Court File No.: CV-23-00703933-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

QUALITY RUGS OF CANADA LIMITED

Applicant

- and -

WAYGAR CAPITAL INC., AS AGENT FOR NINEPOINT CANADIAN SENIOR DEBT MASTER FUND L.P.

Respondent

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF QUALITY RUGS OF CANADA LIMITED AND THE OTHER COMPANIES LISTED IN SCHEDULE "A" HERETO (THE "APPLICANTS")

LIUNA LOCAL 183 BRIEF OF AUTHORITIES

September 20, 2023

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TO: THE SERVICE LIST

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INDEX

TAB 1

01A

Court File No. 13-10181-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COMSTOCK CANADA LTD., CCL EQUITIES INC., AND CCL REALTY INC.

Applicants

ENDORSEMENT OF NEWBOLD J.

Counsel:

Harvey Chaiton – BMO Dip Lender
Demetrios Yiokaris/Adrian Scotchmer – IBEW and Locals 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 1687
Robin Schwill - Monitor
Tony Reyes/Alex McFarlane –Comstock/CCAA Companies
Brett Harrison – Board of Directors
Aubrey Kauffman –Honeywell

October 2, 2013

The relief sought today by BMO to freeze account is contested by the unions, by the company's board of directors, by Honeywell Limited and by Comstock. The Monitor takes no position.

The intent of BMO is to freeze the account so that it may exercise its set off right. Under para. 47(g) of the Initial Order, two days' notice is required before these set-off rights may be exercised. Mr. Chaiton says that para. 47(b) does not prevent BMO from asking for interim relief, and he is right in saying that. It becomes a matter of discretion, and the relative harm to the various parties.

The money to be paid out between now and Friday is (i) $600,000 to subcontractors, (ii) $750,000 to payroll and (iii) $431,000 in source deductions.

The risks of providing sub-contracted services in this CCAA proceeding were well known to the sub-contractors, and it was BMO's Dip advances that have permitted that. The balance favours BMO as against the sub-contractors.

The same cannot be said to labour. These people provided work and expected to be paid for it. They are not individually in the business of running CCAA risks. I am not prepared to freeze the payroll due before Friday.

The directors of Comstock may have liabilities for source deductions not remitted. They of course were prepared to run the risks of a CCAA proceeding, and may or may not have obtained insurance coverage. The balance favours BMO regarding the same deductions.

In the circumstances, the money now held by BMO in the account in question, being approximately $7.56 million, is frozen until the return of BMO's motion to appoint a receiver to be heard Friday, October 5, 2013 except to the extent of payroll due before then in the approximate amount of $750,000, and except as may be agreed by BMO and the Monitor.

Newbould J.

Court File No. CV13-10181-00CL

02

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF COMSTOCK CANADA LTD., CCL EQUITIES INC., AND CCL REALTY INC.

October 2, 2013

The relief sought today by BMO to freeze accounts is contested by the unions, by the company's Sol J directors, by Comstock Harvey well Limited and The Manitou takes no position.

The intent of BMO is to freeze the accounts so that it may exercise its set off rights. Under para 47(5) of the Initial Order, two days notice is required before these set off rights may be exercised. Mr. Chaiton says that para 47(5) does not prevent BMO from asking for interim relief, and he is right in saying that. The

Doc#2828919v1

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceedings commenced at Toronto

MOTION RECORD

(interim relief and appointment of receiver)
(returnable October 2, 2013)

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Lawyers for Bank of Montreal

03

becomes a matter of discretion, and the relative harm to the various parties.

The money to be paid out between now and Friday is (i) £60,000 to sub-contractors, (ii) £7,500, and [redacted] in payroll and (iii) £[redacted], on in source deductions.

The risks of providing sub-contracted services in this CCAA proceeding were well known to the sub-contractors, and it was BMO's DIP advance that have permitted that. The balance favours BMO as against the sub-contractors.

The same cannot be said [redacted] Labour. These people provided work and expect to be paid for it. They are not individually in the business of running CCAA risks. I am not prepared to forgo the payroll due before Friday.

The directors of Comstock may have liabilities for source deductions not remitted, they of course were prepared to run the risks of a CCAA proceeding, and may or may not have obtained insurance coverage. The balance favours BMO [redacted] regarding the source deductions.

