File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

MOTION BRIEF OF THE RECEIVER (LANDLORD TERMS)

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I. LIST OF DOCUMENTS

1. The First Report of the Receiver, dated April 20, 2020;

2. The Supplementary First Report of the Receiver, dated April 27, 2020;

3. Notice of Motion of the Receiver, filed May 27, 2020, with attached draft form of Landlord Terms Order;

4. Second Report of the Receiver, dated May 27, 2020.

II. LIST OF AUTHORITIES

Tab

1. *Companies' Creditors Arrangement Act,* RSC 1985, c C-36, s 11.4;

2. *Soccer Express Trading Corp. (Re),* 2020 BCSC 749;

3. *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, s 243;

4. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508;

5. *Residential Warranty Co. of Canada Inc., Re,* 2006 ABQB 236; and

6. *Petrowest Corporation v Peace River Hydro Partners,* 2019 BCSC 2221.

III. POINTS TO BE ARGUED

Introduction

1. On March 18, 2020, Richter Advisory Group Inc. was appointed receiver (in such capacity, the "**Receiver**") over all assets, undertakings and properties of the Respondents, Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd. ("**NEL**"), Nygard Properties Ltd. ("**NPL**"), 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership ("**NIP**") (collectively, the "**Nygard Group**" or the "**Debtors**") pursuant to an Order (the "**Receivership Order**") of this Honourable Court. The Receivership Order was made upon the application of White Oak Commercial Finance, LLC (**"White Oak**"), in its capacity as administrative and collateral agent under the Credit Agreement dated as of December 30, 2019 (the "**Credit Agreement**") by and among White Oak and Second Avenue Capital Partners, LLC, and the Debtors.

2. On April 29, 2020, this Honourable Court made various Orders, including an Order (the "**Sale Approval Order**") which, *inter alia*, approved a process to liquidate the Debtors' retail inventory and owned furniture, fixtures and equipment ("**FF&E**") at retail store locations leased to the Debtors by various landlords (the "**Liquidation Sale Process**"), along with certain guidelines (the "**Sale Guidelines**") relating to the Liquidation Sale Process. Pursuant to the Sale Approval Order, the Court also approved an agreement (the "**Consulting Agreement**") between the Receiver and a contractual joint venture comprised of Merchant Retail Solutions, ULC, Hilco Appraisal Services Co., Hilco Receivables Canada ULC, Hilco Merchant Resources, LLC, Hilco IP Services, LLP

dba Hilco Streambank, and Hilco Receivables, LLC (collectively, the "**Consultant**"), and White Oak, pursuant to which, *inter alia*, the Consultant will provide marketing, consulting and other related services in connection with the Liquidation Sale Process.

3. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Consulting Agreement (attached as Appendix "T" to the First Report of the Receiver dated April 20, 2020), the Sale Approval Order and the Sale Guidelines.

4. At the time of the granting of the Sale Approval Order, defining the parameters of the Liquidation Sale Process and dealing with the rights and interests of Landlords was a challenge as a result of the uncertainty created by ongoing public health and business closure orders, and other effects arising from the COVID-19 pandemic. As such, the Sale Approval Order contemplates the Receiver coming back before this Honourable Court to obtain a further order in relation to certain terms of importance to Landlords prior to the commencement of the Liquidation Sale Process. More specifically, paragraph 10 of the Sale Approval Order contemplates the Receiver obtaining a further order in relation to the following terms:

(a) the Sale Commencement Date, the Sale Termination Date and/or the duration of the Sale;

(b) the payment of rent in respect of the Sale Term;

(c) the payment of rent, if any, in respect of the period from March 18, 2020 to the Sale Commencement Date;

(d) the timing of delivery and period of notice of repudiation in relation to the Store leases;

(e) the prescription, if any, of limits on the augmentation of Merchandise to the Stores for the purposes of the Sale; and

(f) such other matters as may be required,

(collectively, the "**Landlord Terms**")

5. The Receiver has now filed the Second Report of the Receiver, dated May 27, 2020 (the "**Second Report**"). Among other things, the Second Report provides this Honourable Court with an update as to the actions and activities of the Receiver since the filing of the First Report of the Receiver dated April 20, 2020 and the Supplementary Report of the Receiver dated April 27, 2020. In addition, the Second Report contains certain recommendations of the Receiver as to the Order sought from this Honourable Court contemplated by paragraph 10 of the Sale Approval Order (the "**Landlord Terms Order**"). In particular, the Receiver is seeking an Order:

(a) establishing the Landlord Terms in relation to the sale of the Debtors' retail inventory and FF&E at the various retail store locations leased to the Debtors;

(b) granting a charge (the "**Landlords' Charge**") over the Property, as defined in the Receivership Order, in favour of the Landlords to secure the payment of monies for any unpaid rent for the period commencing March 18, 2020, up to and including the repudiation date of a Lease;

(c) abridging the time for service of the Notice of Motion of the Receiver and the materials filed in support thereof, such that the motion is properly returnable on the stated hearing date, and dispending with further service thereof; and

(d) approving the Second Report and the conduct, activities and accounts of the Receiver described therein.

6. This Brief is being filed on behalf of the Receiver so as to outline the legal basis for the requested Landlord Terms Order, particularly in relation to proposed Landlords' Charge.

Granting of Landlords' Charge

7. The importance of facilitating the continued participation of third parties who are deemed critical to a court-supervised insolvency process has been recognized in Canada. In that regard, section 11.4 of the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**"), expressly provides for the granting of a charge on a debtor's property in favour of third parties deemed to be "critical suppliers".

Companies Creditors Arrangement Act, RSC 1985, c C-36, s 11.4 [Tab 1]

8. While the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "**BIA**") does not expressly provide for the granting of a charge in favour of critical suppliers, the Receiver submits that it is fair, reasonable and in the general interest of stakeholders in the present case for this Honourable Court to invoke the broad jurisdiction under section 243 of the BIA to grant the requested Landlords' Charge, having regard to the same considerations examined by courts in connection with a critical suppliers charge under section 11.4 of the CCAA.

9. Section 11.4 of the CCAA provides that the Court may declare a person a "critical supplier" where the person supplies goods or services to the debtor which are critical to the debtor's continued operations. If a person is declared a "critical supplier", the Court has discretion to order continued supply of goods and services on certain terms. If the Court declares that a critical supplier must continue to provide the critical goods or services, it is mandatory that the court also order a charge or security in favour of the supplier.

CCAA, *supra* s 11.4 [Tab 1]

10. Orders granted pursuant to section 11.4 of the CCAA have been described by Courts as "facilitative and practical in nature". Making such an order requires the Court engage in a balancing of interests to determine what is appropriate and fair in the circumstances. Appropriateness will be assessed by considering whether the order sought will usefully further the efforts made to achieve the remedial purpose of the CCAA and courts will be mindful that the chances for a successful process under the CCAA are heightened where all stakeholders are treated as fairly as the circumstances permit.

Soccer Express Trading Corp. (Re), 2020 BCSC 749 at paras 65-66 [*Soccer Express*] [Tab 2]

11. In the recent case of *Soccer Express Trading Corp. (Re)*, 2020 BCSC 749 [*Soccer Express*], the Court considered the application of the CCAA critical supplier provisions in the context of an insolvency proceeding impacted by the COVID-19 pandemic. In that case, the Court referenced the following factors in determining whether it was fair and appropriate to grant an a "critical supplier" order and charge:

(a) the significance of the relationship between the debtor and the supplier;

(b) whether the supplier is willing to continue to provide goods or services absent a court order;

(c) the ability of the debtor to replace the goods or services;

(d) whether an interruption of supply could have an immediate material adverse impact on the debtor entities, and the likelihood of irreparable harm should there be any disruption in service;

(e) whether the negative consequences associated with interruption of supply would result in a serious risk that the restructuring proceedings would fail; and

(f) the consequences for stakeholders should the restructuring process fail.

Soccer Express, supra at para 67 [Tab 2]

12. Section 243 of the BIA confers broad power on the Court to make wide-ranging orders as the Court considers just and convenient:

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable.
>
> [emphasis added]

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 243(1) (the "BIA") [Tab 3]

13. In *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.,* 2019 ONCA 508, the Ontario Court of Appeal interpreted the broad wording of subsection 243(1)(c) as "permitting the court to do what 'justice dictates' and 'practicality demands'". As such, the court may turn to its inherent jurisdiction to fill a possible gap where the BIA is silent or does not deal with a matter exhaustively.

Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508, at paras 57 and 72 [*Dianor*] [Tab 4]

14. As noted in *Residential Warranty Co. of Canada Inc., Re,* 2006 ABQB 236 at paragraph 27:

> Solutions to BIA concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. As astutely noted by Mr. Justice Farley in *Canada* (*Minister of Indian Affairs & Northern Development) v. Curragh Inc*.:
>
> > While the BIA is generally a very fleshed-out piece of legislation when one compares it to the CCAA, it

> should be observed that s. 47(2)(c): "The court may direct an interim receiver ... to ... (c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

Residential Warranty Co. of Canada Inc., Re, 2006 ABQB 236 at para 26 (aff'd 2006 ABCA 293) [Tab 5]

15. In other words, where the BIA is silent or does not deal with a matter exhaustively, it is within the court's jurisdiction in a BIA proceeding to craft appropriate remedies to attempt to ensure the fair, orderly, and expeditious resolution of the proceeding where the benefit of granting the remedy to the insolvency process as a whole outweighs the potential prejudice to affected parties.

Petrowest Corporation v Peace River Hydro Partners, 2019 BCSC 2221, at para 49 [Tab 6]

16. While the BIA does not explicitly provide for the granting of a Landlords' Charge, the Receiver submits that the unique circumstances of the present case – which largely arise out of the unprecedented COVID-19 pandemic, and the inability of the Receiver and Consultant to commence the Liquidation Sale Process promptly after the granting of the Receivership Order – call for the adoption of a unique remedy. The Receiver submits the proposed Landlord Terms (including the Landlords' Charge) represent a pragmatic approach with the goal of facilitating the efficient realization of the

Debtors' assets, while at the same time treating affected parties (in this case, the Landlords) fairly.

17. As set out in the Second Report, as certain governments have started to lift restrictions that have been in place in response to the COVID-19 pandemic and are gradually reopening businesses, the Receiver and the Consultant intend to commence the Liquidation Sale process contemplated in the Sale Approval Order and Sale Guidelines as soon as possible, where permitted. It is critical that the Liquidation Sale Process is commenced as soon as is reasonably possible in order to provide some certainty to the proceedings, including for several employees of the Debtors who will be returning to work for the purposes of the Liquidation Sale Process.

Second Report, paras 39 and 43

18. The Receiver has worked closed with the Consultant, and has consulted with counsel representing approximately 60 of the Landlords of the Stores to develop the Landlord Terms. In the Receiver's view, the proposed Landlord Terms are sensitive to the circumstances faced Landlords as a result of the COVID-19 pandemic. Due to the nature of the COVID-19 pandemic and the differing responses of local and provincial governments across Canada, the Landlord Terms contemplate the retail locations reopening at different times depending on the nature and location of the store.

Second Report, para 43

19. The proposed Landlords' Charge would entitle the Landlords to a charge on the Property, as defined in the Receivership Order, as amended, as security for the

payment of monies for any unpaid rent for the period commencing March 18, 2020, up to and including the repudiation date of a lease ("**Post Filing Rent**"). The amount of Post Filing Rent subject to the Landlords' Charge in favour of any particular landlord will be determined in accordance with the applicable Lease.

20. To be clear, it remains the intention of the Receiver to fund the Debtors in sufficient amounts to actually pay Post Filing Rent from the Sale Commencement Date at each Store until the effective date of repudiation of each Lease. Thus, it is anticipated the Landlords' Charge will primarily be utilized as a mechanism for Landlords to obtain payment for any unpaid Post Filing Rent from the date of the Receivership Order until the Sale Commencement Date.

21. The Receiver submits the proposed Landlords' Charge is fair in the circumstances, based on the following considerations:

(a) the Landlords' Charge provides an appropriate level of protection to the Landlords, who are currently stayed from exercising any remedies against the Debtors (or the property of the Debtors) pursuant to the provisions of the Receivership Order;

(b) the willingness of the Landlords to continue to lease the retail store locations to the Debtors is critical to the Liquidation Sale Process and the ability of the Receiver and the Consultant to carry out that process in an effective and efficient manner;

(c) any interruption or disruption in the Debtors' tenancy at the retail store locations may result in serious adverse consequences with respect to the Liquidation Sale Process;

(d) the Landlords' Charge should assist in eliminating the prospect of the Receiver having to respond to motions brought by Landlords seeking to lift the stay imposed against them in an effort to either terminate a Lease and/or seek immediate recovery of Post Filing Rent; and

(e) White Oak, the Consultant, and many of the Landlords approve of the Landlords' Charge, and the Landlord Terms generally.

22. The Receiver further submits that the Landlords' Charge is akin to a "critical supplier" charge provided for in the CCAA. Thus, the Receiver submits it is appropriate for this Honourable Court to have regard to the same considerations relevant in granting a "critical supplier" charge under the CCAA, noted in the *Soccer Express* case referenced above.

23. Simply put, access to and use of the retail premises owned by the Landlords is clearly critical to a successful Liquidation Sale Process. The proposed Landlords' Charge recognizes this fact, and seeks to deal fairly with the interests of Landlords.

24. As noted, the Receiver has worked cooperatively with White Oak, the Consultant, and counsel representing approximately 60 of the Landlords of the retail store locations to craft the proposed Landlord Terms Order, including the proposed Landlords' Charge. Overall, the Receiver submits the proposed Landlord Terms Order:

(a) is commercially reasonable and fair;

(b) offers an appropriate level of protection to the Landlords in relation to the payment of Post Filing Rent; and

(c) assists in maximizing the value of the retail inventory and FF&E for the benefit of all stakeholders.

25. Accordingly, the Receiver submits that this Honourable Court should grant the Landlord Terms Order in the form attached as Schedule "A" to the Receiver's Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of May, 2020.

THOMPSON DORFMAN SWEATMAN LLP

Per: "Ross A. McFadyen"
G. Bruce Taylor / Ross A. McFadyen
Lawyers for Richter Advisory Group Inc.,
the Court-Appointed Receiver

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.4

s 11.4

Currency

11.4

11.4(1)Critical supplier

On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

11.4(2)Obligation to supply

If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

11.4(3)Security or charge in favour of critical supplier

If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

11.4(4)Priority

The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[Editor's Note: S.C. 2000, c. 30, s. 156(2) provides as follows:

> *(2) Subsection (1) [which repealed and replaced s. 11.4 of the Act] applies to proceedings commenced under the Act after September 29, 1997.]*

[Editor's Note: S.C. 2001, c. 34, s. 33(2) provides as follows:

> *(2) Subsection (1) [which repealed and replaced the portion of paragraph 11.4(3)(c) before subparagraph (i) of the Act] applies to proceedings commenced under the Act after September 29, 1997.]*

Amendment History

1997, c. 12, s. 124; 2000, c. 30, s. 156(1); 2001, c. 34, s. 33; 2005, c. 47, s. 128; 2007, c. 36, s. 65

Currency

Federal English Statutes reflect amendments current to May 1, 2020
Federal English Regulations are current to Gazette Vol. 154:7 (April 1, 2020)

End of Document

2020 BCSC 749, 2020 CarswellBC 1233

2020 BCSC 749
British Columbia Supreme Court

Soccer Express Trading Corp. (Re)

2020 CarswellBC 1233, 2020 BCSC 749

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

And IN THE MATTER OF THE BUSINESS CORPORATIONS ACT, S.B.C. 2002, c. 57, AS AMENDED

And IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED

And IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF SOCCER EXPRESS TRADING CORP. AND KAHUNAVERSE SPORTS GROUP INC. (Petitioners)

Fitzpatrick J.

Heard: May 8, 2020
Judgment: May 12, 2020
Docket: Vancouver S204288

Counsel: C.J. Ramsay, K.G. Mak, N. Carlson (A/S), for Petitioners, Soccer Express Trading Corp. and Kahunaverse Sports Group Inc.
V. Tickle, L. Williams, for Monitor, PricewaterhouseCoopers Inc.
K. Robertson, D. Jackson, for Greyrock Capital Incorporated
R. Clark, Q.C., E. Bisceglia, B. Frino, C. Fell, for Adidas Canada Limited

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

Headnote

Bankruptcy and insolvency

Business associations

***Fitzpatrick J.*:**

Introduction

1 This is a comeback hearing arising from my earlier granting of an initial order on April 30, 2020 pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") in favour of the petitioners, Soccer Express Trading Corp. ("SX") and Kahunaverse Sports Group Inc. ("KSG"), (collectively, the "Petitioners").

