated all of its resources to the defence of the Castor litigation and it will continue to do so. OpCo has ceased distributions to its partners, including CLCA, in order to preserve funds for the purpose of funding the defence of the litigation. If the Castor litigation continues, further legal and other costs will be incurred by OpCo and judgments may be rendered against CLCA and its partners. If so, those costs and judgments will have to be paid by OpCo through advances from OpCo to CLCA. Since CLCA has no sources of revenue or cash inflow other than OpCo, the liabilities of CLCA, and therefore the applicant, will only increase.

49 If the litigation is not settled, CLCA's only option will be to continue in its defence of the various actions until either it has completely depleted its current assets (thereby exposing the defendant partners to future capital calls), or a satisfactory settlement or judicial determination has been reached. If no such settlement or final determination is achieved, the cost of the defence of the actions could fall to the defendant partners in their personal capacities. If a resolution cannot be reached, the amount that will be available for settlement will continue to decrease due to ongoing legal costs and other factors while at the same time, the damages claimed by the plaintiffs will continue to increase due to accruing interest. With the commencement of further trials, the rate of decrease of assets by funding legal costs will accelerate.

50 After a final determination had been reached on the merits in the Widdrington action, CLCA's board of directors created a committee comprised of certain of its members to consider the next steps in dealing with CLCA's affairs given that, with the passage of time, the defendant partners may ultimately be liable in respect of negligence arising from the Castor audits without a settlement.

51 Over the course of several months, the committee and the defendant partners evaluated many possible settlement structures and alternatives and after conferring with counsel for various plaintiffs in the Castor litigation, the parties agreed to participate

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

in a further mediation. Multiple attempts had earlier been made to mediate a settlement. Most recently, over the course of four weeks in September and October 2014, the parties attended mediation sessions, both plenary and individually. Chrysler participated in the mediation.

52 Although a settlement could not be reached, the applicant and others supporting the applicant believe that significant progress was achieved in the mediation. In light of this momentum, the applicant and CLCA continued settlement discussions with certain plaintiffs willing to engage in negotiations. These discussions culminated with the execution of a term sheet outlining a plan of arrangement under the CCAA that could achieve a global resolution to the outstanding litigation.

53 A CCAA proceeding will permit the applicant and its stakeholders a means of attempting to arrive at a global settlement of all claims. If there is no settlement, the future looks bleak for everyone but the lawyers fighting the litigation.

54 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It is also intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Without a stay, such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan would succeed. See *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) per Farley J.

55 In this case it would be unfair to one plaintiff who is far down the line on a trial list to have to watch another plaintiff with an earlier trial date win and collect on a judgment from persons who may not have the funds to pay a later judgment. That would be chaos that should be avoided. A recent example of a stay being made to avoid such a possibility is the case of *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re* which stayed litigation arising out of the Lac-Mégant train disaster. See also *Muscletech Research & Development Inc., Re*.

56 In this case, the term sheet that the applicant anticipates will form the basis of a proposed Plan includes, among other elements:

> (a) the monetization of all assets of CLCA and its partnership OpCo to maximize the net proceeds available to fund the plan, including all applicable insurance entitlements that are payable or may become payable, which proceeds will be available to satisfy the determined or agreed claims of valid creditors;
>
> (b) contributions from a significant majority of the defendant partners;
>
> (c) contributions from non-defendant partners of CLCA and CLCG exposed under the PwC indemnity;
>
> (d) contributions from CLCA's insurers and other defendants in the outstanding litigation;
>
> (e) the appointment of Ernst & Young Inc. as Monitor to oversee the implementation of the plan, including to assist with the realization and monetization of assets and to oversee (i) the capital calls to be made upon the defendant partners, (ii) a claims process, and (iii) the distribution of the aggregate proceeds in accordance with the plan; and
>
> (f) provision to all parties who contribute amounts under the plan, of a court-approved full and final release from and bar order against any and all claims, both present and future, of any kind or nature arising from or in any way related to Castor.

57 This term sheet is supported by the overwhelming number of creditors, including 13 German banks, 8 Canadian banks, over 100 creditors of Castor represented by the Trustee in bankruptcy of Castor and the Widdrington estate. It is also supported by the insurers. The plaintiffs other than Chrysler, representing approximately 71.2% of the face value of contingent claims asserted in the outstanding litigation against CLCA, either support, do not oppose or take no position in respect of the granting of the Initial Order. Chrysler represents approximately 28.8% of the face value of the claims.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

58 Counsel for the German and Canadian banks points out that it has been counsel to them in the Castor claims and was counsel for the Widdrington estate in its successful action. The German and Canadian banks in their factum agree that during the course of the outstanding litigation over the past 20 years, they have been subjected to a "scorched earth", "war of attrition" litigation strategy adopted by CLCA and its former legal counsel. Where they seriously part company with Chrysler is that they vigorously disagree that such historical misconduct should prevent the CLCA group from using the CCAA to try to achieve the proposed global settlement with their creditors in order to finally put an end to this war of attrition and to enable all valid creditors to finally receive some measure of recovery for their losses.

59 It is argued by the banks and others that if Chrysler is successful in defeating the CCAA proceedings, the consequence would be to punish all remaining Castor plaintiffs and to deprive them of the opportunity of arriving at a global settlement, thus exacerbating the prejudice which they have already suffered. Chrysler, as only one creditor of the CLCA group, is seeking to impose its will on all other creditors by attempting to prevent them from voting on the proposed Plan; essentially, the tyranny of the minority over the majority. I think the banks have a point. The court's primary concern under the CCAA must be for the debtor and all of its creditors. While it is understandable that an individual creditor may seek to obtain as much leverage as possible to enhance its negotiating position, the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor. See *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 (Alta. C.A. [In Chambers]), at para 38, per O'Brien J.A.

60 The German and Canadian banks deny that their resolve has finally been broken by the CLCA in its defence of the Castor litigation. On the contrary, they state a belief that due to litigation successes achieved to date, the time is now ripe to seek to resolve the outstanding litigation and to prevent any further dissipation of the assets of those stakeholders funding the global settlement. Their counsel expressed their believe that if the litigation continues as suggested by Chrysler, the former partners will likely end up bankrupt and unable to put in to the plan what is now proposed by them. They see a change in the attitude of CLCA by the appointment of a new committee of partners to oversee this application and the appointment of new CCAA counsel in whom they perceive an attitude to come to a resolution. They see CLCA as now acting in good faith.

61 Whether the banks are correct in their judgments and whether they will succeed in this attempt remains to be seen, but they should not be prevented from trying. I see no prejudice to Chrysler. Chrysler's contingent claim is not scheduled to be tried until 2017 at the earliest, and it will likely still proceed to trial as scheduled if a global resolution cannot be achieved in the course of this CCAA proceeding. Further, since Chrysler has not obtained a judgment or settlement in respect of its contingent claim, the Initial Order has not stayed any immediate right available to Chrysler. The parties next scheduled to proceed to trial in the outstanding litigation who have appeared, the insurers and then the three German banks, which are arguably the most affected by the issuance of a stay of proceedings, have indicated their support for this CCAA proceeding and Initial Order, including the stay of proceedings.

62 What exactly Chrysler seeks in preventing this CCAA application from proceeding is not clear. It is hard to think that it wants another 10 years of hard fought litigation before its claim is finally dealt with. During argument, Mr. Vauclair did say that Chrysler participated in the unsuccessful mediation and that it has been willing to negotiate. That remains to be seen, but this CCAA process will give it that opportunity.

63 Chrysler raises issues with the term sheet, including the provision that the claims of the German and Canadian banks and the Trustee of Castor will be accepted but that the Chrysler claim will be determined in a claims process. Chrysler raises issues regarding the proposed claims process and whether the individual CLCA former partners should be required to disclose all of their assets. These issues are premature and can be dealt with later in the proceedings as required.