In the circumstances, the money now held by BMO in the accounts in question, being approximately $7.56 million, is frozen ~~except to the extent~~ until the return of BMO's motion to appoint a receiver to be heard on Friday, October 5, 2013 except to the extent of payment otherwise in the approximate amount of $750,000, and except as may be agreed by BMO and the Monitor.

TAB 2

2000 CarswellOnt 3544
Ontario Superior Court of Justice

News Canada Marketing Inc. v. TD Evergreen

2000 CarswellOnt 3544, [2000] O.J. No. 3705, 100 A.C.W.S. (3d) 145, 100 A.C.W.S. (3d) 45

News Canada Marketing Inc., Plaintiff and TD Evergreen, A Division of TD Securities Inc./Valeurs Mobilieres TD Inc., Defendant

Nordheimer J

Heard: September 29, 2000
Judgment: October 4, 2000
Docket: 00-CV-188234CM

Counsel: *Joseph C. D'Angelo*, for Plaintiff.
F. Paul Morrison and *Ian A.C. MacKinnon*, for Defendant.

Related Abridgment Classifications
Civil practice and procedure
XV Preservation of property rights pending litigation
XV.2 Interim preservation of property
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party

Headnote
Practice --- Pre-trial procedures — Interim preservation of property
Purchaser and vendor entered in to share purchase agreement — Purchaser placed sum of purchase price into escrow account held by defendant and subject to escrow agreement — Vendor indemnified purchaser under share purchase agreement — Purchaser was to notify defendant regarding claims for indemnity and defendant would interplead disputed amount if no objection by vendor — Purchaser sent notice to defendant but it was not received until after defendant had advanced funds to vendor in advance of date set out in escrow agreement — In advance of its request to forward funds early, vendor knew of purchaser's notice and failed to inform defendant — Motion by purchaser to pay funds in escrow account into court was granted — Vendor was ordered to pay into court proportion of moneys improperly advanced, sufficient to bring total amount equal to purchaser's claim — Interpretation of indemnity clause was serious issue to be tried — Balance of convenience favoured maintenance and protection of fund held in escrow.

Table of Authorities
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 45 — considered

R. 45.01 — considered

R. 45.02 — considered

***Nordheimer J.*:**

1 In this motion, the plaintiff seeks an order requiring certain escrow funds to be paid into court or otherwise secured in favour of the plaintiff pending the disposition of this, and of a companion, action. The defendant actually took no position with respect to this motion. The opposition to the relief sought comes from the vendor under a share purchase agreement which I will describe in more detail below. The vendor's solicitors are also the solicitors for the defendant in this action.

2 In August 1994, the plaintiff (which was then known as Actmedia Canada Inc.) entered into a Share Purchase Agreement whereby it agreed to acquire the shares of a company which was, at the time, owned by Nedcorp Quebec and others. Pursuant to the terms of the Share Purchase Agreement, the sum of $2,380,000.00 of the purchase price was to be placed in an escrow account. The purpose of the escrow account, as stated in one of the preambles to the escrow agreement, was:

> ... to be used to satisfy certain potential indemnities of Nedcorp (including for this purpose, of Nedkov) as provided in section 8.1(a) of the Purchase Agreement;

3 The escrow agreement established certain dates on which portions of the escrow funds were to be paid out to the vendor. The sum of $550,000.00 was to be paid out on August 15, 1998; the sum of $950,000.00 was to be paid out on August 15, 1999; and the sum of $750,000.00 was to be paid out on August 15, 2000. The balance of the escrow funds was to be paid out on August 15, 2001. The escrow funds were placed into an account with the defendant.

4 Clause 8.1(a) of the Share Purchase Agreement says in part:

> each shareholder shall severally indemnify and hold harmless Purchaser against any losses, claims, damages or liabilities (together, "Claims") to which Purchaser may become subject insofar as such Claims (or actions in respect thereof) arising out of or are based upon
>
> > (i) a breach by such Shareholder of any representation, warranty or covenant made by such Shareholder herein or in any agreement executed pursuant hereto...

5 The essential process established under the escrow agreement is that if the plaintiff claims to be entitled to be indemnified by the vendor, it may deliver to the defendant a written notice requesting that the defendant pay all, or a portion, of the escrow funds to the plaintiff. If the defendant does not receive a written objection from the vendor within 14 days of such notice, the defendant may pay the amount to the plaintiff. If the defendant does receive an objection, then the defendant is permitted to interplead the disputed amount.