2 The significant issue to be addressed is the Petitioners' request for a declaration of critical supplier with respect to one of their major suppliers, adidas Canada Limited ("adidas"), and that adidas be granted a charge

for the supply of its goods (the "Critical Supplier Charge").

Procedural History

3 On March 11, 2020, the Petitioners filed notices of intention (NOIs) to make a proposal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). PricewaterhouseCoopers Inc. ("PwC") was appointed as the proposal trustee.

4 The NOI filings arose against the backdrop of the Petitioners facing increasing financial challenges, reaching back to early 2019.

5 In late 2019, before the NOI filings, the Petitioners entered into a share purchase agreement (the "SPA") with Greyrock Capital Incorporated ("Greyrock") to address continuing liquidity issues. The SPA has not yet closed; it remains subject to a number of conditions.

6 The NOI filings were intended to allow the Petitioners to secure interim financing during a restructuring, with the Petitioners intending to present a proposal to their creditors which would allow the sale to Greyrock to close and the continuation of business operations. Since mid-March 2020, generally speaking, the Petitioners have secured the cooperation of their vendors and suppliers of product toward that end.

7 The spread of the COVID-19 pandemic across Canada has, not surprisingly, affected the Petitioners, as with most other businesses. Needless to say, the effects of the pandemic, including store closures and staff layoffs, created more uncertainty within the Petitioners' restructuring proceedings.

8 Despite these challenges, the NOI proceedings continued with some progress and success. A major issue arose, however, with adidas. As I will discuss in more detail below, adidas' position with respect to the Petitioners was seen as threatening the potential success of the restructuring proceedings.

9 On March 30, 2020, Justice Myers granted orders in the *BIA* proceedings extending the stay period to May 25, 2020, approving an administrative charge and authorizing an interim financing facility with Greyrock of $1.4 million (the "*BIA* Orders").

10 On April 16, 2020, Aegis Advisory Incorporated ("Aegis") was appointed as Chief Restructuring Officer (CRO) of the Petitioners. Aegis' president, Jeff Johnson, a licensed insolvency trustee, is acting as CRO.

11 On April 28, 2020, the Petitioners commenced these proceedings, seeking relief under the *CCAA*. In large part, the Petitioners considered that the *CCAA* afforded them broader relief than that obtainable under the *BIA*, principally in respect of adidas. That broader relief included the possibility of obtaining a declaration that adidas was a critical supplier and that adidas be ordered to continue to supply product to the Petitioners.

12 On April 30, 2020, I granted an order continuing the *BIA* proceedings under the *CCAA*, in accordance with the *CCAA*, s. 11.6(a) (the "Initial Order"). I was satisfied that the statutory requirements had been met (including that no *BIA* proposals had been filed) and that the continuation of the *BIA* proceedings under the *CCAA* was consistent with the purposes of the *CCAA*: *Clothing for Modern Times Ltd. (Re)*, 2011 ONSC 7522 at para. 9.

13 In the Initial Order, I continued the relief granted by Myers J. in the *BIA* Orders, including granting an Administration Charge of $200,000 (increased from $150,000) and approving the Interim Lender's Charge in favour of Greyrock.

14 I also extended the stay for only a short period to May 8, 2020, in accordance with the *CCAA*, s. 11.02(1). In addition, over the objection of adidas, I was satisfied that the Petitioners were entitled to temporary and interim relief from April 30, 2020 until the comeback hearing with respect to adidas, as necessary for their continued operations: *CCAA*, s. 11.001. That relief included a declaration of critical supplier with respect to

adidas and an order that adidas continue to supply the Petitioners during that period, but on a cash-on-delivery (COD) basis.

15 Evidence on the application for the Initial Order included Mr. Johnson's Affidavits #1 and #2, both sworn on April 28, 2020. In addition, I had the benefit of PwC's Proposed Monitor's Pre-Filing Report dated April 28, 2020, which included PwC's Proposal Trustee's First Report dated March 27, 2020 which was prepared in support of the hearing before Myers J.

16 The May 8, 2020 hearing was the comeback hearing. The Petitioners seek an Amended and Restated Initial Order (ARIO) that:

a) Amends and restates the Initial Order;

b) Extends the stay of proceedings to July 31, 2020;

c) Declares that adidas is a critical supplier to the Petitioners and orders that adidas continue to supply goods and services to the Petitioners on the terms and conditions that are consistent with the existing arrangements, including but not limited to the 2020 Trade Investment Package — adidas Brand (the "adidas Trade Agreement"), as may be amended by the terms and conditions set out in the ARIO;

d) Orders adidas to:

i. Maintain KSG/SX as vendors on the MiTeam system to allow MiTeam orders to be processed;

ii. Provide access to KSG/SX and their representatives to the B2B system;

iii. Permit the Petitioners, their representatives and their customers uninterrupted access to the MiTeam and B2B system;

iv. Honour all negotiated net price items in accordance with the supply relationship;

v. Honour all customer activation discounts in accordance with the supply relationship; and

vi. Process all purchase orders in a timely manner without delay consistent with the supply relationship.

e) Grants adidas a charge on the Petitioners' property in an amount equal to the value of the goods and services supplied by adidas and received by the Petitioners; and

f) Approves the terms of an amended commitment letter between the Petitioners and Greyrock for a credit facility in the maximum amount of $2.8 million and increases the Interim Lender's Charge to that amount.

17 In addition, the Petitioners seek approval to implement a claims process.

18 With the exception of adidas, no person objects to the granting of the relief sought. Adidas remains significantly opposed, although that opposition is limited to the relief sought under the *CCAA* critical supplier provisions, whether as proposed by the Petitioners or otherwise.

19 All of the relief sought is supported by Greyrock and the Monitor.

Background of the Petitioners

20 KSG is in the business of selling multi-brand sporting equipment, apparel and accessories to individuals,

institutions and sports teams. It has a wide range of product offerings. KSG is headquartered in Surrey, BC. It has five retail locations across Canada and has an e-commerce platform. It employed approximately 90 employees across Canada prior to recent layoffs due to a decision to close its retail stores as part of the efforts to address the COVID-19 pandemic.

21 SX is a fully owned subsidiary of KSG. SX specializes in the business of selling multi-brand soccer related sports apparel and equipment to customers across Canada. It has a focus on servicing soccer clubs. SX is headquartered in Coquitlam, BC. It has a retail store in Coquitlam, called the "Superstore", and an e-commerce platform. It employed approximately 60 employees prior to recent layoffs due to the closure of the Superstore.

22 Aside from intercompany balances, the Petitioners' combined assets include:

a) Accounts receivable consisting primarily of trade receivables to be collected from sports teams, clubs and institutional customers for the sale of sports apparel, accessories and equipment;

b) Inventory consisting of sporting goods such as apparel, shoes, accessories and equipment for sale from multiple brands. The inventory also includes team uniforms which have not yet been customized;

c) Property consisting of equipment, furniture and leasehold improvements; and

d) Intangibles consisting of goodwill.

23 The Petitioners' combined liabilities include approximately $10.4 million owing to secured creditors. This includes approximately $8.6 million of secured debt which has now been acquired by Greyrock. The pre-filing amount owed by the Petitioners to unsecured creditors is approximately $15.5 million, including approximately $8 million owed to vendors/suppliers.

24 Greyrock is also the holder of the Interim Lender's Charge approved in the *BIA* proceedings and continued in the Initial Order. As of May 2, 2020, approximately $750,000 had been drawn under that facility.

25 One of the conditions under the SPA is that Greyrock would enter into satisfactory arrangements with the Petitioners' vendors and suppliers. This condition related not only to addressing current balances owing by the Petitioners (through proposals and now a plan of arrangement), but also ensuring future supply of goods and services.

26 With respect to the latter aspect of that condition, the Petitioners and Greyrock have been in contact with all key vendors and have been making arrangements for the continued supply of product. To date, the arrangements concluded have varied, and include COD purchases, providing retainers on account, in process arrangements for credit card purchases and letters of credit. In addition, the Petitioners have had ongoing discussions with vendors regarding their intention to settle pre-NOI obligations through the filing of formal proposals (and now a plan of arrangement in the *CCAA* proceedings).

27 The Petitioners' evidence is that, with the exception of adidas, vendors and suppliers have generally been supportive of continuing to do business with the Petitioners, even in the present circumstances. The Petitioners are of the view that their vendors and suppliers will be supportive of a proposal or plan to compromise the pre-filing debts as they will receive more through that process than in the event of a bankruptcy.

The adidas Relationship

28 In support of this application, I have had the benefit of reading the direct evidence of various representatives of the Petitioners and adidas. I have read John Prisco's Affidavit #1 sworn on May 7, 2020. He is the Vice President of KSG. I have also read Brad Leitch's Affidavit #1 sworn on May 7, 2020. He is the President of SX. Finally, I have read Chris Miall's Affidavits #1 and #2 sworn May 7 and 8, 2020 respectively.

Mr. Miall is a Sales Director — Team and Soccer Specialty for adidas.

29 What is apparent from this evidence, particularly from Mr. Prisco and Mr. Leitch, is that the relationship between the Petitioners and adidas is significant and long standing. The business relationship between the Petitioners and adidas stretches back not in years, but in decades. I accept Mr. Leitch's evidence that the relationship with SX can be described as "intertwined" and Mr. Prisco's description of their supply relationship with adidas as "symbiotic".

30 Adidas is the largest vendor to the Petitioners by a large margin. Adidas supplies products to the Petitioners pursuant to the adidas Trade Agreement. The term of the adidas Trade Agreement expires on November 30, 2020.

31 An important aspect of the relationship between the Petitioners and adidas is what is referred to as "Team Sales". The Petitioners, in relation to the sale of product directly to institutional clients and clubs, enter into contracts with customers which include providing access to adidas product. These contracts will usually cover a multi-year period. For KSG, 2019 sales to customers under exclusive buy-sell agreements were approximately $8 million to about 150 different customers. Of these sales, approximately $2.7 million related to agreements that provided customers with access to adidas product. For SX, total sales to adidas institutional and contract clubs for the 2019 fiscal year were $3.8 million, being approximately 40% of SX's total club sales of $8.4 million.

32 In addition, an important aspect of the Team Sales programs is the ability of the Petitioners to source product from adidas by way of purchase orders, using access by the Petitioners and their customers to online services offered by adidas, known as the "MiTeam" and "business to business" or "B2B" platforms. Access by the Petitioners and their customers to these platforms is not addressed in the adidas Trade Agreement; however, it was and continues to be an important service provided by adidas and is an important aspect of the operation of the relationship in terms of the Petitioners and their customers accessing adidas product.

33 I acknowledge that issues between the Petitioners and adidas in their business relationship have arisen over the years, most recently arising from the Petitioners' financial challenges that began in 2019.

34 Mr. Miall describes that there were material defaults throughout the fall of 2019. Arising from those defaults, adidas began carefully monitoring the Petitioners' order of product to ensure payment was made. At times, the Petitioners' access to the online platforms were temporarily suspended by adidas until matters were regularized.

35 In late February 2020, given ongoing concerns, adidas requested that the Petitioners execute a General Security Agreement (GSA) in its favour. Adidas complains that instead, the NOI filings took place, and suggests that the Petitioners were acting inappropriately in holding off providing the GSA while ordering more product from adidas. At the time of the NOI filings, the Petitioners' combined debt owing to adidas was approximately $1.89 million.

36 I see no merit in adidas' arguments in this respect. As Mr. Johnson and the Monitor confirm, the balances outstanding to adidas, while discussions concerning a GSA were underway, were in fact reduced over the period of the discussions by over $430,000; they were not increased to the detriment of adidas. In addition, the Critical Supplier Charge now sought by the Petitioners is materially better than any such GSA, even assuming that such security would have withstood an attack that granting it on the eve of the NOIs was a preference that should be set aside.

37 The NOI filings certainly did not improve the relationship with adidas, despite immediate communications from the Petitioners to adidas to confirm that they wished to carry on business as normal, including with adidas.

38 In response to the NOI filings, adidas immediately deactivated the Petitioners' access to the MiTeam and

B2B platforms. In addition, adidas continued to supply the Petitioners but it unilaterally decided not to process orders that provided for delivery after what adidas calculated would be a vote on a proposal (despite that no formal proposal had yet been filed). This action was arguably in violation of s. 65.1 of the *BIA*; however, the Petitioners sought to negotiate an amicable solution with adidas.

39 Subsequent to the NOI filings, the Petitioners made substantial efforts to discuss and negotiate a path forward with adidas. At that time, the Petitioners confirmed that all post-filings orders would be paid on a COD basis. The Petitioners and Greyrock had discussions with adidas in the hopes of coming to a long term supply arrangement beyond these *CCAA* proceedings, or alternatively, to at least confirm ongoing supply and payment terms to the end of the term of the adidas Trade Agreement on November 30, 2020.

40 Even so, the Petitioners and Greyrock were singularly unsuccessful in their efforts to secure adidas' cooperation; adidas made it crystal clear that it has no intention of continuing its supply relationship with the Petitioners, unless it is ordered to do so by the Court.

41 After the NOI proceedings were commenced and even now during the *CCAA* proceedings, adidas has advanced a number of allegations against the Petitioners, met to some extent by allegations by the Petitioners against adidas.

42 Adidas alleged that there were some post-NOI filings orders that were filled but remained unpaid. I understand that this was an oversight; when brought to the Petitioners' attention, those amounts were immediately paid.

43 Adidas also now alleges that the Petitioners are in breach of the adidas Trade Agreement by producing "knockoff" brands. However, adidas has been aware of that activity for some time and only very recently voiced objections, raising suspicions as to the veracity of such allegations.

44 The Petitioners allege that adidas has directly contacted some of their customers and attempted to harm their relationship with those customers for its own benefit. Adidas denies these allegations. In my view, it is not necessary to determine that issue on this application.

45 At present, the Petitioners have accepted adidas' position, as they must. They now have no choice but to source product from other vendors in terms of their ongoing operations. However, that process will take time and will not happen overnight, particularly given the depth of the current relationship with adidas and the historical supply of adidas products to their customers.

46 Given the state of their increasingly fractious relationship with adidas, the Petitioners were unable to process or fulfil customer orders for adidas product in the normal course of their business during the NOI proceedings. That circumstance in turn led to the commencement of these *CCAA* proceedings and the granting of the Initial Order on April 30, 2020.

47 On May 1, 2020, following the reinstatement of the Petitioners' access to the MiTeam and B2B platforms pursuant to the Initial Order, the Petitioners began working through open orders and advised adidas that they would be communicating with adidas on processing orders. The Petitioners proposed to adidas that they would advance a retainer to adidas of $250,000 to be held against unpaid invoices. That proposal was presented to address the impracticality of paying COD on numerous invoices, some very small.

48 The Petitioners' proposed that, once open purchase orders are confirmed or new purchase orders submitted, adidas would ship and invoice in the usual manner. The Petitioners would then batch the invoices received by adidas at the end of each week and submit payment each Monday. The Petitioners did not believe that at any point in time the outstanding invoices would exceed $250,000.

49 Adidas did not accept that this arrangement was sufficient to remove payment risk to it, given the amount of open purchase orders (then some $1.8 million). Adidas advised that it required $1 million in cash security, a

demand that the Petitioners could not meet.

50 In the normal course of their supply relationship, the Petitioners work with adidas to finalize purchase orders for shipment based on reports made by adidas. Purchase orders are made up to six months in advance of shipment, and are open and subject to change during that period. The Petitioners communicate with customers and adidas throughout this period to finalize the open purchase orders based on current demand for and availability of product.

51 KSG expects to sell approximately $2 million in adidas product between July 1 and December 31, 2020. This period is consistent with past years, as customers must make orders for product for the coming sports season that begins every September. These sales are effected by customers placing orders. To ensure the timely delivery of adidas product to the customers, the Petitioners must place these orders in the spring and early summer with adidas, otherwise orders will be backlogged, and delivery will not occur in time for the September sports season. If adidas does not immediately place these orders, KSG may lose any or all of the expected sales from orders throughout this period.