64 Mr. Kent, who represents a number of former CLCA partners, said in argument that the situation cries out for settlement and that there are many victims other than the creditors, namely the vast majority of the former CLCA partners throughout Canada who had nothing to do with the actions of the few who were engaged in the Castor audit. The trial judge noted that the main CLCA partner who was complicit in the Castor Ponzi scheme hid from his partners his relationships with the perpetrators of the scheme.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

65 Mr. Kent's statement that the situation cries out for settlement has support in the language of the trial judge in the Widdrington test case. Madame Justice St. Pierre said in her opening paragraph on her lengthy decision:

> **1** Time has come to put an end to the longest running judicial saga in the legal history of Quebec and Canada.

66 At the conclusion of her decision, she stated:

> **3637** Defendants say litigation is far from being finished since debates will continue on individual issues (reliance and damages), on a case by case basis, in the other files. They might be right. They might be wrong. They have to remember that litigating all the other files is only one of multiple options. Now that the litigants have on hand answers to all common issues, resolving the remaining conflicts otherwise is clearly an option (for example, resorting to alternative modes of conflict resolution).

67 In my view the CCAA is well able to provide the parties with a structure to attempt to resolve the outstanding Castor litigation. The Chrysler motion to set aside the Initial Order and to dismiss the CCAA application is dismissed.

(iii) Should the stay be extended to the insurers?

68 The applicant 451 moves as well to extend the stay to the insurers of CLCA. This is supported by the insurers. The trial against the insurers was scheduled to commence on January 12, 2015 but after the Initial Order was made, it was adjourned pending the outcome of the motion by Chrysler to set aside the Initial Order. Chrysler has made no argument that if the Initial Order is permitted to stand that it should be amended to remove the stay of the action against the insurers.

69 Under the term sheet intended to form the basis of a plan to be proposed by the applicant, the insurers have agreed to contribute a substantial amount towards a global settlement. It could not be expected that they would be prepared to do so if the litigation were permitted to proceed against them with all of the costs and risks associated with that litigation. Moreover, it could well have an effect on the other stakeholders who are prepared to contribute towards a settlement.

70 A stay is in the inherent jurisdiction of a court if it is in the interests of justice to do so. While many third party stays have been in favour of partners to applicant corporations, the principle is not limited to that situation. It could not be as the interests of justice will vary depending on the particulars of any case.

71 In *Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada Cie), Re*, Castonguay, J.C.S. stayed litigation against the insurers of the railway. In doing so, he referred to the exceptional circumstances and the multiplicity of proceedings already instituted and concluded it was in the interests of sound administration of justice to stay the proceedings, stating:

> En raison des circonstances exceptionnelles de la présente affaire et devant la multiplicité des recours déjà intentés et de ceux qui le seront sous peu, il est dans l'intérêt d'une saine administration de la justice d'accorder cette demande de MMA et d'étendre la suspension des recours à XL.

72 In my view, it is in the interests of justice that the stay of proceedings extend to the action against the insurers.

(iv) Should a creditors' committee be ordered and its fees paid by CLCA?

73 The Initial Order provides for a creditors' committee comprised of one representative of the German bank group, one representative of the Canadian bank group, and the Trustee in bankruptcy of Castor. It also provides that CLCA shall be entitled to pay the reasonable fees and disbursements of legal counsel to the creditors' committee. Chrysler opposes these provisions.

74 The essential argument of Chrysler is that a creditors' committee is not necessary as the same law firm represents all of the banks and the Trustee of Castor. Counsel for the banks and the Trustee state that the German bank group consists of 13 distinct financial institutions and the Canadian bank group consists of 8 distinct financial institutions and that there is no evidence in

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the record to the effect that their interests do not diverge on material issues. As for the Castor Trustee, it represents the interests of more than 100 creditors of Castor, including Chrysler, the German and Canadian bank groups, and various other creditors. They says that a creditors' committee brings order and allows for effective communication with all creditors.

75 CCAA courts routinely recognize and accept *ad hoc* creditors' committees. It is common for critical groups of critical creditors to form an *ad hoc* creditors' committee and confer with the debtor prior to a CCAA filing as part of out-of-court restructuring efforts and to continue to function as an *ad hoc* committee during the CCAA proceedings. See Robert J. Chadwick & Derek R. Bulas, *"Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World"*, in Janis P. Sarra, ed, Annual Review of Insolvency Law 2011 (Toronto:Thomson Carswell) 119 at pp 120-121.

76 Chrysler refers to the fact that it is not to be a member of the creditors' committee. It does not ask to be one. Mr. Meland, counsel for the two bank groups and for the Trustee of Castor said during argument that they have no objection if Chrysler wants to join the committee. If Chrysler wished to join the committee, however, it would need to be considered as to whether antagonism, if any, with other members would rob the committee of any benefit.

77 Chrysler also takes exception to what it says is a faulty claims process proposed in the term sheet involving the creditors' committee. Whether Chrysler is right or not in its concern, that would not be a reason to deny the existence of the committee but rather would be a matter for discussion when a proposed claims process came before the court for approval.

78 The creditors' committee in this case is the result of an intensely negotiated term sheet that forms the foundation of a plan. The creditors' committee was involved in negotiating the term sheet. Altering the terms of the term sheet by removing the creditors' committee could frustrate the applicant's ability to develop a viable plan and could jeopardize the existing support from the majority of claimants. I would not accede to Chrysler's request to remove the Creditors' committee.

79 So far as the costs of the committee are concerned, I see this as mainly a final cri de couer from Chrysler. The costs in relation to the amounts at stake will no doubt be relatively minimal. Chrysler says it is galling to see it having to pay 28% (the size of its claim relative to the other claims) to a committee that it thinks will work against its interests. Whether the committee will work against its interests is unknown. I would note that it is not yet Chrysler's money, but CLCA's. If there is no successful outcome to the CCAA process, the costs of the committee will have been borne by CLCA. If the plan is successful on its present terms, there will be $220 million available to pay claims, none of which will have come from Chrysler. I would not change the Initial Order an deny the right of CLCA to pay the costs of the creditors' committee.

80 Finally, Chrysler asks that if the costs are permitted to be paid by CLCA, a special detailed budget should be made and provided to Chrysler along with the amounts actually paid. I see no need for any particular order. The budget for these fees is and will be continued to be contained in the cash flow forecast provided by the Monitor and comparisons of actual to budget will be provided by the Monitor in the future in the normal course.

Conclusion

81 The motion of Chrysler is dismissed. The terms of the Initial Order are continued.

Order accordingly.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 21

2004 CarswellQue 300
Quebec Superior Court

Boutiques San Francisco Inc., Re

2004 CarswellQue 300, [2004] R.J.Q. 986, [2004] Q.J. No. 2886, 5 C.B.R. (5th) 174, J.E. 2004-620, REJB 2004-54298

Les Boutiques San Francisco Incorporées, Les Ailes de la Mode Incorporées and Les Éditions San Francisco Incorporées (Debtors) and Ritchter & Associés Inc. (Monitor) and L'Oréal Canada inc. and Make Up For Ever S.A. (Petitioners)

Gascon J.S.C.

Heard: January 29, 2004
Judgment: February 10, 2004
Docket: C.S. Montréal 500-11-022070-037

Counsel: Me Serge Guérette, Me Stéphanie Lapierre for Debtors
Me Philippe Buist for Monitor
Me Nicolas Plourde for L'Oréal Canada inc., Make Up For Ever S.A.