6 The amount due on August 15, 1998 was paid to the vendor. However, matters were considerably different a year later. On August 4, 1999 a letter from the plaintiff's solicitors was sent by courier to the defendant. The letter enclosed a notice pursuant to the terms of the escrow agreement requesting the defendant to pay to the plaintiff the amount of $1,462,192.00 to satisfy a claim for indemnity which the plaintiff claimed to have against the vendor. Copies of the letter and notice were concurrently sent by courier to the vendor. The defendant refused to accept the courier delivery because the letter was addressed to an individual who no longer worked for the defendant although this was the person identified in the escrow agreement as being the person to whom notices to the defendant should be addressed. It appears that the defendant had never advised the plaintiff that the individual in charge of the escrow account had changed.

7 Because of the defendant's refusal to accept the courier delivery, the next day copies of the letter and notice were sent by fax transmission to the defendant. In addition, on August 11, 1999 the original versions of the letter and notice were personally delivered to the defendant. The letter and notice eventually reached the individual within the defendant in charge of the escrow arrangement on August 17, 1999.

8 Meanwhile, and unknown to the plaintiff, the vendor requested the defendant to send to it, on August 13, 1999, the $950,000.00 that was to be paid on August 15, 1999. The reason for this request, it appears, was that August 15, 1999 was a Sunday. The defendant, after obtaining a signed confirming letter from the vendor, complied with the vendor's request and in

fact released the funds to the vendor on August 12, 1999. Then by letter dated August 16, 1999, the solicitors for the vendor wrote to the defendant and objected to the notice which the plaintiff had delivered.

9 Over the next several months, and for reasons which are not explained, the defendant refused to respond to inquiries from the solicitors for the plaintiff as to the status of the funds in the escrow account. The plaintiff assumed that the defendant was proceeding to interplead the disputed funds. However, after several months had passed and with no evidence that the defendant was so proceeding, the plaintiff commenced this action. It was only when the defendant filed its statement of defence in this action that the plaintiff first became aware that the defendant had in fact released the $950,000.00 to the vendor.

10 As a consequence of this revelation, the plaintiff brought this motion in which it seeks essentially to have the remaining funds in the escrow account paid into court and to require the vendor to pay into court that portion of the $950,000.00 needed to make the total amount paid into court equal to the amount of the plaintiff's claim under its notice. The plaintiff seeks this relief because it says that it has lost faith in the defendant's impartiality because of the improper payment of the $950,000.00. In the alternative, the plaintiff seeks an injunction restraining the defendant from releasing or disbursing any further amounts from the escrow account.

11 The plaintiff principally relies on Rule 45 in support of the relief which it seeks, the relevant portions of which are:

> 45.01(1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party.
>
> (2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just.
>
> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

12 Both parties rely on the decision in *Sun v. Ho* (1998), 18 C.P.C. (4th) 363 (Ont. Gen. Div.) for the test applicable to a motion under rule 45. In that case, Rivard J., at p. 364, accepted the test put to him by counsel in the following terms:

> Mr. Birnboim, on behalf of the responding parties submits the following: firstly, under Rule 45.02 the plaintiff must establish a right to a specific fund; secondly, there must be a strong prima facie case and, thirdly, the balance of convenience requires the Court to inquire into the potential harm that would be incurred by the moving party if the relief is not granted.
>
> I have added the words, 'potential harm that would be incurred by the moving party if relief is not granted' because that is the test set out in the *Unigrand International Enterprises Ltd. v. Sea-Glo Seafoods Ltd.* (January 29, 1993), Doc. 93-CQ-31872 (Ont. Gen. Div.) a case referred to the Court by counsel.

This same test is set out in *Tom Jones Corp. v. Mishemukwa Developments Ltd.* (1996), 46 C.P.C. (3d) 77 (Ont. Gen. Div.). In contrast, in the decision in *Kongrecki v. Rafael* (1993), 19 C.P.C. (3d) 58 (B.C.C.A.) there is no mention of a requirement that there be a "strong" prima facie case.