52 For 2020, KSG forecasts team sales of $4 million; $2 million represents team sales on contract; $2 million represent other team sales and rebates. If adidas cuts off supply of adidas products to KSG, customers relying on rebates would lose $192,000.

53 In the normal course of business, SX generates adidas purchase orders up to six months in advance of shipment to ensure that its customers will have access to the adidas product when required.

54 SX currently has $1.5 million in open purchase orders with adidas which have been generated by SX to ensure that customers have product available for the fall sports season. From now until the fall, these orders remain open and subject to change. SX communicates with customers and adidas to finalize what products will actually be shipped based on the current demand for and availability of product. As this process is ongoing amongst the customers, adidas and SX, “batches” of adidas product are shipped to customers directly or to third party design companies over the period of time leading up to the fall sports seasons. At the point in time the orders are shipped, adidas issues an invoice for that particular batch of adidas goods and that invoice is paid by SX in the normal course.

55 Accordingly, the process of having “open purchase orders” with adidas is underway and is of fundamental importance to the Petitioners’ ongoing business operations. That process involves an ongoing discussion between the Petitioners, their customers and adidas concerning the product to be shipped. Once the product is determined, the order is finalized. Once shipment occurs, adidas invoices the Petitioners for payment. Payment terms are as set out in the adidas Trade Agreement, typically net 30, 60 or 90 days.

Critical Supplier Issue

56 The critical supplier provision in s. 11.4 of the *CCAA* provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company’s continued operation.
>
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the

order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

57 Accordingly, the decision tree under s. 11.4 requires a number of steps:

a) The court must determine if a person is a "supplier" and if the goods and services supplied by that person are "critical" to the debtor's continued operations. In that event, the court has the discretion to declare that person to be a "critical supplier" (s. 11.4(1));

b) If a person is declared to be a "critical supplier", the court has the discretion to order the continued supply of goods and services on certain terms (s. 11.4(2)); and

c) If the court declares that a critical supplier must continue to supply specified goods or services, it is mandatory that the court also order security or a charge in favour of the supplier, although the court has the discretion to determine the priority of any security or charge (s. 11.4(3) and (4)).

(1) Is adidas a "supplier" and are its goods and services "critical" to the Petitioners' continued operations?

58 Despite the difficult and acrimonious relationship that has arisen between the Petitioners and adidas, in deciding this issue, I have had the benefit of the independent evidence and analysis of both Mr. Johnson as CRO and PwC in its capacity as both Proposal Trustee and Monitor.

59 Adidas opposes any declaration that it is a "critical supplier". It takes the position that its products are not integral to the Petitioners' business and that the Petitioners are not dependent on the continued supply of those products to remain in operation. This position by adidas is, however, untethered to any evidence and in fact, is contradicted by the evidence.

60 The numbers, as confirmed by Mr. Johnson and the Monitor, clearly support that adidas is the largest supplier of product for the Petitioners' business:

a) In 2019, 52% ($3.5 million) and 21.5% ($3.2 million) of the top ten vendor purchases by SX and KSG, respectively, came from adidas. On a combined basis this represents 30.9% ($6.7 million) of the top ten vendor purchases;

b) In 2019, KSG sold $5.3 million of adidas product, accounting for 21.18% of sales for that year;

c) SX sells more adidas product than any other brand. SX's total sales in past years are: $6,451,068 (2019); $7,264,109 (2018); $6,273,282 (2017);

d) In 2013, SX opened the Superstore and 70% of the Superstore's inventory has always consisted of adidas product; and

e) As of March 12, 2020, the Petitioners have open purchase orders with adidas for approximately $2.2 million, for deliveries into July 2020.

61 Mr. Johnson describes the continued supply of adidas product to the Petitioners to the end of the term of the adidas Trade Agreement as "critical" to their business operations and ability to preserve customer goodwill and meet their obligations to customers. He expresses the view that, if this relationship is not reinstated to normal or somewhat normal terms, the completion of the SPA with Greyrock will be jeopardized. In that event, he considers it unlikely that the Petitioners can find another purchaser and, without a sale, no plan can be

presented that would see operations continue.

62 Similarly, the Monitor confirms that adidas is the Petitioners' largest supplier. The Monitor also describes that the Petitioners have integrated adidas into their sales and purchasing processes. Finally, the Monitor confirms its view that a discontinuation of the supply of adidas product to the Petitioners jeopardizes the viability of the businesses and increases the risk that the SPA conditions can not be met toward a conclusion of the sale to Greyrock. Accordingly, the Monitor opines that without such a declaration, the restructuring is in jeopardy.

63 In the above circumstances, I conclude and find as a fact that adidas is a "supplier" to the Petitioners and that the supply of its goods and services are critical to the Petitioners' continued operations at this time.

(2) Should the Court declare adidas to be a "critical supplier" and order continued supply?

64 Section 11.4 of the *CCAA* is intended to allow the Court to intervene and order continued supply where actions that might otherwise be taken by a supplier might jeopardize the restructuring efforts that are underway. Such relief is not unlike other *CCAA* provisions that allow relief which adversely affects other stakeholders in aid of these objectives and measures. The stay of proceedings and the priming of existing security are other examples.

65 In *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286 at para. 43, Justice Pepall (as she then was) described an order under the provision as "facilitative and practical in nature".

66 As always, a balancing of interests is required in determining what is appropriate and fair in the circumstances. In that respect, the comments of the Court in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60bear repeating:

> [70] . . . Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

67 I readily conclude that this Court should exercise its discretion to declare adidas as a "critical supplier" under s. 11.4(1) of the *CCAA* given the following circumstances:

a) The relationship between the Petitioners and adidas is significant, a point conceded by adidas' counsel in argument;

b) Adidas supplies unique branded goods to the Petitioners, as their customers wish to purchase and arising from the active promotion of adidas products by the Petitioners to their customers over the course of their long relationship;

c) The relationship at this point is beyond repair and continues to be acrimonious. Adidas has indicated that it is not prepared to continue to supply without a court ordering it to do so;

d) The Petitioners do not have the capability to pivot away from the supply of adidas products in the near term to other or similar products;

e) Any disruption in the continued supply of adidas products at this time would have serious and negative repercussions to the Petitioners' business operations into the near term and would likely cause irreparable harm to their businesses;

f) If any disruption to the adidas supply occurs, with expected negative consequences, there is serious jeopardy to Greyrock's support of these proceedings; and

g) Without Greyrock's support of these proceedings, there is significant risk that the restructuring proceedings will fail entirely, with disastrous consequences to most stakeholders in the event of a liquidation of assets. Those stakeholders include the significant supplier group, which includes adidas.

68 In my view, declaring adidas to be a critical supplier is consistent with the statutory objectives of the *CCAA* and well supported by the circumstances here. It is so ordered. Adidas is ordered to continue to supply its products and provide services to the Petitioners under the arrangements in place prior to the NOI filings, until further court order. Those services will include providing access to the MiTeam and B2B platforms, as before.

(3) What terms should be imposed with respect to adidas' continued supply of goods and services?

69 Section 11.4(2) of the *CCAA* provides the Court with considerable flexibility to impose terms and conditions that are "consistent" with the supply relationship or that the Court considers appropriate. This allows the Court to exercise its discretion to impose the same or similar terms as were in place before the filing, or to impose such other terms as might be appropriate in the circumstances.

70 Any terms that might be imposed may be informed by the existing contractual terms between the parties, although the existence of a contract is not necessarily a prerequisite under s. 11.4. In addition, any existing terms and conditions may be modified by the Court as appropriate. Other appropriate terms may be imposed.

71 I have already outlined above the relief sought by the Petitioners in the ARIO with respect to adidas. Essentially, they seek an order moving away from a COD relationship or retainer arrangement and into something akin to the pre-NOI filings relationship, by which supply would occur, and payment would follow within specified time limits as set out in the adidas Trade Agreement.

72 Adidas takes the position that, if it is declared to be a critical supplier, any further orders or fulfillment of existing orders should be subject to the following conditions:

a) The Petitioners are required to take delivery in accordance with the date that the orders are ready for shipment for all orders to date moving forward, without rights of cancellation (ie. they are "final" now to avoid "cherry picking" orders);

b) The Petitioners remedy existing non-monetary defaults, including selling non-branded and knock-off products, alleged by adidas to be in breach of the adidas Trade Agreement;

c) The Petitioners pay monies into a solicitor's trust account in an amount to be paid to adidas 60 days in advance of shipment, such monies to be on a "rolling basis";

d) The Petitioners pay a "reasonable" contribution to the repayment of the pre-NOI filings debt (suggested by adidas' counsel at 30% of the amount outstanding or approximately $600,000);

e) There be a clear expiration or review date of the compelled supply of July 31, 2020, or in any event, no later than the end of the term on November 30, 2020; and

f) The Petitioners pay adidas' legal fees in respect of the *CCAA* proceedings.

73 Adidas advances its argument, particularly as to the retainer arrangement, on the basis that the cash flows attached to the Monitor's report include budgeting for payment of ongoing supply, including from adidas, on a COD basis. This is said to be accommodated by the proposed increase in the Interim Lending Facility to $2.8 million, to be funded by Greyrock. Accordingly, adidas takes the position that it is not necessary to allow any

outstanding payables to accrue and thereby expose adidas to payment risk. Adidas contends that the Petitioners' evidence only supports that it would be "convenient", not crucial, for the Petitioners to be supplied on credit, rather than continue in a COD supply arrangement.

74 Again, I return to the independent evidence before me provided by Mr. Johnson and the Monitor.

75 Mr. Johnson states in his Affidavit #3:

> 41. Based on the position being taken [by adidas], I am concerned that any go forward arrangement that relies on C.O.D. or retainer arrangements is not likely to be successful, will result in an unnecessary and cumbersome level of administration and will be contrary to the normal course of business. The current process between adidas and the Companies will allow for normal processing of orders, which avoids delays and an opportunity to verify that what is shipped, received and invoiced is consistent.
>
> . . .
>
> 51. The Updated Cashflows do not reflect normal credit terms with adidas, however, a return to normal credit terms with adidas would provide flexibility in relation to uncertainties inherent in the cashflow projection, would decrease reliance on interim financing and reduce related costs, would streamline the administration process and reduce demands on the Companies finance group.

76 Similarly, the Monitor states in its First Report that, while the cash flows assume COD payments to adidas:

> 4.20 . . . it is preferable for the Companies to pay based on pre-filing terms as it is not practical from an administrative perspective for the Companies to pay adidas on a COD basis . . .

77 I accept the reasoning of both Mr. Johnson and the Monitor in this respect. I do not agree with adidas that ordering it back to normal supply terms is simply a matter of preference, and a cheaper preference at that, for the Petitioners and Greyrock, rather than having Greyrock finance a COD supply arrangement.

78 As mentioned, the state of the relationship between adidas and the Petitioners is extremely toxic at this time. I consider that any arrangement — such as a COD or rolling retainer arrangement — would introduce further levels of complexity and risk of conflict between them. If that should occur, as mentioned by Mr. Johnson, there is risk of delays and breakdowns in the ordering of product and shipments, all potentially very detrimental to the Petitioners' restructuring efforts. In addition, the added time, distraction and cost of managing and overseeing such a fractious relationship would detract from those restructuring efforts.

79 I reject adidas' other proposed terms as unreasonable in the circumstances.

80 As for the "cherry picking", this is inconsistent with what has occurred in the supply arrangement in the past. There is no reason to compel the Petitioners to accept delivery of products that they or their customers have not ordered and do not want, as confirmed to adidas through the existing arrangements. In my view, the "open purchase order" process should continue as before, which simply restores the *status quo* as between these parties.

81 I have already rejected adidas' argument regarding the Petitioners selling knock-offs. This was only very recently advanced by adidas with respect to the Petitioners and was not raised in any fashion prior to the NOI filings. I make no determination of course with respect to that issue as it might be raised in these proceedings or otherwise. I would parenthetically add that adidas' present position on this issue is interestingly inconsistent with its other position that the Petitioners really have no need for adidas products because of their other options for supply.

82 I also reject adidas' demand for payment toward the pre-NOI filings debt. I acknowledge that it is within the discretion of the Court to order such a payment: see *Canwest Global Communications (Re)* at para. 41; *Cinram International Inc. (Re)*, 2012 ONSC 3767 at paras. 23-24, 66-71; and *Northstar Aerospace, Inc. (Re)*, 2012 ONSC 4546 at paras. 11-15.

83 However, while factual circumstances supporting such payments toward pre-filing debt will differ, they often involve one or more of the following factors: the debtors having sufficient cash flow for such payment; the support of the debtor; the support of the Monitor; the likely payment of some amount to the unsecured creditor in any event under a plan; need on the part of the supplier; authorization to make such payments only as required and with ongoing approval and oversight by the Monitor; and, that such payment will secure the ongoing cooperation of the supplier for the continued supply of goods or services.

84 Here, none of these circumstances (or any other relevant circumstances) exist that would support the exercise of this Court's discretion to allow payment of such a large pre-filing sum to adidas. In particular, payment of such a large sum to adidas — well beyond what appears to be likely proposed in any plan of arrangement at the end of the day — would be seriously detrimental to other financial stakeholders and the success of the restructuring itself. Adidas would be clearly preferred in respect of other unsecured creditors, without any justification whatsoever.

85 In my view, it is not necessary to set any review date for this arrangement. As I will discuss below, I am acceding to the Petitioners' request to extend the stay of proceedings to July 31, 2020. I expect at that time that the matter of the supply arrangements with the Petitioners' suppliers, including adidas, will be the subject of evidence and also, comment and report by the Monitor. The continuation of the supply arrangements as I am ordering now with respect to adidas can be adjusted at that time, as necessary, based on that evidence.

86 I accept that the terms sought by the Petitioners in the ARIO with respect to adidas are not strictly set out; however, I do not agree that they are vague, as adidas argues. Those terms, as set out in the Initial Order, have been sufficiently stated and understood by the parties to date without issue: see *7098961 Canada Inc.*, 2016 QCCS 2115 at para. 187. Those terms simply restore the Petitioners and adidas to the arrangements or *status quo* in place just prior to the NOI filings. Any further delineation of the terms and conditions of the supply arrangement would only serve to hamstring the dynamic supply arrangements that were intended to and were in place under the former arrangements.

87 In addition, it remains the case that the Monitor will continue to oversee the ongoing operations of the Petitioners until the next hearing date at the end of July 2020. As part of that exercise, I expect that the Monitor will continue to determine if suppliers (including adidas) are being paid in the ordinary course, as the Petitioners propose and as provided for in the cash flow projections. I would also expect that, if issues arise, the Monitor can be involved to attempt to sort out the matters between the Petitioners and adidas. Failing a resolution of the matter through that process, it is of course open to the parties to return to this Court.

88 Finally, I also reject adidas' request for payment of its legal fees. In large part, I have found adidas' position to be unreasonable and I have rejected its position generally. There is no basis to reward that outcome by granting payment of adidas' legal fees.

89 There is, however, one point advanced by adidas with which I do agree. Payment terms under the adidas Trade Agreement include net payment periods of 30, 60 or 90 days. As adidas argues, this essentially amounts to adidas financing the Petitioners' operations to some degree where they might otherwise have been financed by Greyrock at some cost to the stakeholders generally. Net payment terms are a usual term and they were a feature of the relationship with the Petitioners, by which adidas did essentially agree to advance credit. Having said that, there is added financial uncertainty now given the restructuring proceedings and the current economic state of Canada, principally arising from the COVID-19 pandemic.

90 I consider that an appropriate balance between the Petitioners, adidas and the other stakeholders is to shorten those payment terms for adidas. I order that any payment terms under the adidas Trade Agreement shall

be in accordance with that Agreement, but no more than 45 days net. This will reduce payment risk to adidas, as it has sought to do.

91 In summary, the relief sought by the Petitioners with respect to the terms and conditions of supply by adidas are granted, save and except to shorten the payment period as above.

(4) What security or charge should the Court provide for adidas and with what priority?

92 Having declared adidas to be a critical supplier and required to continue to supply the Petitioners on the above terms, the Court is required to order that security or a charge be imposed on the Petitioners' assets to secure the value of the goods and services to be supplied. As stated above, it is intended that adidas will be paid throughout the restructuring as supply occurs; however, there remains some risk that the restructuring will not be successful, leaving adidas exposed.

93 The Petitioners, supported by Greyrock, are proposing that the Critical Supplier Charge rank ahead of the Interim Lender's Charge and of course, the pre-filing security which includes the secured debt now held by Greyrock.