Subject: Insolvency; Contracts; Corporate and Commercial; Property

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Composed of three retail chains, B Group obtained protection of Companies' Creditors Arrangement Act — Initial order stayed proceedings against B Group — On day of initial order, two cosmetics suppliers of B group were owed sums of money for goods delivered to B Group within 30 days preceding date of initial order — Suppliers each filed motion for stay to be lifted and declared inapplicable to them or for deposit of proceeds of sale of goods in separate trust — Motions dismissed — CCAA is flexible tool seeking to allow debtor corporation to stay in business while attempting to solve financial difficulties and to restructure — Key element of achieving CCAA objectives is maintaining status quo for time necessary to obtain creditors' approval of arrangement — Stay of proceedings is basic component of maintenance of status quo — Suppliers' motions went directly against CCAA objectives and maintenance of status quo during restructuring and would put suppliers in preferred position — Contemplated arrangement appeared reasonable and was supported by many creditors — Granting motions would provoke avalanche of similar motions by other creditors — No precedents existed in Quebec or elsewhere in Canada to support motions — Possible situations justifying lifting stay did not exist in case at bar and application of CCAA did not of itself constitute sufficiently serious and distinct prejudice to justify lifting stay — Even if art. 1605 C.C.Q. did apply, suppliers' contracts were not resiliated as B Group was not in default, either by suppliers in writing or by operation of law — Prejudice claimed by suppliers was not serious in overall picture of restructuring B Group — As B Group's core business included cosmetics and perfumes, suppliers were within focus of restructuring and would benefit from successful restructuring — B Group did not act in bad faith towards suppliers — Neither lift of stay nor deposit was warranted.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Composed of three retail chains, B Group obtained protection of Companies' Creditors Arrangement Act — Initial order stayed proceedings against B Group — On day of initial order, two cosmetics suppliers of B group were owed sums of money for goods delivered to B Group within 30 days preceding date of initial order — Suppliers each filed motion for stay to be lifted in respect of suppliers' claims — Supplier L inc. also demanded return of display units provided to B Group — Motions dismissed — Agreement between supplier L inc. and B Group provided that parties would equally share cost of creating, constructing and installing display units and that L inc. would remain owner of units — Agreement was not traditional lease but did have several characteristics usually found in contract of lease — Situation was quite analogous to use of leased property provided after initial

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

order was made — Since B Group was still using displays to sell L inc. products, nothing justified different treatment than that provided by s. 11.3 of CCAA — If B Group intended to continue using display units, B Group had to abide by terms of obligation agreed to, including payment of $28,000 within 90 days of delivery of units as well as $28,000 allowance as "coop-advertising" for 2003-2004 period.

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Effet de l'ararrangement — Suspension des procédures

Groupe B, qui était composé de trois chaînes de magasins, a obtenu la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a suspendu les procédures contre le Groupe B — En date de l'ordonnance initiale, le Groupe B devait de l'argent à deux de ses fournisseurs en cosmétiques pour des biens qu'ils lui avaient livrés dans les 30 jours précédant l'ordonnance initiale — Fournisseurs ont chacun présenté une requête afin que la suspension soit levée et déclarée inapplicable à eux ou afin que le produit de la vente des biens soit déposé dans un compte distinct — Requêtes rejetées — LACC est un outil flexible ayant pour but de permettre à une compagnie débitrice de demeurer en affaires pendant qu'elle tente de régler ses problèmes financiers et de se restructurer — Maintien du statu quo durant le temps nécessaire pour faire approuver l'arrangement par les créanciers constitue un élément clé de la réussite des objectifs de la LACC — Suspension est un élément fondamental du maintien du statu quo — En plus de les privilégier, les requêtes des fournisseurs allaient directement à l'encontre des objectifs de la LACC et du maintien du statu quo pendant la restructuration — Arrangement envisagé semblait raisonnable et était appuyé par plusieurs créanciers — Accueil des requêtes provoquerait une avalanche de requêtes similaires par d'autres créanciers — Aucun précédent appuyant les requêtes n'existait au Québec ou ailleurs au Canada — Aucune des situations possibles justifiant la levée de la suspension n'étaient présentes en l'espèce, et l'application de la LACC ne constituait pas en soi un préjudice suffisamment grave et distinct justifiant de lever la suspension — Même si l'art. 1605 s'était appliqué, les contrats des fournisseurs n'étaient pas résiliés puisque le Groupe B n'était pas en défaut, que ce soit par écrit par les fournisseurs ou par l'opération de la loi — Préjudice allégué par les fournisseurs n'était pas grave dans le cadre de l'ensemble de la restructuration du Groupe B — Puisque le coeur des affaires du Groupe B incluait les cosmétiques et les parfums, les fournisseurs étaient visés par la restructuration et en profiteraient si elle réussissait — Groupe B n'a agi avec aucune mauvaise foi envers les fournisseurs — Rien ne justifiait la levée de la suspension ou un dépôt.

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Questions diverses

Groupe B, qui était composé de trois chaînes de magasins, a obtenu la protection de la Loi sur les arrangements avec les créanciers des compagnies — Ordonnance initiale a suspendu les procédures contre le Groupe B — En date de l'ordonnance initiale, le Groupe B devait de l'argent à deux de ses fournisseurs en cosmétiques pour des biens qu'ils lui avaient livrés dans les 30 jours précédant l'ordonnance initiale — Fournisseurs ont chacun présenté une requête afin d'obtenir la levée de la suspension à l'égard de leur réclamation — Fournisseur L inc. a aussi demandé la remise des présentoirs fournis au Groupe B — Requêtes rejetées — Selon l'entente entre L inc. et le Groupe B, les parties devaient se partager également les coûts de la création, de la construction et de l'installation des présentoirs, et L inc. conserverait la propriété de ceux-ci — Entente ne constituait pas un bail traditionnel, mais comportait plusieurs des caractéristiques se trouvant généralement dans un contrat de location — Situation était très similaire à celle de l'usage d'un bien loué qui a été fourni après le prononcé de l'ordonnance initiale — Puisque le Groupe B utilisait toujours les présentoirs pour vendre des produits de L inc., rien ne justifiait un traitement différent de celui prévu par l'art. 11.3 LACC — Si le Groupe B voulait continuer à utiliser les présentoirs, il devait respecter les termes de l'obligation contractée, y compris faire le paiement de 28 000 $ dans les 90 jours de la livraison des présentoirs en plus du paiement de l'allocation de 28 000 $ à titre de « publicité à frais partagés » pour la période 2003-2004.

MOTIONS by two suppliers for stay of proceedings against corporation protected by *Companies' Creditors Arrangement Act* to be lifted and declared inapplicable to suppliers or for deposit of proceeds of sale of unpaid goods in separate trust.

***Gascon J.S.C.*:**

1) THE ISSUES

1 This judgment deals with the right of unpaid suppliers to repossess their goods still in the hands of a debtor company that availed itself of the protection of the *Companies' Creditors Arrangement Act* [1] (*CCAA*).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2 The facts giving rise to the dispute are simple and can be summarized as follows.

3 On December 17, 2003, Les Boutiques San Francisco incorporées, Les Ailes de la Mode incorporées and Les Éditions San Francisco incorporée (BSF Group) sought and obtained some of the protections available under the *CCAA*. The Initial Order issued on that day provided notably for a stay of the proceedings against the BSF Group.

4 A stay of proceedings is a standard conclusion in the initial orders made under the *CCAA* and section 11 (3) specifically provides for such a possibility:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> >
> > (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> (Emphasis added)

5 On the date of the Initial Order issued here, one supplier, L'Oréal Canada Inc., was owed $413,557.08 by the BSF Group, $360,395,32 of which represented goods delivered within the 30 days prior to December 17, 2003 [2]. After the application of some credits for services rendered, the amount owed was reduced to $299,840.09 on the day of hearing of L'Oréal's motion [3].

6 Similarly, another supplier, Make Up For Ever S.A., was also owed a sum of $67,420.97 on December 17, 2003, $30,015.58 of which represented goods delivered to the BSF Group within the 30 days preceding the date of the Initial Order [4].