13 It is not clear to me where the requirement for a "strong" prima facie case is derived from. It is not found in the rule itself nor does it appear to be mentioned in earlier Ontario authorities under the rule. In one of the first cases to consider rule 45.02, *Rotin v. Lechcier-Kimel* (1985), 3 C.P.C. (2d) 15 (Ont. H.C.), White J. allowed an appeal from a decision of a Master and ordered certain monies paid into Court on the basis that the plaintiffs had established "a prima facie" entitlement to the funds. Similarly, in *Maybank Foods Inc. Pension Plan v. Gainers Inc.* (1988), 63 O.R. (2d) 687 (H.C.), MacFarland J. granted an order under rule 45.02 requiring that a specific fund be paid into court. In the course of her decision, Madam Justice MacFarland stated that the plaintiffs had raised a "substantial issue to be tried." Finally, in *Charlebois v. Denjon Construction Ltd.* (1997), 13 C.P.C. (4th) 150 (Ont. Gen. Div.) in considering a motion under rule 45.02, Platana J. adopted a "prima facie case" or "sufficient grounds" test.

14 I mention this issue because it seems strange to me that the requirement under rule 45.02, to obtain an order for payment into court of a specific fund, would be a higher or more onerous one than that required to obtain an interlocutory injunction, in which it is generally only necessary to show that there is a serious issue to be tried. I consider that there is some considerable logic to having the tests for either form of relief employ a similar standard since they are in large measure designed to accomplish a similar result. I conclude therefore that the appropriate test for relief under rule 45.02 should require the plaintiff to establish that:

(a) the plaintiff claims a right to a specific fund;

(b) there is a serious issue to be tried regarding the plaintiff's claim to that fund;

(c) the balance of convenience favours granting the relief sought by the plaintiff.

15 The vendor submits that the plaintiff's claim against the escrow funds is not covered by the indemnity agreement and therefore the plaintiff cannot establish that it has a strong, or any, prima facie claim to the funds. The vendor also submits that the relief being sought is in the nature of a *Mareva* injunction and that the plaintiff ought to have to satisfy the stringent tests for a *Mareva* injunction before any relief is granted to it. I will deal with each of these points in turn.

16 The plaintiff's claim against the escrow funds under its notice arises out of an issue with respect to the calculation of adjusted working capital for the purchased company as of the closing date. Under clause 1.3, depending on the results of that calculation, there was a requirement to adjust the purchase price. The plaintiff says that a calculation of the adjusted working capital, which the plaintiff also says was considerably delayed by the vendor, gave rise to an entitlement in the plaintiff to an adjustment of the purchase price which it now claims. The vendor disputes the plaintiff's claim and, in any event, submits that it is not a matter which is covered by the indemnity provisions in the share purchase agreement and therefore the escrow funds are not available to respond to it.

17 The vendor's position in this latter respect is based on the wording of clause 8.1(a), which I set out above, and specifically the use of the words "to which Purchaser may become subject". The vendor says that these words do not permit a claim to be made by the plaintiff on the indemnity where it is a claim for loss suffered by the plaintiff itself but only permits claims to which the plaintiff becomes "subject" at the instance of another. The vendor relies on the definition of "indemnify" contained in Black's Law Dictionary (7th edition, West Group, 1999) as meaning:

to reimburse (another) for a loss suffered because of a third party's act or default.

I note, however, that in the same dictionary the word "indemnity" is defined as:

a duty to make good any loss, damage, or liability incurred by another.

Unlike the former definition, the latter definition contains no element of involvement by a third party.

18 I do not agree with the vendor's submissions on this point. In my view, the vendor's interpretation of clause 8.1(a) of the Share Purchase Agreement is overly narrow. It seems to me that a person can be "subject" to losses, claims, damages or liabilities without it being a necessary requirement for there to be a third party involved. I would further observe that if it had been intended to have such a narrow application of the indemnity provision in the Share Purchase Agreement much clearer language could have been employed to accomplish that purpose.

19 In any event, it is clear to me that there is a serious issue to be tried regarding this dispute. Until that dispute is resolved, I believe that the balance of convenience favours the maintenance and protection of the fund which the parties expressly set aside from the purchase price. While there was considerable discussion on the motion about the credit worthiness of the vendor and whether that impacted on the balance of convenience, it is obvious to me that the whole reason for setting aside a portion of the purchase price in an escrow account was to avoid any issue of the monies not being available from the vendor to answer for any claim that might be made by the plaintiff.