94 Both Mr. Johnson and the Monitor share the view that the assets of the Petitioners will be more than sufficient to satisfy any amounts owing under the Critical Supplier Charge should the restructuring prove unsuccessful. Specifically, they point to:

a) The Critical Supplier Charge would only be subject to the Administration Charge to a maximum of $200,000;

b) The net book value of the Petitioners' current assets as of April 30, 2020 exceeds $11 million, as represented by:

i. Inventory of $10 million (at average net cost);

ii. Accounts receivable of $1.8 million; and

c) The net book value of the Petitioners' fixed assets (property and equipment) as of December 2019 was $1.9 million.

95 I accept that the value of all of these assets could be compromised in the event of a liquidation, particularly given the uncertain and recessionary times into which the Canadian economy has fallen with the COVID-19 pandemic. However, I consider it extremely unlikely that, even with a significant fall in recoveries, there is any material risk of non-payment to adidas in these circumstances. Again, this is particularly so given that adidas will receive ongoing payments for supply; if such payments are not made in the ordinary course, I would expect that adidas will seek immediate relief in respect of the Critical Supplier declaration and Critical Supplier Charge.

96 The Critical Supplier Charge as sought is granted.

Approval of Amended Commitment Letter

97 The Initial Order authorized the Petitioners to continue to borrow under a credit facility from Greyrock and continued the Interim Lender's Charge under the BIA Orders, to the maximum amount of $1.4 million plus interest, fees and costs. Approximately $750,000 has already been drawn. The Petitioners seek to increase that amount to $2.8 million.

98 As previously stated, the Petitioners' cash flow projections to July 31, 2020 assume that the purchase of product is based on COD terms with most suppliers, which increases the pressure on cash flow and results in a much higher level of borrowings than anticipated. The Petitioners concede that, with the critical supplier declaration in favour of adidas and the requirement imposed on adidas to fund on the above terms, it is very possible that the full extent of this further borrowing will not be required.

99 Pursuant to s. 11.2(4) of the *CCAA*, any increase in borrowing involves a consideration of the following factors, among other things:

> a) the period during which the company is expected to be subject to proceedings under [the *CCAA*];
>
> b) how the company's business and financial affairs are to be managed during the proceedings;
>
> c) whether the company's management has the confidence of its major creditors;
>
> d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> e) the nature and value of the company's property;
>
> f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> g) the monitor's report referred to in paragraph 23(1)(b), if any.

100 The Petitioners' cash flow sets out the requirements to help fund working capital as sports teams source uniforms and equipment to ready themselves for the spring/summer season. In addition, the Petitioners will require funding for on-going operations as they work towards finalizing the transaction with Greyrock and concluding these proceedings.

101 The Monitor will continue to oversee the Petitioners' business and financial affairs during these *CCAA* proceedings; that will include drawdowns on the Interim Lending Facility so as to ensure that it is being used only as needed. While perhaps the full amount will not be required, increasing the limit affords the Petitioners the flexibility of accessing those funds as circumstances arise, again with oversight by the Monitor.

102 No creditor of the Petitioners will be materially prejudiced as a result of the increase in the Interim Lender's Charge, including adidas since the Critical Supplier Charge ranks ahead of the Interim Lender's Charge and the further borrowings will be available, if needed, to fund payments to adidas with respect to ongoing supply.

103 The Monitor supports the increase to the Interim Lending Facility and the Interim Lender's Charge.

104 I conclude that the s. 11.2(4) factors support an increase to the Interim Lending Facility as proposed.

Claims Process Order

105 In conjunction with the Monitor, the Petitioners have developed and are seeking approval of a Claims Process Order to call for the submission of claims against the Petitioners.

106 Pursuant to s. 11 of the *CCAA*, the Court may make any order that it considers appropriate in the circumstances. Courts have in past relied on this broad statutory authority under the *CCAA* to grant claims process orders.

107 The proposed Claims Process Order allows for the usual steps and procedures in such a claims process, consistent with what has been previously ordered in many other restructurings. In particular, the process sets a

claims bar date of June 30, 2020 to file claims or, with respect to a restructuring claim, within 10 days of receiving a notice of disclaimer or resiliation.

108 The Monitor supports the proposed Claims Process Order. The Monitor opines that this process should facilitate the implementation of a plan and the overall restructuring.

109 I conclude that, consistent with the statutory objectives of the *CCAA*, the claims process will bring some certainty to this restructuring proceeding in determining the claims that must be addressed by the Petitioners in any plan of arrangement. The proposed Claims Process Order is granted on the terms sought, with amendment of the various timelines set out in the proposed order to extend them by two business days, given the delay in giving these reasons.

Extension of Stay

110 Finally, the Petitioners are seeking to extend the stay period to July 31, 2020.

111 No stakeholder objects to such an extension.

112 The Monitor supports such an extension, confirming that the Petitioners have acted and continue to act in good faith and with due diligence, as required by s. 11.02(2) of the *CCAA*.

113 Clearly the extension of the stay is necessary for a number of reasons to advance the restructuring. The further time will allow the Petitioners to continue operations with a view to developing a longer term strategy that does not include supply from adidas. In addition, once the Claims Process is completed, a clearer picture will emerge toward developing a plan of arrangement for consideration of the creditors and the Court. Finally, as matters move along, the Petitioners and Greyrock can move toward completion of the SPA.

114 These reasons are consistent with the purpose and objectives of the *CCAA* and will enable the Petitioners to proceed with an orderly sale of their assets to maximize recovery to stakeholders, including all unsecured creditors which of course includes adidas.

115 I am satisfied that an extension of the stay to July 31, 2020 is appropriate in the circumstances and it is so ordered.

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.
243(1)Court may appoint receiver
Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver
In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"
Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)
For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to May 1, 2020
Federal English Regulations are current to Gazette Vol. 154:7 (April 1, 2020)

End of Document

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
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Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders
At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding;

however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous
At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal
At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE

in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

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APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the

proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

(1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent

undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) take any other action that the court considers advisable.

46 ”Receiver” is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> (a) is appointed under subsection (1); or
>
> (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
>
> (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
>
> (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan’s farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor’s property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor’s business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor’s business, and market and sell the debtor’s property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205;

Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List])[6].

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,

(c) take any other action that the court considers advisable. [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an

> expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the

law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss

the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell

Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence

of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact*

Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of), 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

> 1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.
>
> 2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.
>
> 3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As

found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.*:**
I agree.

***Grant Huscroft J.A.*:**
I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

End of Document

2006 ABQB 236
Alberta Court of Queen's Bench

Residential Warranty Co. of Canada Inc., Re

2006 CarswellAlta 383, 2006 ABQB 236, [2006] A.W.L.D. 1798, 21 C.B.R. (5th) 57, 393 A.R. 340, 62 Alta. L.R. (4th) 168

In the Matter of the Bankruptcy of Residential Warranty Company of Canada Inc.

In the matter of the Bankruptcy of Residential Warranty Insurance Services Ltd.

Topolniski J.

Judgment: March 24, 2006*
Docket: Edmonton 24-112232, 24-112233

Proceedings: Affirmed, 2006 CarswellAlta 1354, (sub nom. Residential Warranty Co. of Canada Inc. (Bankrupt), Re) 417 A.R. 153, [2006] A.W.L.D. 3143, 275 D.L.R. (4th) 498, (sub nom. Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of)) [2006] I.L.R. I-4552, (sub nom. Residential Warranty Co. of Canada Inc. (Bankrupt), Re) 410 W.A.C. 153, [2006] 12 W.W.R. 213, 2006 ABCA 293, 65 Alta. L.R. (4th) 32, 25 C.B.R. (5th) 38 (Alta. C.A.)

Counsel: John I. McLean for Kingsway General Insurance Company
Kent Rowan for Deloitte & Touche Inc.

Subject: Insolvency; Estates and Trusts

Headnote

Bankruptcy and insolvency --- Administration of estate — Trustees — Remuneration of trustee — General principles
Bankrupts were in process of winding up home warranty business — Trustee was appointed interim receiver in context of minority shareholder's oppression remedy — Creditor was insurance underwriter of home warranty policies brokered or administered by bankrupts — Creditor filed proofs of claim in estates for approximately $11 million pursuant to contractual, statutory and common law trusts and brought related concurrent action against bankrupts — Trustee gave notice that trust claim was disputed — Trustee maintained that all or substantially all insurance premiums collected by bankrupts for insurance policies were paid to creditor and that balance of estate of bankrupts was income derived from business operations — Creditor appealed trustee's decision — Creditor brought application for order that trustee was not entitled to utilize realizations of assets and property of bankrupts for purpose of fees and expenses — Application dismissed — Trustee was entitled to retrospective charge on assets under administration for fees and expenses in undertaking work on estate to date — Common sense dictated trustees in bankruptcy receive reasonable compensation when called upon to exercise duties and judgment — If compensation were commonly withdrawn in such instances, trustees would be inclined to shy away from problems and few would be willing to take on role — Creditor had not discharged onus of establishing valid trust on date of bankruptcy — Creditor's action had been stayed and creditor had not been vigilant in pursuing other grievances — No evidence was presented illustrating trustee's actions favoured any party to bankruptcy.

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APPLICATION by creditor for order that trustee was not entitled to utilize realizations of assets for fees and

expenses.

***Topolniski J.*:**

I. Nature of the Application

1 This Decision concerns retrospective and prospective funding of a trustee in bankruptcy from assets under administration when all of the assets are subject to a disputed trust claim that is far from being resolved.

2 Residential Warranty Company of Canada Inc. (RWC) and Residential Warranty Insurance Services Ltd. (RWI) (collectively the Bankrupts) are Alberta companies that operated a home warranty business. They were in the process of winding up when, in late 2004, Deloitte & Touche LLP was appointed their interim receiver (IR) in the context of a minority shareholder's oppression action. On the companies' deemed bankruptcy in May 2005 (Bankruptcies), Deloitte & Touche LLP became their trustee in bankruptcy (Trustee).

3 The Applicant, Kingsway General Insurance Company (Kingsway), was an insurance underwriter of home warranty policies brokered or administered by the Bankrupts in Alberta and British Columbia. Kingsway filed proofs of claim in the estates pursuant to s. 81 of the *Bankruptcy and Insolvency Act* (*BIA*)[1] claiming approximately $11,200,000.00 pursuant to contractual, statutory and common law trusts. The Trustee gave notice under s. 81(2) that the trust claim was disputed. It maintains that all or substantially all of the insurance premiums collected by the Bankrupts for insurance policies on which Kingsway is liable have been paid to Kingsway and that the balance of the estate of the Bankrupts is income derived from the operation of their home warranty business. Kingsway has appealed the Trustee's decision (Appeal).

4 Kingsway's trust claim arises from a series of transactions that are detailed in a broadly drafted Amended Statement of Claim (BC Action) which it filed in the British Columbia Supreme Court in June 2004, prior to the Bankruptcies. The Amended Statement of Claim is comprised of 125 paragraphs over 42 pages and contains allegations of breach of contract, fraud, conversion, breach of trust, breach of fiduciary duty. The Bankrupts, along with certain of their directors, officers, and employees, are named as defendants in the lawsuit.

5 Kingsway now applies for an order:

> 1. declaring that the Trustee is not entitled to use the realizations of any assets and property of the Bankrupts for the purpose of paying its fees and expenses, both past and future, pending the hearing of the Appeal and the disposition of the BC Action;
>
> 2. directing that the Trustee return all fees paid after notice of its trust claim, subject to deduction for reasonable fees directly attributable to preservation of the alleged trust property;
>
> 3. appointing the Trustee as Interim Receiver of the Bankrupts' assets under s. 47.1 of the *BIA* (*BIA* IR) for preservation purposes pending determination of the Appeal and the BC Action; and
>
> 4. requiring the Trustee to post security for costs in respect of its defence of the Appeal and the BC Action;

6 The Trustee's position is that resolution of the Appeal to finally determine the validity of Kingsway's claim is central to administration of the Bankruptcies. The Trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to the Appeal for lack of funding.

7 In response to Kingsway's application, the Trustee asks for a retrospective and prospective charge on all of the estate assets under its administration in order to pay its fees and disbursements, including legal fees and disbursements. The Canada Revenue Agency (CRA), an unsecured creditor, and a builder, Nucon Developments, support the Trustee's request.

8 The parties on this application focussed squarely on the issue of Trustee funding. Kingsway did not pursue its request for security for costs and, while mention was made of its request for the appointment of the Trustee as a *BIA* IR in Kingsway's written submissions, no evidence or argument was offered to support the relief requested. In supplemental written submissions, Kingsway argued that 'super-priority' funding for a *BIA* IR under s. 47.2 of the *BIA* is not applicable in a "straight bankruptcy" like this. I took this submission to mean that it had abandoned this arm of its application.

9 Kingsway has applied for an order transferring the Appeal to the British Columbia Supreme Court (In Bankruptcy) and for an order granting it leave to continue the BC Action "to be heard at the same time as the Appeal, subject to the direction of the Judge of the British Columbia Supreme Court hearing the BC Action". The applications and the Appeal were adjourned at the parties' suggestion. The applications are now set to be heard in mid May. Kingsway wants to await the outcome of its applications before scheduling the Appeal.

10 As Kingsway's application to have the Court in British Columbia deal with the Appeal has not been decided, my Ruling on the present application presumes that the Appeal will proceed in the ordinary course of events in this Court.

II. Background

A. The Bankrupts, the Builders and Kingsway

11 The Bankrupts brokered and administered residential warranty policies sold in Alberta and British Columbia to builders which were underwritten by Kingsway as the insurer of record. The builders paid for membership in the programs. Each of them also paid money by way of cash deposit or letters of credit as security for repairs covered by the warranty policies. The Bankrupts held the cash deposits in a segregated account. Provided a builder did not owe any money on expiry of the warranty period, the deposit would be repaid to the builder. Letters of credit were treated in a similar fashion.

12 Relations between Kingsway and the Bankrupts soured to the point where Kingsway terminated its contracts with them in August 2003, alleging that the Bankrupts had sold unauthorized products and had failed to remit certain premiums. The Bankrupts denied the allegations and the fight was on.

13 In the spring of 2004, Kingsway complained to the British Columbia Financial Institutions Commission (FICOM), British Columbia's insurance regulatory authority, about the Bankrupts' conduct. FICOM investigated the companies and RWI responded by surrendering its broker's license for three weeks. The Insurance Council of British Columbia subsequently allowed reinstatement of its license on conditions, one of which was that RWI hold approximately $3,100,000.00 in trust with its lawyers for premiums allegedly owed to Kingsway.

14 Kingsway commenced the BC Action in June 2004, claiming a minimum of $2,108,576.35 plus additional unascertained damages. It started a similar lawsuit in Alberta, but did not prosecute it. About three weeks after the BC Action was commenced, RWC paid $3,092,612.50 to Kingsway, unconditionally.

15 By the date of the Bankruptcies in May 2005, the defendants to the BC Action had defended and counter-claimed (alleging outstanding commissions, expenses, third party costs, lost income, lost opportunity, and loss of reputation) and Kingsway had demanded document production. Kingsway's forensic accountant apparently calculated the amount that remained owing to Kingsway from the Bankrupts as at June 7, 2005 to be $3,786,606.00. In late June 2005, after receiving certain financial information from the Trustee, Kingsway's forensic accountant determined that $11,292,224.00 (over and above the monies already paid by RWC), plus additional amounts for unliquidated damages, was still owing from the Bankrupts.

16 Kingsway filed proofs of claim in the Bankruptcies on September 2, 2005 and put the Trustee on notice of its claim and of the position that it was taking with respect to the Trustee's fees and expenses on October 4,

2005.

17 In late 2005, the police charged the Bankrupts, one of their former directors, and a former employee with fraud, theft, uttering a forged document and drawing a document without authority. An Information was sworn and warrants were held until December 15, 2005. I was not provided with any additional information on this application as to the current status of the criminal proceedings.

B. The Interim Receiver, The Trustee and Stakeholders

18 The order appointing the IR granted the IR a 'super-priority' charge over the companies' assets, giving it priority over all security, charges and encumbrances affecting the assets.