7 In early January 2004, L'Oréal and Make Up For Ever each filed a motion by which they claimed that the stay of proceedings should be lifted and declared inapplicable inasmuch as they were concerned. The reason invoked: they each want to exercise their right to revendicate the goods sold and delivered still in the possession of the BSF Group, as any sale which took place is now resolved and resiliated automatically because of the BSF Group's failure to perform its obligations, namely to pay for the goods.

8 They rely upon article 1605 C.C.Q. which states:

> "**1605.** A contract may be resolved or resiliated without judicial proceedings where the debtor is in default by operation of law or where he has failed to perform his obligation within the time allowed in the writing putting him in default."
>
> (Emphasis added)

9 Subsidiarily, if the Court does not agree to lift the stay of proceedings against them, they ask that the proceeds of the sales of their goods be kept from now on in a separate trust account by the BSF Group, in order to protect their future rights and recourses.

10 Finally, in its own motion, L'Oréal asks that the BSF Group be ordered to either pay for the continued use of the display units ("agencements") it recently provided to them or return those immediately to L'Oréal in the absence of payment.

11 Not surprisingly, the BSF Group vigorously contests these requests. In that contestation, it also has the support of many: the Monitor, the Bank Syndicate and the Ad Hoc Committee of Unsecured Creditors.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

12 Their position is clear and unanimous. There is no reason to treat these two suppliers any different than the other creditors of the BSF Group. To lift the stay of proceedings for these two suppliers would go against the specific objectives of the *CCAA* and the principles of the status quo that it should protect. Furthermore, the demands of these suppliers are not supported by any of the relevant precedents, be it from the Quebec or the Common Law provinces courts. Finally, they say that not only are the requests unjustified under the circumstances as these two suppliers, in particular, do not suffer any serious prejudice, but granting those would create an impact of such a nature as to put seriously in jeopardy the proposed arrangement of the BSF Group.

13 On the issue of the display units, they reply that nothing is owed at this stage since this debt preceded the Initial Order and should therefore be treated in the same manner as any others.

14 For sake of clarity and as the issues are very distinct from one another, the Court will deal, firstly, with the requests of L'Oréal and Make Up For Ever for the lift of the stay of proceedings and for the deposit of moneys in trust, and secondly, with the claim of L'Oréal pertaining to the display units.

2) THE LIFT OF THE STAY OF PROCEEDINGS AND, SUBSIDIARILY, THE DEPOSIT OF MONEYS IN TRUST

15 On the basis of the applicable statutes, the relevant case law and the evidence adduced, the Court is of the view that neither the lift of the stay of proceedings nor the deposit of moneys in trust should be ordered here, be it for the benefit of L'Oréal or Make Up For Ever. In reaching this conclusion, the Court relies on the following considerations:

a) The purpose and objectives of the *CCAA*;

b) The precedents in Quebec and Canada; and

c) The absence of a serious and distinct prejudice to the two suppliers involved.

a) The purpose and objectives of the CCAA

16 It has been said often, and rightly so, that the *CCAA* is a remedial legislation. Its purpose is to allow companies in financial difficulties to reorganize themselves. As one judgment of the Quebec Superior Court recently reminded, it should be interpreted and applied as a flexible tool to assist in the restructuring of companies in financial difficulties [5] .

17 One of the main goals of the *CCAA* is to allow the debtor company seeking its protection to stay in business as a going concern while attempting to solve its financial difficulties. The Courts indeed recognize that the Act should be given a large and generous interpretation to favour this objective [6] .

18 As the Quebec Court of Appeal stated lately, contrary for instance to recourses under the *Bankruptcy and Insolvency Act* [7] (BIA), the objective of the *CCAA* is not to end the operation of a business and distribute its assets to its creditors, but rather to reach an arrangement between the debtor company and its creditors to allow for its survival [8] .

19 One of the key elements to achieve these objectives is maintaining a status quo for the necessary time while the debtor company attempts to gain the approval of its creditors for a proposed arrangement [9] . Like the British Columbia Court of Appeal once said [10] :

> "[. . .] Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11."
>
> (Emphasis added)

20 In a judgment often cited on that subject, Mr. Justice Tysoe of the British Columbia Supreme Court summarized well what is meant by maintaining the status quo when a debtor company seeks the protection of the *CCAA* [11] :

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

"It is my view that the maintenance of the status quo is intended to attempt to accomplish the following three objectives:

> 1. To suspend or freeze the rights of all creditors as they existed as at the date of the stay Order (which, in British Columbia, is normally the day on which the *CCAA* proceedings are commenced). This objective is intended to allow the insolvent company an opportunity to reorganize itself without any creditor having an advantage over the company or any other creditor.
>
> 2. To postpone litigation in which the insolvent company is involved so that the human and monetary resources of the company can be devoted to the reorganization process. The litigation may be resolved by way of the reorganization.
>
> 3. To permit the insolvent company to take certain action that is beneficial to its continuation during the period of reorganization or its attempt to reorganize or, conversely, to restrain a non-creditor or a creditor with rights arising after the stay from exercising rights that are detrimental to the continuation of the company during the period of reorganization or its attempt to reorganize. This is the objective recognized by *Quintette* and *Alberta-Pacific Terminals***.** [. . .]"

(Emphasis added)

21 Therefore, as section 11 of the *CCAA* enacts and these precedents reiterate, in order to allow a debtor company to restructure itself and continue its operations, the stay of proceedings is a basic component of the maintenance of the status quo. Staying the proceedings means to suspend or freeze not only actual or potential litigation, but likewise any type of manoeuvres for positioning amongst creditors. This obviously includes the possibility of creditors seeking to repossess their goods in the hands of the debtor company who, to the contrary, should be allowed to continue operating as a going concern while protected under the *CCAA*.

22 From that standpoint, the motions of L'Oréal and Make Up For Ever are going directly against these objectives and the key element of maintaining the status quo during the course of the restructuring under the *CCAA*. The lift they are seeking is directly opposed to what the Act specifically provides for at section 11 and would place both of them in a preferred position compared to that of the other unsecured creditors.

23 Surely, maintaining the status quo involves balancing the interests of all affected parties and avoiding advantages to some over the others. Under the *CCAA*, the restructuring process and the general interest of all the creditors should always be preferred over the particular interests of individual ones [12].

24 The Court does not believe that it is appropriate to set aside these objectives and principles in this case.

25 In its Initial Amended Order of January 15, 2004, the Court has already indicated that the contemplated arrangement of the BSF Group appeared practical, workable and realistic from an economic standpoint. At this stage, it has very strong support within the creditors of the BSF Group and no one has suggested that there exists a better solution to the problems now faced by the BSF Group.

26 In a situation where there exists a contemplated arrangement which is not doomed to fail but rather appears reasonable, which has the support of a vast majority of the creditors, and which is still being pursued diligently, it is the Court's opinion that the pursuit of the objectives of the *CCAA* should strongly be favoured, not countered.

27 As a result, with a contemplated arrangement such as the one involved here, the solutions should be pursued and the issues resolved within the context of this arrangement, not outside of it.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

28 To that end, one must remember that the contemplated arrangement described by the BSF Group already gives consideration to the situation of suppliers such as L'Oréal and Make Up For Ever. One of its guiding principles is indeed expressed as follows by the BSF Group [13] :

> The participation of claims in the baskets could be adjusted so that the first dollars of each claim and sums due for merchandise sold and delivered within 30 days of the Initial Order, could be entitled to a greater participation in the basket than the remaining claims;

29 Since the proposed arrangement is not yet finalized, it is certainly too soon to comment on this potential treatment of the particular situation of the "30 days goods" suppliers. At this stage, it is sufficient to note that proper attention is being given to the situation of these suppliers who may otherwise have had other rights save for the protection afforded by the *CCAA*. Presently, there is no reason to believe that the arrangement that will eventually be submitted to the creditors for approval, and thereafter to the Court for sanction if fair and reasonable, will not be governed by similar considerations.