19 The IR, which is also the Bankrupts' Trustee, complied with the Court's directions to investigate the Bankrupts' affairs, dispose of certain assets and report on numerous concerns, including the BC Action and the builders' deposits. It prepared three reports for the Court. Kingsway contends that the IR's mention of the BC Action in its first report, dated December 21, 2004, constitutes evidence of notice to Deloitte & Touche LLP of Kingsway's trust claim, and that funding for the Trustee from alleged trust assets, which comprise the entire estate of both Bankrupts, should not be allowed after that date. It asserts that funding should not extend beyond October 4, 2005 at the very latest, when its counsel particularized its trust claim and formally put the Trustee on notice of the position which it now advances.

20 The assets under the Trustee's administration include bank accounts and claims against various parties, but the vagaries of the Bankrupts' business and their relationships with others have somewhat complicated the Trustee's work. Apart from the typical issues arising in any bankruptcy (financial analysis, securing assets, reviewing proofs of claim, reporting to and meeting with creditors and inspectors, and acting as the point person coordinating court matters), the Trustee has instructed litigation and dealt with winding up business operations. It has also addressed enquiries from policyholders and builder claimants about warranties and the refund of deposits relating to 550 properties.

21 Kingsway has referred some policyholders to the Trustee on denying coverage under various policies and it has jointly instructed some litigation with the Trustee. The Trustee has provided it with financial analyses and other information, including information concerning the Trustee's findings on premium payments.

22 The Trustee predicts that its future work will entail continued realization of assets through litigation efforts, including intended litigation against Kingsway to recover $1,500,000.00 in allegedly overdue profit sharing, and resolution of creditor and proprietary claims. In due course, it will wind up the estates, return property rightfully belonging to others, and distribute residual property to the creditors.

23 There are 627 persons interested in the builders' deposit fund and letters of credit (Builder Claimants). The builders' deposit fund is worth approximately $1,000,000.00 while the letters of credit are valued at approximately $5,000,000.00. The Trustee concedes that some of the Builder Claimants have trust claims against the cash builders' deposits. The method by which builders' claims are to be proved in the bankruptcy and a claims bar date were set by Order in December 2005. Kingsway has agreed to that process.

24 Kingsway has participated in case management meetings and applications relating to the claims of the Builder Claimants. It has requested that it be given notice of claims that the Trustee disallows. It also wants to participate in the Trustee's application for directions as to whether the letters of credit are impressed with a trust and appeals of the disallowance by the Trustee of some builders' claims. Kingsway maintains that it is entitled to all of the value of the letters of credit, although it has not indicated how these can be considered traceable trust assets. It also claims approximately $300,000.00 of the builders' cash deposit fund as a result of alleged setoffs owed to it by builders for the cost of repairs. Kingsway takes the position that once the claims of the Builder Claimants who are seeking access to the cash fund have been resolved in these bankruptcy proceedings, the Builder Claimants must "duke it out" with Kingsway in the ordinary courts to determine who is entitled to the funds.

III. Analysis

A. Fairness, Practicality and Neutrality

25 A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.

26 The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers.[2] Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.[3]

27 Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard.[4] What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. As astutely noted by Mr. Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*[5] :

> While the *BIA* is generally a very fleshed-out piece of legislation when one compares it to the *CCAA*, it should be observed that s. 47(2)(c): "The court may direct an interim receiver ... to ... (c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organised and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

28 Neutrality is the necessary mantra of trustees in bankruptcy. They are neither an agent of the creditors nor of the debtor, but rather are administrative officials and officers of the court charged with the responsibility of looking after all parties' interests. Trustees are obliged to comply with the procedures and rules of conduct set out in the *BIA*, the code of ethics in the *BIA General Rules*[6] and with professional codes of conduct, and cannot enter the fray between competing stakeholders.[7] They must present the facts in a dispassionate, non-adversarial manner in matters before the court.[8] Their job is to act as an independent voice of reason and to provide discipline in the oft-chaotic circumstances created on bankruptcy.

B. Trust Property

29 Unless otherwise provided by legislation, trustees in bankruptcy have no greater interest in the property they are responsible for administering than the bankrupt does.

30 The property held by a bankrupt in trust for another is not divisible among the creditors of the bankrupt.[9] However, this does not mean that the res of the trust is not subject to administration by the trustee in bankruptcy. On the contrary, property held by the bankrupt in trust for a third party becomes part of the bankrupt's estate in the possession of the trustee in bankruptcy, who is obliged to administer the property and to

deal with it in accordance with the law.[10]

31 Section 81(2) of the *BIA* governs the actions of a trustee in bankruptcy when presented with a trust claim. Within 15 days of presentation, the trustee in bankruptcy is either to admit the claim or to give notice disputing it, together with the reasons for doing so. There is no intermediate position which may be taken.

32 Section 81(2) reads:

> 81(2) The trustee with whom a proof of claim is filed under subsection (1) shall within fifteen days thereafter or within fifteen days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or give notice in writing to the claimant that the claim is disputed with his reasons therefor, and, unless the claimant appeals therefrom to the court within fifteen days after the mailing of the notice of dispute, he shall be deemed to have abandoned or relinquished all his right to or interest in the property to the trustee who thereupon may sell or dispose of the property free of any lien, right, title or interest of the claimant.

33 The Trustee in the present case has performed a quasi-judicial function in assessing and disallowing Kingsway's claim. There is no suggestion that it acted unfairly in doing so or that it has somehow entered into the fray between competing stakeholders. The Trustee has simply done its job.

34 The Trustee agrees that the Bankrupts had trust obligations to Kingsway for unremitted premiums, but disagrees with Kingsway's assessment that all of the money collected by the Bankrupts from their customers represented premiums. It also questions the merit of Kingsway's constructive trust claim arising from alleged "secret commissions" and breach of fiduciary duty. Tracing will be an issue concerning Kingsway's claim to entitlement to the letters of credit and possibly other aspects of its claim.

35 The Act is silent about the trustee's responsibilities on an appeal from its rejection of a claim. However, s. 41(4) of the *BIA* provides that an estate is deemed to have been fully administered only when "a trustee's accounts have been approved by the inspectors and taxed by the court and all objections, applications, oppositions, motions and appeals have been settled or disposed of and all dividends have been paid".

36 In my view, the Trustee is a necessary party to the Appeal, which it is to participate in as an officer of the court, presenting the relevant facts in a dispassionate, non-adversarial manner, leaving the court to decide the matter. The Trustee's responsibility is to ensure that only valid claims to the assets under administration are recognized.

37 Kingsway has asserted a significant trust claim that might prevail at the end of the day, but at present that claim is merely an assertion - a fact that weighs heavily on this application.

38 The onus of establishing a trust at the date of bankruptcy will rest with Kingsway and the ordinary law of trust applies in that regard.[11] Kingsway has not yet proved its claim of a valid trust. It has procured an accounting expert's opinion that it relies on, but that opinion is untested. The BC Action was in the early stages when stayed by the Bankruptcies. Other proceedings dealing with the same series of transactions are seemingly over or similarly not far advanced. FICOM's investigation resulted in a three-week licence suspension, but no further action was taken, and the criminal proceeding is in its early stages.

C. Trustee Funding

39 In a typical bankruptcy, the trustee is paid from estate assets. Like all insolvency professionals, trustees in bankruptcy are or should be alive to securing payment of their fees, particularly for work in the initial stages of a bankruptcy until the asset base from which they can be paid is assessed. Trustees often look to the petitioning creditor for an indemnity for their fees. Here, the Bankruptcies occurred when proposal deadlines were not met and there is no petitioning creditor. However, other interested parties include the CRA, an

unsecured creditor and the Builder Claimants.

40 Section 39(1) of the *BIA* provides that: "The remuneration of the trustee shall be such as is voted to the trustee by ordinary resolution at any meeting of creditors." However, if remuneration has not been fixed under 39(1), the trustee is entitled under s. 39(2) to insert in his final statement and retain as remuneration, subject to increase or decrease on application to the court, a sum not exceeding seven and one-half per cent of the amount remaining out of the realization of the property of the debtor after the claims of the secured creditors have been paid or satisfied.

41 Ordinarily, a trustee in bankruptcy will not be funded from trust assets unless it shows that its work was necessary to preserve or otherwise benefit the trust assets,[12] or the work was required for resolution of the trust claim or to sort out beneficiaries.

42 The first exception developed as a result of the court's exercise of inherent jurisdiction in ordinary trust cases, a topic reviewed in some depth by Sigurdson J. in *Gill, Re* and Tysoe J. in *Eron Mortgage Corp., Re*.[13] The court's inherent jurisdiction in this regard has been exercised sparingly and generally in circumstances where the beneficiary would have had to hire someone else to do the work performed by the trustee.[14] The second exception flows from the trustee in bankruptcy's duty under the *BIA* to approve or disallow of claims.[15]

43 There is also statutory authority in Alberta which allows for the funding of ordinary trustees. The *Trustee Act*[16] authorizes the court to order compensation for "the trustee's care, pains and trouble and the trustee's time expended in and about the trust estate". This compensation is available regardless of whether the trusteeship arises by construction, implication of law, or express trust.[17] Trustees in bankruptcy can avail themselves of this legislation to the extent that it is not in conflict with the *BIA*.[18]

44 The Alberta Court of Appeal in *Sproule v. Montreal Trust Co.*[19] considered the intent and scope of s. 44 funding (then s. 39). Mr. Justice Haddad commented that:[20]

> My concept of the term care and management is consistent with the expressions to which I have referred. It connotes to me not only the responsibility of reasonable supervision and vigilance over the preservation or disposition of assets but also the responsibility of judgment and decision making in the affairs of an estate to resolve problems from time to time arising over and above the usual and regular procedures attendant upon administration.

45 The Trustee in the present case was obliged to gather in trust property, which vested in the Trustee, but it cannot distribute the res of the trust to creditors. The Trustee therefore has two capacities, one as trustee in bankruptcy and the other as an ordinary trustee arising by implication of law. If Kingsway prevails at the end of the day, the Trustee is entitled to seek compensation for its work "in and about the trust". In my view, the broad scope of compensable work discussed by Mr. Justice Haddad in *Sproule* includes identifying which assets, if any, are subject to a trust and, if doubt exists, placing the necessary information before the court for determination of that issue.

46 There are several notable cases in which trustees in bankruptcy have been denied or given only limited funding from trust assets. *P.A.T., Local 1590 v. Broome*; *Shirt-Man Inc., Re* and *Genometrics Corp., Re* involved assets impressed with undisputed statutory trusts for employee withholdings. In *P.A.T., Local 1590 v. Broome*, as here, the trust claims were to the entirety of the funds gathering in by the trustee.

47 *P.A.T., Local 1590 v. Broome* concerned employee tax withholdings. Master Bowne described his ruling as:[21]

> ...A signal to trustees that where there are trust claims, before undertaking work with a view to realization of assets to benefit trust fund recipients, the trustee would be advised to make arrangements that remunerations would be paid by the administrator of the trust or otherwise.

48 Master Browne said in *obiter dicta* that even if the funds in the estate exceeded the amount of the trust claims, the expenses and fees which the trustee would be entitled to claim from the estate assets under s. 107 (now s. 136) of the *BIA* would not include indemnity for any work done which did not result in a benefit to the creditors. This aspect of the decision was qualified in *Pugsley, Re*,[22] an appeal of a registrar's taxing order which disallowed legal fees incurred by the trustee in obtaining an opinion on the validity of a trust claim asserted by Revenue Canada under s. 59 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (now s. 81 of the *BIA*). Mr. Justice O'Driscoll in that case held that the comment of Master Browne in *P.A.T., Local 1590 v. Broome* should not be extended or expanded to include the assessed costs of legal counsel retained by the trustee to provide such legal services. He did not consider it logical that a trustee would be entitled to pay counsel for the opinion if in the end the proof of claim was adjudged invalid, but not if the claim was upheld, even though technically there was no benefit to the creditors in obtaining the opinion.

49 The debtor in *C.J. Wilkinson Ford Mercury Sales Ltd., Re*[23] sought a charge over statutory trust assets, again employee withholdings, to fund his legal counsel. The court denied the application, commenting that it would not allow money owned by one person to be paid over to another person so that he could pay it to yet another person.

50 *Grant v. Ste. Marie*[24] involved a summary trial in the ordinary courts, a bankrupt rogue, a finding of a valid express trust and competing claimants. The plaintiff was granted leave to proceed with his lawsuit against the bankrupt. The issue was whether the plaintiff, a victim of the bankrupt defendant's fraud, could trace funds that he had paid to the bankrupt into the hands of the trustee in bankruptcy.

51 Mr. Justice Slatter found that the bankrupt had used words of trust to reassure the plaintiff. He ruled that the trustee's investigative work was instrumental in precluding improper payouts to others and thereby benefited the plaintiff. Likening the trustee to a *bona fide* purchaser for value without notice, he allowed encroachment on the trust property to pay certain expenses to the extent they related to the trustee's dealings with the traced funds, but only to the date the trustee received notice of the trust claim.

52 Slatter J. noted that the trustee's fees and expenses relating to general administration of the estate were a legitimate expense of the estate. Where trust funds are used to discharge a debt owed to the recipient of the funds, there is a giving of value and no tracing to the recipient is permitted.[25] Therefore, he reasoned that the trustee's payment of legal expenses and even its own fees prior to receiving notice of the trust precluded the trust claimant from tracing those funds and defeated the beneficiary's interest to that extent. He commented[26] that:

> ... the Trustee is an officer of the Court, and a necessary part of the bankruptcy regime, and the discharge of the estate's obligation to pay the Trustee should also be considered as the giving of value. Before receiving notice of the Plaintiff's claim the Trustee was a bona fide purchaser for value without notice, and the Plaintiff cannot recover the portion of funds used to discharge the legitimate expenses of the estate.

53 *Westar Mining Ltd., Re*[27] addressed the issue from the opposite perspective. A group of trust claimants sought funding from estate assets to pay legal fees for their application to exclude certain assets from distribution to the creditors. The court held that the legal work did not benefit the bankrupt's estate nor was it necessary for the management and preservation of estate assets. The court was unmoved by the claimants' plea that it would be unfair to them to have to retain counsel when counsel for the trustee, who was paid for by the estate, represented the other creditors.

54 The court in *Ridout Real Estate Ltd., Re*[28] charged trust funds that ultimately were held to belong to realty vendors and purchasers, brokers and salespersons with payment of the fees of a trustee in bankruptcy. The only mention of the trustee's work in connection to the trust assets was that he received a deposit and brought an application for directions concerning distribution of the assets. Presumably, this was sufficient to warrant compensation. The case report refers only to trust funds in the trustee's hands. There is no mention made as to whether there were any residual assets in the bankrupt's estate.

55 In *NRS Rosewood Real Estate Ltd., Re*,[29] the court awarded the trustee in bankruptcy $25,000.00 in compensation from trust monies as it was satisfied that issues between the stakeholders had to be resolved by the court and it was the trustee's initiative which had caused that to happen. Apparently, there were some residual assets in that case.

56 Mr. Justice Urquhart in *Nakashidze, Re*[30] allowed the trustee compensation from securities that were not property of the bankrupt, noting that the trustee had undertaken a vast amount of work in sorting out and assembling the securities and claims. However, he reached a contrary conclusion in *McLeod, Re*,[31] finding that the trustee in bankruptcy was not entitled to compensation from proprietary assets because the proprietary claimant rather than the trustee had "salvaged" the asset. Nevertheless, he did indicate that any work undertaken by the trustee could be taken into account when the estate was wound up in fixing his general compensation.

57 *Walter Davidson Ltd., Re*[32] involved a dispute between a secured creditor claiming under a general assignment of book debts, mechanics' lien claimants and unsecured creditors. The court ultimately ruled in favour of the statutory lien claimants, but held that it was the trustee in bankruptcy's efforts which had made the money available to the lien claimants and therefore charged the trust assets with payment of the trustee's fees.

58 Like Kingsway, the miners' lien claimants in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*[33] protested funding of the insolvency professional. Funding in that case was pursuant to a 'super priority' charge granted under s. 47.2 of the *BIA*. In refusing the claimants' application, Mr. Justice Farley described the interim receiver's work as "providing discipline to the proceedings" and noted that the interim receiver had to be capable of exercising its own independent judgment. He commented as follows on the status of the applicants' claims in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*:[34]

> ...Secondly, it would seem to me that one should not presume what one is hopeful of establishing (i.e. the MLA claimants have not yet proved the validity and priority of their liens). Thirdly, while it should be recognized that the IR may be funded, there is no assurance that it will "win"; it may "lose" in whole or in part. However, at least there will be the testing of the Royalty Claim for the benefit of all creditors who have a valid claim against *Curragh*...
>
> ... Simply put, it comes down to a question of cutting through the Gordian Knot: one does not know at this stage whether these opposing MLA claimants have a valid and prior claim. It seems to me that the amount of funding is reasonable in the circumstances and would be modest investment in the process.

59 The trustee is an integral part of the bankruptcy system. The claims review process is designed to ensure that only proper claimants are entitled to share in the bankrupt's property. The Trustee, at least in this case, is a necessary party to the Appeal. Kingsway should succeed only if it has a legitimate claim and not simply by default. To rule otherwise would be to open the door for possible abuse of the system by rogue claimants filing spurious proprietary claims.

60 If a charge is granted, Kingsway ultimately may be prejudiced if it proves its claim to the extent asserted, but that prospect remains an "if". The sheer magnitude of its claim is no reason to hold the Trustee and the bankruptcy system at bay pending determination of its validity. Mr. Justice Farley's words in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* resonate ... "one should not presume what one is hopeful of establishing".[35]

D. Charge on the Assets

61 Kingsway contends that an asserted trust claim valued at more than potential realizations, regardless of its facial merit, forces the trustee in bankruptcy to seek funding for an appeal of its disallowance of the claim from sources other than the assets under administration. It contends that responsibility to fund the Trustee falls

on the shoulders of other creditors or claimants, whether by means of direct funding or an assignment under s. 38 of the *BIA*. Given the nature of the claims in these Bankruptcies, I disagree. The validity and priority of the trust claims must be determined. The Trustee is assisting the Court and all of the claimants in coordinating these matters and in providing the necessary information to resolve these issues.

62 The Trustee is not asking for a retrospective charge over undisputed statutory employee withholdings, as were the (unsuccessful applicant) trustees in bankruptcy in *P.A.T., Local 1590 v. Broome*; *Shirt-Man Inc., Re* and *Genometrics Corp., Re*. Nor is the Trustee seeking a prospective charge over undisputed statutory employee withholdings like the bankrupt in *C.J. Wilkinson Ford Mercury Sales Ltd., Re*.

63 Mr. Justice Slatter held in *Grant* that the trustee in that case could not use the trust funds after receiving notice of the proprietary plaintiff's claim. It is unclear what position the trustee in that case took concerning the trust claim (offering financial and documentary information to the court does not equate to disputing the claim), what work, if any, it undertook after notice of the trust claim, and whether there were residual assets from which it could be funded. This is not surprising given that the case was not about trustee compensation or the charging of trust assets.

64 The role of the Trustee here is more akin to that of the trustees described in *Ridout Real Estate Ltd., Re*; *NRS Rosewood Real Estate Ltd., Re*; *Nakashidze, Re*; *Walter Davidson Ltd., Re*, and *McLeod, Re*[36], each of whom was successful in obtaining a retroactive charge over established trust assets for their work in gathering and preserving trust assets or in sorting out the trust claims.

65 In *Pugsley, Re*, Mr. Justice O'Driscoll commented that a trustee should be able to pay counsel for their opinion and services in regard to a proof of claim whether the claim eventually is adjudged invalid or not. He reasoned that if the trustee cannot hire and remunerate counsel to process the claims, counsel to a trustee might refuse to do so because of the potential for non-remuneration. In his view, that would put the trustee in a "no win" situation with regard to legal advice and legal services regarding proofs of claim.

66 *Sproule* is also responsive to the "no win" situation identified by Mr. Justice O'Driscoll in *Pugsley*.

67 Common sense dictates that trustees in bankruptcy should receive reasonable compensation when they are called on to exercise their judgment and to be real problem solvers in a situation such as the present one. If it were otherwise, trustees would be inclined to shy away from problems and the list of persons willing to take on the role of trustee would dwindle, particularly in situations where there was no personal connection between the potential trustee and the beneficiary or the assets under administration.

1. Retrospective Charge

68 Kingsway's application is denied. The Trustee is entitled to a charge on the assets under administration for its fees and expenses in undertaking work on the estate to date. Presuming success for Kingsway in the end, a significant part of the Trustee's work will have benefited Kingsway, given that its claim is to all of the assets under administration. Furthermore, the Trustee is entitled to compensation for all of its work to date in sorting out Kingsway's claim. The Trustee has offered its assistance to Kingsway in related proceedings concerning proposals made by various directors and officers of the Bankrupts, it has formulated a plan that Kingsway has joined in for resolving claims by Builder Claimants, it has coordinated and attended case management meetings, and it has argued a preliminary arm of Kingsway's jurisdictional application.

69 I have taken Kingsway's choices regarding process into consideration in determining whether it is appropriate to grant the Trustee a retrospective charge on the contested assets for its fees and disbursements. Kingsway has chosen to make a preliminary application to move the Appeal to British Columbia. It wants to continue the BC Action. While it is entitled to bring these applications, it cannot ignore the logical consequences of doing so. These applications, and others which it has brought in parallel proceedings relating to the proposals made by various officers and directors of the Bankrupts, have and will continue to delay the ultimate decision about the validity of Kingsway's trust claim. Kingsway wants to take advantage of the

bankruptcy proceedings to have this Court determine the validity of the claims of the Builder Claimants and whether the letters of credit are impressed by a trust, but to force builders with trust claims against which it alleges a right of setoff to "duke it out" in the ordinary courts. Finally, I observe that Kingsway did not seek an expedited hearing for this or its other applications.

70 Kingsway's application to stop the Trustee from using assets under its administration to pay its fees and expenses is denied and the Trustee is granted a retrospective charge over the assets under its administration for all of its reasonable fees and disbursements, including legal expenses, concerning the gathering in and preserving of assets in the estate and the general administration of the Bankruptcies, such as investigating Kingsway's trust claim. The charge is granted no matter what the outcome is of the Appeal.

71 If an appeal court decides that the retrospective charge should be restricted to fees and expenses relating to work undertaken before the Trustee had notice of Kingsway's claim, as in *Grant*, I offer my finding that reasonable notice did not occur until November 25, 2005. The reasons for my finding in this regard are:

1. The Trustee's work in its capacity as IR was at the Court's behest. Like the insolvency professional in *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.*,[37] it is entitled to payment from trust assets for all work done prior to the Bankruptcies.

2. The Trustee, as IR, indicated in its reports to the Court between December 2004 and May 2005 that:

(i) the BC Action existed;

(ii) it had a concern about Kingsway's calculation of premiums owing;

(iii) it was premature to opine on the merits of the BC Action, but once that could be done, a decision would be taken to settle, vigorously defend or purse damages by counter-claim.

3. The allegation of breach of trust in the BC Action is just one of many claims in a broadly cast pleading. The filing of pleadings in a civil action does not mean that the plaintiff will pursue its claim in a bankruptcy.

4. It was not until October 4, 2005 that Kingsway's counsel particularized its trust claim and formally put the Trustee on notice of the position which it now asserts.

5. Kingsway's Notice of Motion was filed November 25, 2005. That is the date on which the clock should run.

2. Prospective Charge

72 *Gill* is the only reported bankruptcy case that specifically addresses prospective charges over trust assets. As might be expected, the decision there turned on the unique facts of the case. There were allegations that the bankrupt had been involved in a scheme to hide his interest in certain properties by having them registered in the names of others. The trustee filed 350 caveats to preserve the interests of creditors and potential proprietary claimants. Information about the extent of the trust property and the claimants was uncertain at the date of the application. The trustee sought a retrospective and prospective charge over the yet unascertained trust assets.

73 Mr. Justice Sigurdson found that the application for a prospective charge was premature, but granted leave to the trustee to reapply on evidence of creditor prejudice. He noted that the trustee's request would ripen when valid trust claims were established and sale proceeds were ready for distribution. He was concerned that affected parties should have notice of the application, an impossibility at the time of the application given that the trustee did not know who they were.

74 The facts in *Gill* are distinguishable from those in the present case. Unlike the situation in *Gill*, the Trustee's application here is not wholly premature. It is clear that Kingsway and the Builder Claimants advance trust claims. The value of Kingsway's claim is established. Values of the assets under administration are known, subject to some further collection efforts and potential litigation recoveries from actions against Kingsway. The trust claims have not been substantiated at present. That alone is not sufficient reason to defer the Trustee's application.

75 *Eron Mortgage Corp.* was followed in *Gill* and therefore merits brief discussion, although the facts in that case also are distinguishable. *Eron Mortgage Corp.* involved the judicial trusteeship of an insolvent company. A court sanctioned lenders' committee sought a charge over (what appear to be undisputed) trust assets to secure past and future payment of expenses and remuneration. Mr. Justice Tysoe concluded that he could exercise inherent jurisdiction to order the charge, but declined to do so, although he gave leave to the committee to reapply. His rationale for declining the charge was that the evidence was unclear about certain committee functions. He considered that it was premature to say what future efforts, if any, would benefit the trust assets.

76 In my view, it is clear in the present case that resolution of Kingsway's claim will benefit the trust claimant if it succeeds. Similarly, the creditors are entitled to have Kingsway's claim tested, presuming the Inspectors agree to the Trustee's involvement in the Appeal.

77 The Trustee's request, however, is not just for a charge over potential trust assets in relation to the Appeal, but for a charge in relation to furthering the general administration of the Bankruptcies, including the Appeal. I understand that the Trustee intends to seek a charge over the assets at issue in the Builder Claimants' matter. However, even excluding that work, the proposed charge encompasses more than the case law presently authorizes for sorting out claims and preserving trust assets. It is a request for a general "super priority" funding order like that available to *BIA* interim receivers under s. 47.2, to judicial receivers, and to debtors in *Companies' Creditors Arrangement Act*[38] proceedings for financing a restructuring (DIP or priming liens).

78 Except in the context of commercial restructuring cases under the *BIA*,[39] caution must be exercised when considering developments concerning inherent jurisdiction emanating from the *CCAA*. The *BIA* and *CCAA* are very different in degree of specificity and the policy considerations involved. For example, courts in *CCAA* proceedings routinely rationalize financing for commercial restructuring that compromises creditors' traditional interests in the name of the greater good. There is an overarching policy concern favouring the possibility of a going concern solution and the potential of a long-term upside value for a broad constituency of stakeholders.[40] Arguably, in some cases, super-priority financing and priming charges must be available if restructuring is to be a possibility.

79 Here, the policy consideration is not to facilitate a potential business survival, but rather to maintain the integrity of the bankruptcy system and to be fair, while recognizing established trusts law.

80 According to the court in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.*,[41] "super priority" funding for judicial receivers ordinarily is limited to circumstances where either:

1. The receiver's appointment is at the request of or with the consent or approval of the holders of security.

2. The receiver's appointment is to preserve and realize assets for the benefit of all interested parties, including secured creditors.

3. The receiver has expended money for the necessary preservation or improvement of the property.

81 In my view, a prospective charge can be fashioned which will respect these limitations. Since the assets under administration are bank accounts and chose in action, the Trustee's work for general estate administration can be restricted to matters of some urgency. If the Appeal is dealt with in a timely fashion, significant hardship to the creditors can be avoided and Kingsway can be offered some assurance deductions from the assets over

which it is claiming a trust will be minimized. I appreciate, however, that some litigation may be time sensitive. Therefore, the Trustee is granted leave to revisit this restriction on evidence of prejudice to the creditors by delaying litigation.

82 A prospective charge will be granted on the Trustee filing a report with the Court confirming that the Inspectors in these Bankruptcies have approved the actions which the Trustee proposes to take, including its involvement in the Appeal and all of the preliminary applications filed by Kingsway that may be heard prior to the Appeal. On the filing of that report, the prospective charge will cover the preliminary applications, the Appeal *per se*, and all steps to readying the Appeal for hearing, whether it is a "paper Appeal" or a directed trial of an issue. Conservative measures for asset maintenance and preservation also are covered by this prospective charge. However, the Trustee may not pursue new asset realization without leave of the Court or Kingsway's consent.

83 The Appeal will proceed on an expedited basis after the hearing of Kingsway's preliminary jurisdictional applications. Any application to have the Appeal dealt with by way of a trial of an issue is to be filed within 14 days of these Reasons and made returnable on May 12, 2006. If there is no such application, a case management meeting will be held May 12, 2006 for the purpose of setting deadlines for the exchange of affidavits, cross-examinations on affidavit and the filing of written submissions.

84 If, as a result of the Appeal, Kingsway establishes a recoverable trust of the magnitude claimed, it will have suffered a loss by virtue of the charge. Nevertheless, that loss will have been incurred, broadly speaking, to benefit the trust in realizing assets and to determine entitlements. If it is held that all of the assets under administration are not impressed with the trust claimed by Kingsway, a hearing is to be held in order to determine out of which funds (i.e. any trust monies owing to Kingsway, any trust monies owing to the Builder Claimants or other parties with a proven trust claim, and the monies to be distributed to creditors), and in what proportion the Trustees' fees and expenses (once approved) are to be taken.

3. Builder Claimants

85 The retrospective and prospective charges which I have granted have the potential to affect the Builder Claimants if they are successful at the end of the day in establishing entitlement to some of the assets under administration. There is no evidence that the Builder Claimants have been given notice of this application. Accordingly, I direct that the Trustee serve the Builder Claimants with notice of my decision. The charges which I am granting will not take effect on any monies claimed by the Builder Claimants until 14 days after the Trustee has filed proof with the Court of service of these Reasons on all of the Builder Claimants. Prior to that time, the Builder Claimants may challenge the charges which I am granting the Trustee over that portion of the assets to which they claim an interest.

4. Costs

86 Costs of this application will be determined following the Appeal. If the Appeal does not proceed for some reason, the parties may return on notice to settle the issue of costs.

Application dismissed.

Footnotes

[*] Affirmed *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABCA 293, 2006 CarswellAlta 1354 (Alta. C.A.).

[1] R.S.C. 1985, c. B-3, as amended and renamed by S.C. 1992, c. 27

2 s. 183(1)

3 *Tlustie, Re* (1923), 3 C.B.R. 654, 23 O.W.N. 622 (Ont. S.C.); *Cheerio Toys & Games Ltd., Re*, [1971] 3 O.R. 721, 15 C.B.R. (N.S.) 77 (Ont. S.C.); varied [1972] 2 O.R. 845 (Ont. C.A.)

4 *A. Marquette & fils Inc. v. Mercure* (1975), [1977] 1 S.C.R. 547 (S.C.C.), at 556

5 (1994), 114 D.L.R. (4th) 176, 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]), at 185 D.L.R.

6 Rules 34-53

7 *Rassell, Re* (1999), 177 D.L.R. (4th) 396, 237 A.R. 136, 12 C.B.R. (4th) 316 (Alta. C.A.); *Nagy, Re*, [1997] 10 W.W.R. 348, 199 A.R. 146, 45 C.B.R. (3d) 160 (Alta. Q.B.); reversed on other grounds [1999] 11 W.W.R. 48, 232 A.R. 399, 13 C.B.R. (4th) 1 (Alta. C.A.); *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572, 35 C.B.R. (4th) 77 (Ont. S.C.J.) at para. 150.

8 *Beetown Honey Products Inc., Re* (2003), 67 O.R. (3d) 511, 46 C.B.R. (4th) 195 (Ont. S.C.J.); affirmed (2004), 3 C.B.R. (5th) 204 (Ont. C.A.)

9 s. 67(1)(a)

10 *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325, 37 C.B.R. (3d) 141 (S.C.C.) at para. 61

11 s. 81(3); *Kenny, Re* (1997), 149 D.L.R. (4th) 508, 37 C.B.R. (4th) 291, 1997 CarswellOnt 6031, 34 O.T.C. 321 (Ont. Gen. Div. [Commercial List])

12 *Gill, Re* (2002), 37 C.B.R. (4th) 257, 2002 BCSC 1401 (B.C. S.C.), at para. 23; *Grant v. Ste. Marie* (2005), 39 Alta. L.R. (4th) 71, 8 C.B.R. (5th) 81, 2005 ABQB 35 (Alta. Q.B.) at paras. 30 and 31; *Westar Mining Ltd., Re* (1999), 13 C.B.R. (4th) 289, 1999 CarswellBC 2149 (B.C. S.C.); *P.A.T., Local 1590 v. Broome* (1986), 61 C.B.R. (N.S.) 233 (Ont. S.C.); *C.J. Wilkinson Ford Mercury Sales Ltd., Re* (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.); *Shirt-Man Inc., Re* (1987), 65 C.B.R. (N.S.) 309, 19 C.C.E.L. 148 (Ont. S.C.); *Genometrics Corp., Re*, 2005 CarswellSask 790, 2005 SKQB 488 (Sask. Q.B.); *McLeod, Re*, 1949 CarswellOnt 88, 29 C.B.R. 163 (Ont. S.C.)