30 Still, L'Oréal and Make Up For Ever argued that the stay of proceedings will potentially deprive them of some of their alleged rights under the Civil Code of Quebec or the *BIA*, particularly if the arrangement fails and a bankruptcy is declared. Even though this possibility exists, when a proposed arrangement is characterized by qualifiers such as "not doomed to failure", "apparently reasonable", "strongly supported" and "diligently pursued", the Court considers that it should assess the situation with an assumption of success, not of failure, of the process.

31 Accordingly, even if these concerns of L'Oréal and Make Up For Ever should the arrangement fails are legitimate, they should not be the guiding criteria of the Court under the circumstances. Especially so when a proper arrangement can eventually alleviate, partially or totally, the loss of the alleged rights that the suppliers may now be denied.

32 To minimize the consequences of their requests, L'Oréal and Make Up For Ever have also argued that their claims represent less than $370,000, while the total accounts payable of the unsecured creditors, including the suppliers, represent more than $31,000,000 [14] . The impact, if any, of their motions upon the restructuring of the BSF Group would therefore be, so they say, minimal.

33 Since no similar motions from other suppliers are presently pending, they are saying that the Court should not conclude that granting their requests will have the detrimental impact upon the restructuring process that the other parties are voicing.

34 With respect, the Court cannot agree with this argument.

35 Even though no other similar motions are now pending, the Court cannot simply close the eyes or look in the opposite direction and just pretend not to see the obvious. In a business such as that of the BSF Group, which is involved in the retail sale of men's, women's and children's apparels and accessories, it is clear that there are many other suppliers in a situation similar to that of L'Oréal and Make Up For Ever.

36 It is also clear that if the requests of L'Oréal and Make Up For Ever are granted, there will be many others presented to the Court. Opening this door would create a chaotic situation that will strike at the very heart of the going concern and continued operations objectives that the *CCAA* aims at protecting.

37 The Court does not need to have specific evidence from other suppliers confirming that they will proceed similarly to L'Oréal and Make Up For Ever should the motions be granted. This is self-evident and the Court cannot ignore it. This is exactly what Mr. Justice Lagacé from the Quebec Superior Court relied upon, amongst other things, in refusing to grant a similar request in the context of the restructuring of Steinberg Inc. under the *CCAA* [15] :

> "[. . .] Or le tribunal ne peut ignorer que plusieurs autres créanciers pourraientréclamer le même droit que désire exercer la débitrice-requérante. [. . .]"

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(Emphasis added)

38 All in all, when one considers the purpose and objectives of the *CCAA,*there are simply no justifications for the conclusions sought by L'Oréal and Make Up For Ever in their motions.

b) The precedents in Quebec and in Canada

39 That said, the Court notes further that there are no precedents, be it in Quebec or elsewhere in Canada, that support the requests made here by L'Oréal and Make Up for Ever. Indeed, all the judgments that bare any kind of similarity to the situation at hand go against the granting of what is being asked.

i. The Quebec Cases

40 To this date, the cases in Quebec have refused the claims of unpaid suppliers to repossess their goods in the context of a stay of proceedings pursuant to a reorganization or restructuring process, be it under the *CCAA* or the *BIA*.

41 For instance, in the context of the Steinberg Inc. restructuring under the *CCAA*, Mr. Justice Lagacé twice refused motions to authorize an unpaid supplier to seize before judgment the merchandises sold and delivered within the 30 days prior to the Initial Order [16] .

42 In the two judgments he rendered, Mr. Justice Lagacé concluded that when faced with an arrangement that appeared serious, the individual interest of a creditor should not be preferred over the general interest of all the creditors. For Mr. Justice Lagacé, granting the requests would have most likely resulted in a number of similar motions by other suppliers and it would have basically led to the failure of the arrangement before it was even submitted to the creditors for approval. This would have been contrary to the objectives of the *CCAA*.

43 It is worth noting that in these two decisions, the suppliers were relying upon article 1543 C.C.B.C. and their corresponding right to revendicate the goods sold and delivered within the prior 30 days. Since 1994, article 1741 C.C.Q. has replaced article 1543 C.C.B.C. It now states the following:

> **1741.** Except in the case of a sale with a term, the seller of movable property may, within thirty days of delivery, consider the sale resolved and revendicate the property if the buyer, being in default, has failed to pay the price and if the property is still entire and in the same condition and has not passed into the hands of a third person who has paid the price thereof, or of a hypothecary creditor who has obtained surrender thereof.
>
> Where the buyer is in default to pay the price and the property meets the conditions prescribed for resolution of the sale, the seizure of the property by a third person is no hindrance to the rights of the seller.
>
> (Emphasis added)

44 Here, L'Oréal and Make Up For Ever are not relying upon this article which is specific to the situation of an unpaid vendor of movable property in the Quebec Civil Code. As their sales were with a term, they do not meet the conditions necessary for its application. Thus, to justify their requests, they are relying upon the general provisions of obligations applicable to all contracts found at article 1605 C.C.Q.

45 It is difficult to see why the reasoning applicable for a claim made under article 1543 C.C.B.C. (now 1741 C.C.Q.) in cases like the two *Steinberg* decisions would be any different inasmuch as the general provisions of article 1605 C.C.Q. are concerned. At the very least, L'Oréal and Make Up For Ever did not present any convincing argument to that end.

46 Likewise, in the context of the *BIA* this time, Mr. Justice Denis has reached a conclusion similar to that of Mr. Justice Lagacé on a demand by suppliers for the repossession of goods after the filing of a notice of intention to make a proposal [17] .

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

47 In that matter, the suppliers were again invoking article 1543 C.C.B.C. Nonetheless, Mr. Justice Denis concluded that there was no reason not to apply the stay of proceedings to them. He emphasized that sections 81.1(4) and 50.4 of the *BIA* intended to temporarily deny certain rights to creditors in order to allow a company to make a proposal to solve its financial difficulties. The protection that the *BIA* afforded to suppliers of goods in section 81.1 was not applicable in a proposal context, hence the absence of any basis to provide them with a similar protection through article 1543 C.C.Q.

48 The same conclusion was reached by Mr. Justice Halperin in *Henry Birks & Sons Ltd., Re* [18] . On a petition for an order pursuant to section 81.1(8) of the *BIA*, he denied the request of unpaid suppliers to exercise their remedies as unpaid vendors, as such could have well placed in jeopardy the whole reorganization process of the debtor company. He noted that section 81.1 was clear and only suspended the running of the 30 days period upon the commencement of a proposal proceeding, even though any rights as unpaid vendors in the future would often be illusory if the goods were no longer in the possession of the debtor company once a bankruptcy was finally declared [19] .

49 No Quebec courts decisions granting the requests sought by L'Oréal or Make Up For Ever could be found to support their position. The situation was no different in the Common Law provinces.

ii. The Common Law Provinces Cases

50 In proceedings taken under the *CCAA*, the British Columbia Supreme Court has twice denied requests similar to those presented by L'Oréal and Make Up For Ever.

51 In *Agro Pacific Industries Ltd., Re* [20] , Mr. Justice Thackray denied an application by suppliers to set aside a stay of proceedings granted under the *CCAA*. He stated notably that ordering that the supplies made to the debtor company within 30 days of the Initial Order be traced and identified and their proceeds put in a trust account would be an attempt to improperly introduce into the *CCAA* proceedings requirements similar to those contained in section 81.1 of the *BIA*. In his reasons, Mr. Justice Thackray had these comments which are worth citing:

> "[52] An order establishing a trust fund in favour of the applicant suppliers would create a class of secured creditors after the fact. It would turn the Court into the author of a new class of creditor. Classes of creditors should be created by the parties on a contractual basis when entering into their business relationships.
>
> [. . .]
>
> [55] Mr. Justice Tysoe in *Re Woodward's* also alluded to the potential that the Court cannot lose sight of legislative intention. He pointed out that the *CCAA* is « silent as to the creation of a trust fund to be held for the benefit of the suppliers in the event that the reorganization is not successful. » Many of the challenges by the suppliers in the case at bar are legislative.
>
> [56] The *CCAA* must be accepted as Parliament's approval of the continued business activities of an insolvent company, to be carried out in as normal a manner as possible while reorganizing. The Court is not allowed to suggest that the legislative intent is one designed, *per se*, to disadvantage the suppliers. It must, rather, be taken as giving hope that reorganization, rather than bankruptcy, will eventually benefit all interested parties."
>
> (Emphasis added)

52 In this judgment, Mr. Justice Thackray found no basis to justify the requests made by the suppliers under the *CCAA*.

53 In *Woodward's Ltd., Re* [21] , Mr. Justice Tysoe reached a similar conclusion. In that case, applications by suppliers of goods for relief under the *CCAA* were also denied. Applications for leave to appeal of that decision were furthermore dismissed [22] .

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

54 For Mr. Justice Tysoe, in addition to the fact that section 81.1 of the *BIA* could not be of any use to the suppliers as the *CCAA* did not contain any similar provision, the creation of any trust fund was not justified as it would not serve to maintain the status quo. He wrote this on the issue [23] :

> "Apart from consideration of s. 81.1 of the *B. & I. Act*, there is no justification for the creation of the trust fund. It would not serve to maintain the status quo. To the contrary, it would give the suppliers an advantage over other creditors of Woodward's. It would not be beneficial to the continuation of Woodward's business during the reorganization period or Woodward's attempt to reorganize. Indeed, it was the position of Woodward's on these applications that the creation of a trust fund in the amount of $30 million would make any reorganization impossible."
>
> (Emphasis added)

55 Finally, and similarly to what the Quebec courts did conclude, in *Bruce Agra Foods Inc.*, Mr. Justice Farley denied a motion made by unpaid suppliers this time within the context of a notice of intention to file a proposal under the *BIA*. In that case, Mr. Justice Farley concluded that in a reorganization scenario, unpaid suppliers could not avail themselves of a protection similar to that of section 81.1 of the *BIA*. He mentioned [24] :

> "2. If Parliament had intended that unpaid suppliers have direct *immediate*rights in a reorganization scenario as envisaged by a Notice of Intention to File a Proposal, then it would seem to me that it would have provided for same to take place in s. 81.1(b) but rather Parliament addressed the Notice of Intention situation by having a suspension during the relevant time period: see s. 81.1(4). Unfortunately for those affected, in order to promote reorganizations (which is an underlying fundamental of the BIA including the 1992 amendments which puts some teeth or perhaps « life blood » into that part of the BIA), there will be some prejudice to creditors (who may be unpaid sellers). If the rights of unpaid suppliers were to override, then there would have to be an amendment to section 69.1 (a) to that effect. [. . .]
>
> [. . .]
>
> 6. It would seem to me that unpaid supplier rights are truly intended to protect against the unfair consequences in liquidation as seen by Parliament and are not intended to affect or disrupt reorganizations proposed pursuant to Part IV of the BIA. [. . .]"
>
> (Emphasis added)

56 Again, L'Oréal and Make Up For Ever could not refer the Court to any decision from the Common Law provinces which had granted a motion similar to theirs.

iii) L'Oréal and Make Up For Ever reply to the precedents

57 Notwithstanding, to distinguish these decisions, L'Oréal and Make Up For Ever first argued that in the Quebec decisions in *Steinberg* or in *Shirmax* [25] , no claims for the deposit of moneys in a trust account similar to what is requested here were apparently made.

58 While it is true that this issue was not specifically dealt with in these three judgments, the Court fails to see on what basis their conclusions would have been any different with respect to the deposit of moneys in a trust account.

59 The protection given to an unpaid supplier under article 1543 C.C.B.C. (now 1741 C.C.Q.) discussed in these decisions was limited to the right to repossess its goods. If the exercise of that right was considered by the Courts as inappropriate in the context of proceedings under the *CCAA* or the *BIA*, it follows that, logically, the exercise of the same right "by equivalent", namely by having the proceeds of the sale of the goods deposited in a trust account, would normally trigger the same answer.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

60 Second, L'Oréal and Make Up For Ever further argued that the judgment in *Shirmax*[26] should be distinguished because in that case, the impact upon the restructuring would have been very significant considering the extent of the debt owed to the suppliers involved when compared to the whole debt of the company. This argument cannot be retained because it would require the Court to ignore the obvious consequences of a judgment granting the requests made, namely that it will in all likelihood trigger an avalanche of similar type of requests by the numerous suppliers of the BSF Group.

61 Third, L'Oréal and Make Up For Ever argued that the decisions of the Common Law provinces should be distinguished and ignored as there are no recourses similar to that of article 1605 C.C.Q. in those jurisdictions.

62 While that is true, it remains that the decisions rendered in the Common Law provinces are quite relevant and useful to the issues to be decided here.

63 On the one hand, these judgments have correctly emphasized that the *CCAA*, while providing for a stay of proceedings in the context of a restructuring, has made no exceptions for the rights of suppliers as, for instance, the *BIA* has done in some limited circumstances, albeit not for proposals.

64 On the other hand, in denying the requests made, these judgments have also emphasized, again rightfully, that the issues raised by the suppliers were more legislative than judicial in nature, since Parliament had decided to protect specifically the unpaid suppliers rights only in limited circumstances in the *BIA*.

65 These decisions have correctly noted that in situations of reorganizations or restructurings, neither the *CCAA* nor the *BIA* contain provisions addressing these rights, except for the suspension of the running of the 30 day delay of section 81.1 in the case of a proposal under the *BIA*. On that issue, and as it was decided for example in *Woodward's Ltd., Re*, the terms of the Court's Initial Order already include a similar suspension for the benefit of the suppliers.

66 In addition, and again similarly to what this Court did here, these judgments of the other provinces have considered and given weight to the detrimental impact the granting of the motions involved would have had upon the key objectives of the protections offered by the *CCAA*.

67 On the whole, even though provisions similar to article 1605 C.C.Q. do not exist in these other jurisdictions, these decisions can be relied on since their conclusions are based upon reasons that do apply in this case.

68 As a fourth and final point, L'Oréal and Make Up For Ever argue that, notwithstanding all these precedents, in two cases decided in the context of restructurings conducted under the *CCAA* and the *BIA*, the Quebec courts have granted requests to put in a trust account the proceeds of merchandise sold pending the outcome of the reorganization process.

69 In this respect, they refer to the Superior Court judgment of Mr. Justice Archambault in *Century Industries Inc. v. Enterprises Union Électrique Ltée*[27] and to the Court of Appeal decision in *Gestion Max Boutin inc. v. Brasserie Molson O'Keefe*[28].

70 However, as it was indicated at the hearing, these decisions can be distinguished easily as the creditors involved had specifically retained by contract their rights of ownership in the goods at issue, which is not the case for L'Oréal or Make Up For Ever.

71 In short, the review of these precedents in Quebec and in Canada confirms the absence of justification for the remedies sought here by these two suppliers.

c) The absence of a serious and distinct prejudice to the two suppliers involved

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

72 But that is not all. In addition to the fact that the conclusions sought by L'Oréal and Make Up For Ever would be contrary to the applicable case law as well as the purpose and objectives of the *CCAA*, the Court is satisfied that under the circumstances, neither L'Oréal nor Make Up For Ever would suffer a prejudice sufficiently serious as to justify lifting the stay of proceedings.