13 (1998), 53 B.C.L.R. (3d) 24, 2 C.B.R. (4th) 184 (B.C. S.C.)

14 *Eron Mortgage Corp., Re*, footnote 14; *Harris v. Conway* (1987), [1989] 1 Ch. D. 32, [1989] B.C.L.C. 28, [1988] 3 All E.R. 71 (Eng. Ch. Div.); *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385, 14 C.B.R. (3d) 6 (Ont. C.A.); *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 106 D.L.R. (4th) 132 (Ont. C.A.)

15 *Ridout Real Estate Ltd., Re* (1957), 36 C.B.R. 111 (Ont. S.C.); *NRS Rosewood Real Estate Ltd., Re* (1992), 9 C.B.R. (3d) 163 (Ont. Bktcy.); *Nakashidze, Re*, [1948] O.R. 254, 29 C.B.R. 35 (Ont. H.C.); *Walter Davidson Ltd., Re* (1957), 10 D.L.R. (2d) 77, 36 C.B.R. 65 (Ont. S.C.)

16 R.S.A. 2000, c. T-8, s. 44. The Act expressly permits charging of trust assets for the fees of judicial trustees, but

otherwise is silent.

17 *Trustee Act*, footnote 16, s. 1(b)

18 *BIA*, footnote 1, s. 72(1); see also the discussion concerning operational conflict in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at 190: "[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament." In my view, the overarching principle to be derived from *Multiple Access Ltd.* and later cases is that a provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means. Impossibility of dual compliance is sufficient but not the only test for inconsistency.

19 (1979), 95 D.L.R. (3d) 458, 13 A.R. 420 (Alta. C.A.)

20 *Sproule v. Montreal Trust Co.*, footnote 20, para. 11

21 *P.A.T., Local 1590 v. Broome*, footnote 12, pp. 236 tp 237

22 (1988), 63 O.R. (2d) 635, 67 C.B.R. (N.S.) 98 (Ont. Bktcy.)

23 footnote 12

24 footnote 12

25 D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989), 68 Can. Bar Rev. 315 at 321

26 footnote 12 at para. 31

27 footnote 12

28 footnote 15

29 footnote 15

30 footnote 15

31 footnote 12

32 footnote 15

33 [1994] O.J. No. 1917 (Ont. Gen. Div. [Commercial List])

34 1994 CarswellOnt 3853 (Ont. Gen. Div. [Commercial List]) at paras. 8 and 9

35 footnote 34 at para. 8

36 footnote 14

37 footnote 14

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

39 *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271, 2005 CarswellOnt 1963 (Ont. S.C.J.), leave to appeal to Ont. C.A. granted (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]).

40 *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]); David B. Light, "Involuntary Subordination of Security Interests to Charges for DIP Financing under the *Companies' Creditors Arrangement Act*," (2005) 30 C.B.R. (4th) 245.

41 (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.), at 205-206

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2019 BCSC 2221
British Columbia Supreme Court

Petrowest Corporation v. Peace River Hydro Partners

2019 CarswellBC 3819, 2019 BCSC 2221, 100 B.L.R. (5th) 128, 313 A.C.W.S. (3d) 239, 74 C.B.R. (6th) 53

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd., and Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd. (Plaintiffs) and Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A., and Samsung C&T Corporation (Defendants)

Iyer J.

Heard: October 2, 2019
Judgment: December 20, 2019
Docket: Vancouver S189418

Counsel: J. Schmidt, K. Meyer, for Plaintiffs
D. De Groot, for Defendants

Subject: Civil Practice and Procedure; Contracts; Insolvency

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Stay of court proceedings — Discretion of court to grant stay
Defendants formed partnership that contracted with provincial hydro company to do certain construction work on project, and defendants then subcontracted work to plaintiffs — Court appointed receiver of plaintiffs, and receiver was subsequently appointed trustee in bankruptcy — Plaintiffs filed notice of civil claim seeking recovery of amounts allegedly owing for performance of subcontracted work — Defendants applied for stay of claim on ground that mandatory arbitration clauses in various subcontracts governed resolution of all of plaintiffs' claims — Application dismissed — Receiver acquired contractual rights of plaintiffs to sue on agreements through bankruptcy order, and in that sense receiver was party to agreements — Where receiver was suing on agreements in its own name as trustee, it was party to agreements for purposes of s. 15 of Arbitration Act (AA) — Defendants applied for stay before filing defence or taking any other step in proceedings — Some of claims were captured by arbitration clauses — For purposes of application, it was assumed that arbitration clauses were not void, inoperative or incapable of performance, and s. 15 of AA was engaged — Section 15(2) of AA does not prevent court from exercising its discretion to determine whether to

refuse to stay proceedings where s. 183 of Bankruptcy and Insolvency Act (BIA) applies — Exercise of inherent jurisdiction under BIA was not confined to situations that approached abuse of process or threatened integrity of entire insolvency process — Resort to inherent jurisdiction was available as important but sparingly used tool — Where BIA is silent, court has jurisdiction to craft appropriate remedies to ensure fair, orderly and expeditious resolution of proceedings before it, but court should only exercise its jurisdiction where benefit of granting remedy to insolvency process as whole outweighs prejudice to affected parties — Consideration of relevant factors tipped balance in favour of exercising court's inherent jurisdiction to override arbitration clauses — Overriding arbitration clauses would promote efficient and inexpensive resolution of dispute — Defendants had not pointed to any prejudice if arbitration clauses were overridden and claims were decided by court — Granting stay would significantly compromise objectives of BIA in relation to bankruptcy proceedings.

Table of Authorities

Cases considered by *Iyer J.*:

Commonwealth Insurance Co. v. Larc Developments Ltd. (2010), 2010 BCCA 18, 2010 CarswellBC 74, 100 B.C.L.R. (4th) 139, 86 C.L.R. (3d) 1, 315 D.L.R. (4th) 242, 282 B.C.A.C. 99, 476 W.A.C. 99 (B.C. C.A.) — considered

Dufferin Paving Co. v. George A. Fuller Co. of Canada (1934), [1935] O.R. 21, [1935] 1 D.L.R. 538, [1934] O.W.N. 670, 1934 CarswellOnt 63 (Ont. C.A.) — considered

Fofonoff v. C & C Taxi Service Ltd. (1977), 3 B.C.L.R. 159, 5 C.P.C. 131, 3 C.L.R. 159, 1977 CarswellBC 90 (B.C. S.C.) — considered

Hayes Forest Services Ltd., Re (2009), 2009 BCSC 1169, 2009 CarswellBC 2286, 57 C.B.R. (5th) 52 (B.C. S.C.) — considered

Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership (2018), 2018 BCSC 970, 2018 CarswellBC 1565, 60 C.B.R. (6th) 267 (B.C. S.C.) — considered

New Skeena Forest Products Inc. v. Kitwanga Lumber Co. (2005), 2005 BCCA 154, 2005 CarswellBC 578, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327, *(*sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, *(*sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, *(*sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185 (B.C. C.A.) — considered

Pope & Talbot Ltd., Re (2009), 2009 BCSC 1552, 2009 CarswellBC 3060, [2010] I.L.R. I-4922, 61 C.B.R. (5th) 16, 66 B.L.R. (4th) 58, 2 B.C.L.R. (5th) 132, [2010] 6 W.W.R. 449 (B.C. S.C.) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABQB 236, 2006 CarswellAlta 383, 21 C.B.R. (5th) 57, 62 Alta. L.R. (4th) 168, *(*sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 393 A.R. 340 (Alta. Q.B.) — considered

Residential Warranty Co. of Canada Inc., Re (2006), 2006 ABCA 293, 2006 CarswellAlta 1354, 25 C.B.R. (5th) 38, [2006] 12 W.W.R. 213, *(*sub nom. *Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of))* [2006] I.L.R. I-4552, 65 Alta. L.R. (4th) 32, 275 D.L.R. (4th) 498, *(*sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 417 A.R. 153, *(*sub nom. *Residential Warranty Co. of Canada Inc. (Bankrupt), Re)* 410 W.A.C. 153 (Alta. C.A.) — considered

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, 1999 ABCA 179 (Alta. C.A.) — considered

Tylon Steepe Homes Ltd. v. Pont (2009), 2009 BCSC 103, 2009 CarswellBC 207, 78 C.L.R. (3d) 123, 93

B.C.L.R. (4th) 322 (B.C. S.C. [In Chambers]) — considered

Statutes considered:

Arbitration Act, R.S.B.C. 1996, c. 55
s. 1 "arbitration agreement" — considered

s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

Arbitration Act, 1991, S.O. 1991, c. 17
Generally — referred to

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

s. 71 — considered

s. 183 — considered

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

s. 11 — considered

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009
Generally — referred to

R. 21-8(1)(b) — considered

R. 21-8(2) — considered

APPLICATION by defendants for stay of plaintiffs' claims pending mandatory arbitration.

***Iyer J.*:**

INTRODUCTION

1 This application arises out of the construction of the Site C project in northern British Columbia. Very briefly, the defendants formed a partnership that contracted with BC Hydro to do certain construction work on the project. They then subcontracted the work to the plaintiffs (excepting Ernst and Young). Subsequently, the Alberta Court of Queen's Bench appointed the plaintiff Ernst and Young as receiver of the plaintiff Petrowest entities ("Receiver"). After the appointment of the Receiver, the plaintiffs filed a notice of civil claim seeking recovery of amounts allegedly owing for performance of the subcontracted work ("Claim"). In this application, the defendants ask for a stay of the Claim on the ground that mandatory arbitration clauses in the various subcontracts govern resolution of all of the plaintiffs' claims.

2 In order to decide whether to stay the Claim, I must answer three broad questions. First, is s. 15 of the

Arbitration Act, which mandates a stay of proceedings under certain circumstances, engaged in this case? If it is, does the court nevertheless have discretion not to stay the proceedings? If the court has that discretion, how should that discretion be exercised in this case?

BACKGROUND FACTS

3 Petrowest Corporation (”Petrowest”) is the parent company of all of the other plaintiffs (”Petrowest Affiliates”) with the exception of the Receiver. The defendants consist of the partnership, Peace River Hydro Partners (”PRHP”), and two members of PRHP, Acciona Infrastructure Canada Inc. (”Acciona”) and Samsung C&T Canada Ltd. (”Samsung”) and their respective parent corporations. Petrowest is the third member of PRHP.

4 The relationship between the partners of PRHP is governed by a General Partnership Agreement (”Agreement”) and a Guarantee and Cross Indemnity Agreement (”Guarantee”). Some of the work PRHP subcontracted to Petrowest and the Petrowest Affiliates is governed by purchase orders (”Purchase Orders”) and some of the work is governed by a subcontract agreement (”Subcontract”). Most, if not all, of these various agreements (collectively, “Agreements”) contain mandatory arbitration clauses (”Arbitration Clauses”).[1]

5 The wording of the four Arbitration Clauses differ; each applies to a different set of disputes and each establishes a different arbitration process. The plaintiffs also contend that some of the claims pleaded in the Claim are not subject to arbitration clauses and would have to be heard by a court. It is possible that some of these complexities could be resolved. However, as the defendants concede, it is very likely that arbitration under the Agreements will entail multiple proceedings, with attendant practical challenges and increased cost.

6 The Agreement and Guarantee were entered into in December 2015. The Petrowest Affiliates invoiced for the work they performed under the Purchase Orders Subcontract between 2015 and 2017.

7 In August 2017, PRHP purportedly terminated Petrowest as a partner. The Receiver was appointed in the same month. On April 3, 2018, the Receiver assigned Petrowest and the Petrowest Affiliates into bankruptcy. The court order appointed the Receiver as the trustee in bankruptcy.

8 The plaintiffs commenced the Claim on August 29, 2018, seeking recovery from PRHP of amounts they say are owed to them under the Agreement, Purchase Orders and Subcontract, and from Acciona (and its parent) and Samsung (and its parent) under the Guarantee.

POSITIONS OF THE PARTIES

9 The plaintiffs say that the Receiver is not a party to the Agreements containing the Arbitration Clauses and is not bound by the debtor’s contracts. Further, as a court appointed officer, the plaintiffs say that the Receiver has the powers and obligations conferred under the *Bankruptcy and Insolvency Ac*t, R.S.C. 1985, c. B-3 (”*BIA*”) permitting it to request the court to exercise its inherent jurisdiction to displace private contractual rights in order to achieve the objectives of the *BIA*.

10 The defendants disagree. Essentially, they say that because the Receiver and the other plaintiffs are advancing contractual claims they are bound by the Agreements. They say the plaintiffs cannot rely only on those contractual clauses that favour them and at the same time maintain that other provisions of the same contracts do not apply.

11 Both positions have some merit.

ANALYSIS

Is Section 15 of the Arbitration Act Engaged in this Case?

12 Section 15 of the *Arbitration Act* requires the court to enforce valid arbitration agreements by staying court proceedings commenced in breach of such agreements:

> 15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

13 "Arbitration agreement" is defined in s. 1 of the *Arbitration Act* to mean a term in any agreement between two or more parties to submit disputes between them to arbitration. Section 15 therefore mandates a stay of proceedings where:

> 1. A party to an agreement containing an arbitration clause commences legal proceedings against another party to the agreement;
>
> 2. The party seeking the stay applies to the court before filing a response or taking any other step in the proceedings;
>
> 3. The subject matter of the proceedings is captured under the arbitration clause; and
>
> 4. The arbitration clause is not void, inoperative, or incapable of performance.

14 I will address each requirement in turn.

Is the Receiver a Party to the Agreements?

15 Under the receivership order, the Receiver has the power to receive and collect all amounts owing to Petrowest and the Petrowest Affiliates, and to exercise all remedies Petrowest and the Petrowest Affiliates could otherwise exercise in order to collect those amounts. The Receiver also has the power to initiate and prosecute any proceedings in relation to Petrowest and the Petrowest Affiliates and their property.

16 The Receiver is also the trustee in bankruptcy of Petrowest and the Petrowest Affiliates. When a bankruptcy order is made, s. 71 of the *BIA* provides that the trustee acquires the debtor's property of the debtor, including its contractual rights:

> [71] On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

17 That means that the Receiver acquired the contractual rights of Petrowest and the Petrowest affiliates to sue on the Agreements through the bankruptcy order. In that sense, the Receiver is a party to the Agreements.

18 The plaintiffs argue that the Receiver is not a party to the contracts, relying on *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154 (B.C. C.A.) and *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCSC 970 (B.C. S.C.)

("*Wedgemount*"). Both cases are distinguishable on the basis that neither involved situations where the receiver was also the trustee in bankruptcy, a fact that the Court of Appeal expressly noted in *New Skeena* at para. 16. Further, in neither of those cases was the receiver seeking to enforce contractual claims. The receiver in *New Skeena* was disclaiming a contract (para. 2). In *Wedgemount*, the court rejected the argument that the receiver's claim was under the contract, instead characterizing it as based on representations made by a party to the contract (paras. 45-46).

19 A receiver may apply to the court to break a material contract and, in that limited sense, may not be "bound" by the contract: *New Skeena* at para. 17, quoting *Bennett on Receiverships*, 2d ed (Toronto: Carswell, 1999) at 341. However, that does not mean that the receiver is not a party to the contract within the meaning of s. 15 of the *Arbitration Act*. In cases such as this, where the Receiver is suing on the Agreements in its own name as the trustee, it is a party to the Agreements for the purposes of s. 15.

Did PRHP apply for a stay before filing a response or taking any other step in the proceedings?

20 Even if the Receiver is a party to the Agreements, the plaintiffs submit that the defendants took a "step in the proceedings" before commencing this application, and therefore are barred from bringing it now. They base this argument on a letter sent by counsel for the defendants stating that "we undertake to file a defense in due course." The plaintiffs say that giving an undertaking is a step in the proceedings.