73 In summary, L'Oréal and Make Up For Ever are alleging that they are suffering a serious and distinct prejudice because the stay of proceedings will result in them losing a right to repossess goods that they have under article 1605 C.C.Q., hence their justification to lift the stay.

74 To emphasize their prejudice, they are also asserting that an arrangement under the *CCAA* must give creditors something more than what they would otherwise receive in the context of a bankruptcy. Since they will end up, in all likelihood, receiving less in the context of an arrangement under the *CCAA* than in a bankruptcy process under the *BIA*, they consider that their motions should be granted.

75 The Court disagrees with these arguments.

76 On the first of these arguments, in *Canadian Airlines Corp., Re*, it was stated that under the *CCAA*, there are simply no statutory tests to guide a court in lifting a stay against a certain creditor. In that case, to give some indications of what could be considered to that end, Madam Justice Paperny referred to the following [29] :

> "20 At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes situations in which the court will lift a stay:
>
> 1. When the plan is likely to fail;
>
> 2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> 3. The applicant shows necessity for payment (where the creditors financial problems are created by the order of where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);
>
> 4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;
>
> 5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;
>
> 6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period."
>
> (Emphasis added)

77 When one considers these situations, none apply here, except potentially the fifth one. However, even in such a situation, the only alleged prejudice suffered by L'Oréal and Make Up For Ever would be one directly caused by the mere application of the Act, namely by the stay of proceedings which the *CCAA* authorizes.

78 On that specific issue, in the decision of *St-Lawrence Chemical Inc. v. A.R.C. Resins Corp.*, Madam Justice Lemelin of the Quebec Superior Court concluded this [30] :

> "Le préjudice de la requérante ne peut être que celui causé par l'application normale de la loi qui suspend les recours de tous les créanciers et fournisseurs. Le juge Trudeau qualifie même ce préjudice "de sérieux" dans l'affaire de faillite Goineau.
>
> La requérante ne peut demander au Tribunal de mettre de côté l'application d'une loi qui dans le voeu du législateur doit favoriser la réorganisation d'entreprises en difficultés en les mettant à l'abri des procédures temporairement. Permettre aux

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

fournisseurs de reprendre les marchandises vendues compromet les opérations de la personne insolvable. La requérante doit satisfaire le Tribunal de ce préjudice sérieux, ce qu'elle ne fait pas."

(Emphasis added)

79 The Court agrees with these comments. Simply stated, the application of the *CCAA* cannot of itself constitute a sufficiently serious and distinct prejudice to justify the lift of a stay of proceedings.

80 Consequently, even though much time was spent in argument by the attorneys for both sides on the right of an unpaid supplier to even invoke the application of article 1605 C.C.Q. in a situation similar to that of L'Oréal and Make Up For Ever, the Court considers that it is not necessary to decide this question.

81 There are sufficient reasons here to deny the motions of L'Oréal and Make Up For Ever without having to decide whether or not an unpaid supplier who does not meet the conditions of article 1741 C.C.Q. can nevertheless invoke the benefit of the general provision of article 1605 C.C.Q. This question appears to be far from settled in the civil law doctrine or in the case law [31] .

82 In any event, on that issue of the alleged right to repossess of these suppliers, the Court notes that the resolution or resiliation of a contract without judicial proceedings as invoked by L'Oréal and Make Up For Ever only applies where the debtor, namely the BSF Group, is in default by writing or by operation of law.

83 The BSF Group was apparently not put in default in writing by these suppliers and article 1597 C.C.Q. describes the situations where a debtor is in default by operation of law:

"**1597**. A debtor is in default by the sole operation of law where the performance of the obligation would have been useful only within a certain time which he allowed to expire or where he failed to perform the obligation immediately despite the urgency that he do so.

A debtor is also in default by operation of law where he has violated an obligation not to do, or where specific performance of the obligation has become impossible through his fault, and also where he has made clear to the creditor his intention not to perform the obligation or where, in the case of an obligation of successive performance, he has repeatedly refused or neglected to perform it."

(Emphasis added)

84 Here, there is only one instance where the BSF Group would potentially be in default by operation of law towards these two suppliers: because it would have "*made clear to* (these) *creditors* (its) *intention not to perform* (its) *obligations*".

85 However, it does not appear that this is the case yet.

86 When a creditor avails itself of the protection that the law offers, and as result is afforded it with a corresponding stay of proceedings, one cannot conclude that this debtor then makes it clear to its creditors that it intends not to perform its obligations. As a matter of fact, under the *CCAA*, the objective of this debtor is rather to propose an arrangement to these creditors for the compromise of these obligations and this may include a partial and even a total performance of these obligations in some cases.

87 Therefore, it is far from obvious that L'Oréal and Make Up For Ever even qualify here for the application of article 1605 C.C.Q. If this were so, then their position would be even less justified under the circumstances.

88 Concerning now the second argument that in proceedings conducted under the *CCAA*, L'Oréal and Make Up For Ever should not be put in a situation worst than the one they would be in under the *BIA*, the Court considers that if anything, it is the situation of all the creditors collectively that must be looked at.

89 While it is true that one of the objectives of the *CCAA* is to provide a better solution than what a bankruptcy would offer, this is so from the standpoint of the benefit to all the creditors, not to individual ones. L'Oréal and Make Up For Ever are

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

looking at the situation only from their own viewpoint, while in the context of proceedings under the *CCAA*, the prejudice and interest of the parties must in every respect be looked at collectively.

90 Indeed, under the circumstances, the prejudice alleged by L'Oréal and Make Up For Ever, even from an individual standpoint, is far from being serious in the overall picture of the restructuring of the BSF Group.

91 Both companies are involved in the cosmetics and perfumes business and they supply mostly, if not exclusively, Les Ailes de la Mode. In the restructuring business plan submitted to the Court [32] , one of the key elements of the repositioning of the BSF Group is to focus upon what it calls its core business, notably with its banner Les Ailes de la Mode. This core business includes for one thing the cosmetics and perfumes.

92 Therefore, these two suppliers, perhaps much more so than many others, are well within the specific business and banner upon which the BSF Group intends to focus for its restructuring. As a result, they appear to be creditors who would definitely benefit, not suffer, from a successful restructuring of the BSF Group.

93 It is in fact striking to note this from the admissions filed in the record [33] . The sales of L'Oréal to the BSF Group totalled $3,609,000 in 2002 and $3,155,000 in 2003, for an average of $281,833 per month over these 24 months. In comparison, the sales of L'Oréal to the BSF Group for the first month immediately following the Initial Order totalled more than $335,000, namely a higher monthly average, even in the context of the restructuring process.

94 Finally, on this issue of the prejudice, it must be remembered that, in this case, there is no evidence of bad faith in the BSF Group's behaviour towards these two suppliers. Notwithstanding what is alleged in their motions, the Court is of the view that the circumstances surrounding the discussions and exchanges of cheques in December 2003 indicate that they were carried on in good faith, in the normal course of business of the BSF Group.

95 To sum up, be it from the angles of the lack of serious and distinct prejudice to L'Oréal and Make Up For Ever, of the applicable precedents and their reasoning, or of the purpose and objectives of the *CCAA*, nothing warrants the Court to lift the stay of proceedings or to order the deposit of moneys in trust in the actual situation of these two suppliers.

3) THE CLAIM OF L'ORÉAL CONCERNING THE DISPLAY UNITS

96 Turning now to the claim of L'Oréal concerning the display units it provided to the BSF Group in November 2003, this is what the evidence indicates.

97 Even if the written contract presented by L'Oréal in that month was never signed by the BSF Group, the exchanges of e-mails [34] that were filed in the record nevertheless suggest that the parties had agreed as follows.

98 L'Oréal accepted to provide to the BSF Group some display units that were to be used by the BSF Group to exhibit the products and facilitate their sales. The parties were to share equally in the cost of creating, constructing and installing these display units but at all times, L'Oréal was to remain the owner. For its share, it was agreed that a first amount of $28,000 would be paid by the BSF Group within 90 days of delivery and another amount of $28,000 would be spent by them as « coop-advertising » during 2003-2004.

99 L'Oréal considers that this is covered by section 11.3 of the *CCAA* which indicates in part that:

> "**11.3** No order made under section 11 shall have the effect of
>
> (*a*) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; [. . .]"
>
> (Emphasis added)

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

100 The BSF Group replies that the agreement at issue is not per se a contract of lease but rather a *sui generis* agreement and that section 11.3 does not apply.

101 Even though this agreement is not a traditional lease, it remains that it shares a lot of the characteristics that one would normally find in a contract of lease (article 1851 C.C.Q.). More specifically, we definitely have here a person, L'Oréal, who provides another, the BSF Group, with the use and enjoyment of display units for a certain period, in exchange for payments that are detailed in the e-mails filed. The display units are also not to be kept by the BSF Group but returned to L'Oréal after their use.

102 This is certainly closer to a traditional lease for use than, for instance, to some sort of financing agreement [35].

103 With respect to these display units, it is the Court's opinion that we have a situation which is quite analogous to the use of leased property provided after the initial order is made. The BSF Group continues to this day to make use of those display units for the purpose of selling the products of L'Oréal. Similarly to the use of leased premises, these are still being enjoyed and benefited from by the BSF Group in order to help the sale of the products of L'Oréal. It is a continuing benefit that the BSF Group still wants to make use of and the Court fails to see why it should be treated differently than the other situations covered by section 11.3 of the *CCAA*.

104 As a result, with respect to these conclusions of the motion of L'Oréal, the Court considers that if it is indeed the intent of the BSF Group to continue to use these display units, it should abide by the terms of the obligations it agreed to. These include the payment of an amount of $28,000 within 90 days of delivery of the display units and an allowance of $28,000 as "coop-advertising" for the period 2003-2004.

105 Since there has been no indication or evidence suggesting that the BSF Group has yet defaulted on these obligations, the Court will simply issue in this respect a declaration confirming this conclusion.

106 **FOR THESE REASONS, THE COURT:**

WITH RESPECT TO L'ORÉAL CANADA INC.:

107 DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

108 DECLARES that with respect to the display units provided by L'Oréal Canada Inc. to Les Ailes de la Mode pursuant to the terms of the e-mails filed as Exhibit R-10, Les Ailes de la Mode must comply with the obligations agreed upon between the parties, namely to:

- Pay an amount of $28,000 to L'Oréal Canada Inc. within 90 days following the delivery of the display units; and
- Provide for an allowance of $28,000 as "coop-advertising" for the period 2003-2004;

109 WITH COSTS.

WITH RESPECT TO MAKE UP FOR EVER S.A.:

110 DISMISSES the motion for the lift of the stay of proceedings and for the deposit of moneys in trust;

111 WITH COSTS.

Motions dismissed.

Footnotes

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

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

2 See "Requête de L'Oréal Canada inc. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes et pour exiger le paiement de sommes relatives à l'utilisation de biens" dated January 13, 2004, paragraphs 2 and 3, and Exhibits R-1 to R-4.

3 See "Liste d'admissions" dated January 29, 2004.

4 See "Requête de Make Up For Ever S.A. pour faire déclarer la suspension des procédures inapplicable ou, subsidiairement, pour ordonner le dépôt en fiducie de sommes" dated January 19, 2004, paragraphs 2 and 3, and Exhibit R-1.

5 *PCI Chemicals Canada Inc., Re* (2002), 2002 CarswellQue 831, [2002] R.J.Q. 1093 (C.S. Que.).

6 *Olympia & York Developments Ltd., Re*, [1994] O.J. No. 1335 (Ont. Gen. Div. [Commercial List]); *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.).

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

8 *Mine Jeffrey inc., Re*, [2003] R.J.Q. 420 (C.A. Que.), par. 30.

9 *Id.*, par. 31.

10 *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), 315; see also *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), 114.

11 *Woodward's Ltd., Re* (1993), 100 D.L.R. (4th) 133 (B.C. S.C.), 140.

12 See, on these issues *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.), 11; *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.); and *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 291 (B.C. S.C.), 297.

13 See Motion for the Extension of the Initial Order dated January 14, 2004, paragraph 17 f).

14 First Report of the Monitor, January 14, 2004, paragraphs 19 and 20.

15 *Steinberg Inc. c. Colgate-Palmolive Canada Inc.* (1992), 13 C.B.R. (3d) 139 (C.S. Que.), 141.

16 *Steinberg Inc. c. Colgate-Palmolive Canada Inc.*, *id.*; *Steinberg Inc. c. Gillette Canada Inc.*, [1992] R.J.Q. 1602 (C.S. Que.).

17 *Détaillants Shirmax Ltée/Shirmax Retail Ltd. c. 170974 Canada Inc.* (1994), 28 C.B.R. (3d) 177 (C.S. Que.).

18 *Henry Birks & Sons Ltd., Re* (1993), 22 C.B.R. (3d) 235 (C.S. Que.).

19 See also *People's Department Stores Ltd. (1992) Inc., Re* (1994), 37 C.B.R. (3d) 28 (C.S. Que.).

20 [2000] B.C.J. No. 1069 (B.C. S.C.).

21 *Woodward's Ltd., Re*, *supra*, note 11.

22 *Woodward's Ltd., Re* (1993), 105 D.L.R. (4th) 517 (B.C. C.A.).

23 *Woodward's Ltd., Re*, *supra*, note 11, p. 141.

24 *Bruce Agra Foods Inc. v. Everfresh Beverages Inc. (Receiver of)* (1996), 45 C.B.R. (3d) 169 (Ont. Gen. Div.), 171-173.

25 *Supra*, note 17.

26 *Supra*, note 17.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

27 C.S. Montreal, nº 500-05-005804-925, 1992-04-29, j. Archambault, 1992 CarswellQue 1869 (C.S. Que.).

28 J.E. 94-804 (C.A.).

29 *Supra*, note 12, p. 7-8.

30 (May 16, 1997), Doc. 505-11-001681-977 (C.S. Que.), J. Lemelin, AZ-97026278, p. 5.

31 See on this issue Jean-Louis BAUDOUIN et Pierre-Gabriel JOBIN, *Les obligations*, 5 e édition, Cowansville, Éditions Yvon Blais, 1998, p. 592-593; Pierre-Gabriel JOBIN, *La vente*, 2 e édition, Cowansville, Éditions Yvon Blais, 2001, p. 262-264; Denys-Claude LAMONTAGNE, *Droit de la vente*, Cowansville, Éditions Yvon Blais, 1995, p. 146-147; *Place Fleur de Lys c. Tag's Kiosque Inc.*, [1995] R.J.Q. 1659 (C.A. Que.); *Packman Packaging Supplies Inc., Re* (1995), 42 C.B.R. (3d) 143 (C.S. Que.); *166606 Canada inc. c. Bashtanik* (1996), 1997 CarswellQue 1797 (C.S. Que.), J.E. 96-1556.

32 Exhibit R-5 in support of the Motion for the Extension of the Initial Order dated January 14, 2004.

33 "Liste d'admissions" dated January 29, 2004.

34 Exhibit R-10 in support of the motion of L'Oréal.

35 See on that issue *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264 (B.C. S.C.); *Philip Services Corp., Re* (1999), 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]); *International Wallcoverings Ltd., Re* (1999), 28 C.B.R. (4th) 48 (Ont. Gen. Div. [Commercial List]).

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.