21 In *Commonwealth Insurance Co. v. Larc Developments Ltd.*, 2010 BCCA 18 (B.C. C.A.), the Court of Appeal considered the distinction between mere correspondence between parties and an action that is contemplated by the Rules. In one such case, a demand for particulars (even though it was made in a letter) was held to be a step in the proceedings because the Rules require a demand to be made before a party can apply to court for an order for particulars: *Fofonoff v. C & C Taxi Service Ltd.* (1977), 3 B.C.L.R. 159 (B.C. S.C.).

22 In *Larc*, the chambers judge distinguished *Fofonoff* on the basis that the stay applicant had expressly stated its intention to seek a stay of the court proceedings in its letter demanding particulars. On that basis, the chambers judge concluded that the applicant had not demonstrated a willingness to have the dispute determined in court.

23 The Court of Appeal disagreed, ruling that a party's intention *not* to embrace the court's jurisdiction is irrelevant if it has taken a step in the proceedings:

> [34] Once it is determined that a demand for particulars has been made under the *Rules of Court*, a step in the proceedings has been taken and a stay under s. 15 of the *Commercial Arbitration Act* no longer is available. A party cannot render the step nugatory by suggesting it may seek to refer the matter to arbitration. It cannot undo what has been done. The orderly administration of justice requires certainty in these matters.

24 The Court of Appeal succinctly stated the underlying rationale (at para. 19): "A party should not be entitled to take the benefit of the litigation process - obtaining particulars - while preserving the ability to reject that process in favour of arbitration."

25 The plaintiffs submit that the defendants took "the benefit of the litigation process" because they obtained the plaintiffs' agreement to delay the date for filing a defense for some weeks. However, the evidence consists only of the defendants' counsel's letters. There is no evidence that the plaintiffs would have acted differently if the letter had not contained an undertaking and had simply stated that the defendants "will" file a defense by a certain date.

26 *Larc* establishes that a party takes the benefit of the litigation process when it relies on the Rules of Court:

> [37] In my view, a request for information solely to determine whether a claim is subject to arbitration — whether the arbitration agreement is void, inoperative or incapable of being performed — would not be a bar to obtaining a stay of proceedings in favour of arbitration. In such a case, a party clearly would not be relying on the authority of the Rules of Court to advance its position in the litigation. It would not be affirming its acceptance of the litigation process . . .

27 That rationale does not support the plaintiffs' position: by undertaking to provide a defense, the defendants did not rely on or invoke the Rules of Court. They communicated their intention to file a defense by a certain date. The plaintiffs' reliance on *Dufferin Paving Co. v. George A. Fuller Co. of Canada* (1934), [1935] O.R. 21 (Ont. C.A.), 1934 CanLII 123) is misplaced. There, the court found that "an undertaking that, on the particulars being furnished and the extension of time granted, the defendant would file its statement of defence" would amount to a step in the proceedings for the purposes of the Ontario Arbitration Act. However, unlike the undertaking at issue here, the undertaking in *Dufferin* clearly did invoke a rule of court as it amounted to a demand for particulars. *Dufferin* does not suggest that simply undertaking to file a defence is a step in the proceedings.

28 The plaintiffs also argue that the defendants' failure to file a jurisdictional response under Rule 21-8(1)(b) before bringing this application means that they have attorned to the jurisdiction of this court. The purpose of this rule is to address conflicts of laws issues, that is, issues of *territorial* jurisdiction, which is not the case here. In any case, Rule 21-8(2) provides a complete answer to this submission since it expressly permits stay applications:

> Whether or not a party referred to in subrule (1) applies or makes an allegation under that subrule, the party may apply to court for a stay of the proceedings on the ground that the court ought to decline to exercise jurisdiction over that party in respect of the claim made against that party in the proceedings.

29 I conclude that PRHP applied for a stay before filing a defense or taking any other step in the proceedings.

Is the Subject-Matter of the Proceedings Captured under the Arbitration Clauses?

30 As I have indicated, there is some dispute about whether all of the claims advanced by the plaintiffs in this court are subject to the Arbitration Clauses because some of the purchase orders may not adopt the Arbitration Clauses. For the purposes of this application, it is sufficient that some of the claims are captured by the Arbitration Clauses.

Are the Arbitration Clauses Void, Inoperative, or Incapable of Performance?

31 The defendants say that there is no evidence that the Arbitration Clauses are void, inoperable or incapable of being performed. The plaintiffs assert that Acciona's purported termination of Petrowest as a partner in PRHP in August 2017 bars the defendants from relying on the arbitration clause in the Agreement. They also say that the arbitration clauses that apply to the Purchase Orders are "inoperative" because the language used is permissive rather than mandatory. They rely on *Tylon Steepe Homes Ltd. v. Pont*, 2009 BCSC 103 (B.C. S.C. [In Chambers]), in which this court held that contractual language that "entitles" a party to give notice of a dispute and to "request" arbitration does not constitute a mandatory arbitration clause.

32 It is not clear on the evidence before me whether the termination is valid or, if it is not, that the arbitration clause in the Agreement cannot apply. Further, with the exception of the arbitration clause in the purchase orders, the language in the Arbitration Clauses is clearly mandatory.

33 Accordingly, for the purposes of the present application, I am prepared to assume that the Arbitration

Clauses (or some of them) are not void, inoperative or incapable of performance.

34 I conclude that s. 15 of the *Arbitration Act* is engaged in this case.

Does the Court have the Discretion to Decline a Stay when Section 15 Applies?

35 It is well settled that s. 11 of the *Companies Creditors Arrangement Act* ("*CCAA*") empowers the court to override an arbitration clause and the otherwise mandatory requirement in s. 15(2) of the *Arbitration Act*: *Smoky River Coal Ltd., Re*, 1999 ABCA 179 (Alta. C.A.) [hereinafter Luscar]; *Hayes Forest Services Ltd., Re*, 2009 BCSC 1169 (B.C. S.C.); *Pope & Talbot Ltd., Re*, 2009 BCSC 1552 (B.C. S.C.).

36 Section 11 reads:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

37 There is no equivalent provision in the *BIA*. However, s. 183 of the *BIA* invests this court:

> . . . with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers.

38 In *Pope & Talbot*, Walker J. affirmed the proposition that the *BIA* confers jurisdiction on the superior courts to disrupt private contractual rights (at para. 118). Walker J. interpreted s. 183 of the *BIA* as empowering the court to exercise its "inherent jurisdiction to control its own processes in order to promote the objectives of the *BIA*" (at para. 126). He explained that the underlying rationale is to achieve fairness in the bankruptcy process and achieve the underlying objectives of the *BIA*, citing the decision of Topolniski J. in *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236 (Alta. Q.B.) ("*Residential Warranty QB"*):

> [119] The rationale underlying that point is well set out in the decision of Topolniski J., whose reasoning was affirmed by the Alberta Court of Appeal in *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABQB 236, 62 Alta. L.R. (4th) 168, aff'd 2006 ABCA 293, 65 Alta. L.R. (4th) 32:
>
> > [25] A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of the bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.

39 Walker J. relied on this reasoning to stay the operation of an arbitration clause in the case before him.

40 Although *Pope & Talbot* does not expressly refer to s. 15 of the *Arbitration Act*, Walker J.'s use of the court's inherent jurisdiction to override an arbitration clause implies that the *BIA* empowers the court to avoid the operation of s. 15 of the *Arbitration Act* in appropriate circumstances. Certainly, that was the conclusion reached by Butler J. in *Wedgemount*. After concluding that the dispute before him was not "the type of dispute that the arbitration agreement provided would be referred to arbitration" (at para. 46), he added:

> [47] However, if I am wrong in coming to that conclusion, I nevertheless conclude that the Court has the inherent jurisdiction to consider the Receiver's application. In doing so, I rely on the decisions of this Court in *Pope & Talbot* and the decision in *Hayes Forest Services Limited (Re)*, 2009 BCSC 1169.

41 I conclude that s. 15(2) of the *Arbitration Act* does not prevent this court from exercising its discretion to determine whether to refuse to stay proceedings where s. 183 of the *BIA* applies.

42 Before leaving this issue, I note an undecided point. The court's exercise of its inherent jurisdiction to refuse a stay may function in one of two ways. First, it may render the arbitration clause "incapable of being performed" or "inoperative" within the meaning of s. 15(2). Alternatively, if s. 15(2) does not admit of that interpretation, there could be a conflict between provincial and federal laws, so that the principle of paramountcy would require the federal law to prevail. That question was raised, but not answered, in *Luscar*, at paras. 73-75. As the issue was not argued before me, and it is not necessary to decide it here, I will not address it further.

How Should the Court Exercise its Discretion in this Case?

43 *Pope & Talbot* holds that the approach to arbitration clauses under the *BIA* is the same as that under the *CCAA*. Specifically, Walker J. wrote that the approach taken by courts under s. 11 of the *CCAA* in cases like *Hayes*, "is not confined to *CCAA* proceedings", and can be used under s. 183 of the *BIA* (at paras. 130-131).

44 However, the source of the court's power to override an arbitration clause differs as between the two statutes. Unlike s. 11 of the *CCAA*, the exercise of inherent jurisdiction under the *BIA* is a "special and extraordinary power". In this respect, the remarks of the Alberta Court of Appeal in *Residential Warranty Co. of Canada Inc., Re*, 2006 ABCA 293 (Alta. C.A.) ("*Residential Warranty CA*") are apposite (cited in *Pope & Talbot* at para. 127):

> [20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case. . . .
>
> [21] Further limitations are based on the nature of the *BIA* — it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. . . . However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: [citations omitted]. It has also been used where there is no other alternative available: [citations omitted] and to accomplish what justice and practicality require: [citation omitted].
>
> . . .
>
> [37] Generally, inherent jurisdiction should only be exercised where it is necessary to further fairness and efficiency in legal process and to prevent abuse.

45 *Pope & Talbot* and *Wedgemount* are the only two cases to which I was referred that involved exercise of the court's inherent jurisdiction under the *BIA* to override an arbitration clause. Both concerned arbitration clauses that threatened to derail the bankruptcy process. In *Pope & Talbot*, the court described the effect of allowing the arbitration clause to operate as permitting the stay applicant to hold the insolvency proceedings "hostage" (at para. 136). In *Wedgemount*, the court found that allowing the arbitration clause to operate would mean that the plaintiff's power generation project would fail, with the result that the issues between the parties might never be resolved on their merits (at para. 50).

46 By contrast, the cases decided under the *CCAA* appear to turn on issues of expense and efficiency. For example, in *Hayes*, the court overrode the arbitration clause because judicial resolution of the dispute was less

expensive, more expeditious (particularly given the availability of judicial review of arbitrations), could be accomplished within certain time constraints, and the issues were appropriate for judicial determination.

47 In my view, the exercise of inherent jurisdiction under the *BIA* is not confined to situations that approach an abuse of process, or threaten the integrity of the entire insolvency process, as was the case in *Wedgemount* and *Pope & Talbot*. This is so in spite of the differences between the *BIA* and the *CCAA*. Concerns of fairness and efficiency are no less fundamental to the *BIA* than to the *CCAA*. To a much greater extent than in other areas of the law, a bankruptcy court requires flexibility to balance the interests of the various stakeholders involved and fashion pragmatic solutions to unanticipated problems that may arise in the course of the insolvency proceedings.

48 Accepting that resort to inherent jurisdiction is "available as an important but sparingly used tool", I adopt the approach of Topolniski J. in *Residential Warranty QB* at para. 26 (cited in *Pope & Talbot* at para. 120):

> There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.

49 In other words, where the *BIA* silent, the court has the jurisdiction to craft appropriate remedies to ensure the fair, orderly, and expeditious resolution of the proceedings before it. However, the court should only exercise its jurisdiction where the benefit of granting the remedy to the insolvency process as a whole outweighs the prejudice to affected parties.

50 In affirming Topolniski J.'s judgment, the Alberta Court of Appeal set out the following additional factors in *Residential Warranty CA* (quoted in *Pope & Talbot* at para. 128) to guide this assessment:

> (a) the stage of the proceedings and the effect of such an order on them - "for example, the ability of the trustee to make distributions and their amount may depend on the determination of the issue";
>
> (b) the need to maintain the integrity of the bankruptcy process - "[t]he equitable distribution of the bankrupt estate must remain at the forefront";
>
> (c) the realistic alternatives in the circumstances;
>
> (d) the impact on the trust claimants and the trust property as well as on other creditors; and
>
> (e) the anticipated time and costs involved.

51 The situation in the present case is less dire than in *Wedgemount* or *Pope & Talbot*. There is no evidence that enforcing the Arbitration Clauses will derail the insolvency proceedings or fundamentally threaten their integrity. Nor is there evidence that the defendants are using the Arbitration Clauses for some ulterior purpose damaging to the plaintiffs.

52 Nevertheless, consideration of the relevant factors tips the balance in favour of exercising my inherent jurisdiction to override the Arbitration Clauses.

53 The plaintiffs' claim seeks over $10M against the defendants, excluding interest. Presumably, a claim in this amount is of significance to the creditors and both their interest and the integrity of the bankruptcy process are promoted by timely and cost-effective determination of the plaintiffs' claims.

54 At this stage of the proceedings, these claims will need to be resolved before any distribution of assets can take place. However, if the Arbitration Clauses are not overridden, following the language of the Agreements, four arbitration processes will be required:

a) Under the Agreement, claims between the plaintiffs, Acciona and Samsung must be decided by a three-person panel following the arbitration rules of the international chamber of commerce ("ICC Rules");

b) Under the Guarantee, claims between the plaintiffs, Acciona, Samsung and each of their parents must be decided by a three-person panel following the ICC Rules;

c) Under the Purchase Orders, claims between the Petrowest Affiliates and PRHP must be decided by a single arbitration under the arbitration rules of the BC International Commercial Arbitration Centre ("BCICAC Rules") following specified pre-arbitration steps; and

d) Under the Subcontract, claims between a particular Petrowest Affiliate and PRHP must be decided by a single arbitration under the BCICAC Rules following different specified pre-arbitration steps.

55 Further, some percentage of the claims under the Purchase Orders do not contain express arbitration clauses. The dispute between the parties about whether those claims are subject to arbitration at all could be decided by an arbitrator initially, but may be subject to judicial review. Any claims that are found not to be governed by arbitration clauses would have to be determined by a court.

56 The parties agree that overriding the Arbitration Clauses would promote the efficient and inexpensive resolution of their dispute. A single judicial process will be faster and less expensive than four arbitrations and a possible court case. No one has suggested that the issues are not appropriate for judicial determination.

57 The defendants correctly note that the parties could agree to streamline the arbitration process; however, there is no evidence that there is any realistic likelihood of that occurring.

58 Importantly, the defendants have not pointed to any prejudice if the Arbitration Clauses are overridden and the claims are decided by a court. They simply rely on the general principle that courts should defer to the jurisdiction of arbitrators.

59 There is no question in this case that the *Pope & Talbot* factors strongly favour overriding the Arbitration Clauses. In saying this, I am not suggesting that the court's inherent jurisdiction under the *BIA* is identical to its statutory powers under s. 11 of the *CCAA*, nor that a case decided under the *CCAA* is determinative of an issue to which the *BIA* applies. Rather, on the particular facts of this case, I am persuaded that overriding the Arbitration Clauses would be an appropriate exercise of my inherent jurisdiction under the *BIA*, given the lack of any evidence of prejudice to the defendants and the obvious benefit to the insolvency process as whole in granting such relief.

60 The defendants say that that this is not an unusual commercial dispute. I take them to be implying that overriding the Arbitration Clauses would lead to the "potentially wide-ranging consequences" about which Butler J. expressed concern in *Wedgemount* (at para 42). I do not agree. This case involves a significant amount of money in which the bankrupts' creditors have an interest. The difference in the cost and time involved of prosecuting the claim in court as compared to the multiple arbitration proceedings is substantial. The bankruptcy order was made in April 2018. It will not be possible to distribute the proceeds of the bankrupts' estates until these disputes are resolved. I agree that the inherent jurisdiction of the court should be used sparingly. However, the significant cost and delay inherent in the multiple proceedings that would occur in this case as compared to judicial determination is unfair to the creditors and contrary to the objects of the *BIA*. The absence of any prejudice to the defendants is an important distinguishing factor.

61 On that basis, I conclude that granting the stay sought by the defendants would significantly compromise achievement of the objectives of the *BIA* in relation to the bankruptcy proceedings.

62 The stay application is dismissed.

Application dismissed.

Footnotes

1 The plaintiffs say that the purchase orders do not all contain the same terms and may not all contain arbitration clauses. For the present purposes it is not necessary for me to decide that question.