20 I also do not accept the submission of the defendants that the relief being sought is tantamount to a *Mareva* injunction and that the plaintiff must therefore satisfy the very strict tests for that relief. This situation is very much different than that to which a *Mareva* injunction is normally directed. Here we have a specific fund which the parties agreed should be set aside in the hands of an escrow agent to be available to answer for certain specified claims. In a *Mareva* injunction case, the plaintiff seeks to restrain the defendant from dealing with the defendant's own assets which the plaintiff would otherwise have no right to claim against, or interfere with, until such time as it had a judgment against the defendant. In my view the two situations are not at all comparable and I therefore do not see any reason to require the plaintiff to satisfy the prerequisites for a *Mareva* injunction in order to obtain relief either under rule 45.02 or in terms of the injunctive relief it seeks.

21 The vendor submits that to grant the relief being sought by the plaintiff, which would have the effect of removing the defendant as the escrow agent, is equivalent to the removal of an executor or trustee. The vendor then cites various authorities regarding the removal of trustees. Again, I do not find the analogy advanced by the vendor to be apt. However, even if it were, there is certainly evidence before me that would raise a legitimate issue as to the defendant's handling of the escrow account. In this regard, it is evident to me that the defendant was in error in forwarding to the vendor the sum of $950,000.00 on August 12, 1999. There was no basis for the vendor receiving such funds in advance of the August 15, 1999 due date and if, as was the case, that date fell on a Sunday then the appropriate date for payment of those funds became Monday, August 16, 1999 and not any earlier date. Further, had it not been for the defendant's own internal changes in personnel, it would have been in receipt of the plaintiff's notice in advance of the payment being made and would then have been absolutely precluded from making any payment to either party under the terms of the escrow agreement. The actions of the defendant in regard to this payment would satisfy me that there were sufficient grounds to question the good faith and reasonableness of the defendant's actions which in turn would provide sufficient grounds for the removal of it as a trustee — see *Re McLaren* (1922), 51 O.L.R. 538 (C.A.).

22 I have concluded therefore that the plaintiff is entitled to an order under rule 45.02 for the payment into court of the balance of the monies being held by the defendant in the escrow account together with all accrued interest. Lastly, I should also mention that the vendor had the plaintiff's notice in advance of prevailing upon the defendant to make the payment which the defendant did on August 12, 1999. It apparently did not mention this fact to the defendant when it made its request for the monies. In such circumstances, it is only fair and reasonable that the vendor should also have to pay into court that portion of the monies which it improperly received which is sufficient to bring the total amount (excluding accrued interest) equal to the amount of the plaintiff's claim.

23 I therefore grant an order directing the defendant to pay the sum of $880,000.00 into court together with all interest that has accrued in the escrow account, and that the sum of $582,192.00 be paid into court by Nedcorp Group Inc. and Nedcorp Holdings (Quebec) Inc., or that these sums be otherwise secured in favour of the plaintiff, pending the final disposition of the issues between the parties or further order of this court.

24 In the circumstances, I cannot see any reason why the plaintiff would not be entitled to its costs of this motion payable forthwith but, if there are matters which counsel wish to bring to my attention that might alter my view in this regard, they may do so by way of written submissions. I am also prepared to fix the costs of the motion if the parties cannot agree on them on receipt of appropriate submissions for that purpose. The plaintiff shall file its submissions within 10 days of the release of these reasons and the defendant/vendor shall file its responding submissions within 10 days thereafter. As always, I would appreciate it if counsel would keep their submissions brief.

Motion granted.

TAB 3

II. THE NATURE OF THE TRUST

The trust is not easy to define because this common law concept has its roots in the Middle Ages, and has grown gradually over the centuries, adapting with marked flexibility to the demands that the needs of society have made upon it. Its adaptability was one of the features which prompted Maitland to consider it the greatest achievement of Equity.[2] Most definitions consequently suffer from the fact that they are really an attempt either to find the essence of a trust, which all too often means emphasizing one kind of trust, or to contain within a sentence all the facets of an institution that has grown pragmatically.

In broad terms, the contemporary tax-planner might say that the trust is a means of managing wealth for the benefit of one or a number of persons. So far as it goes, that summary is correct, at least for the kind of family provision by way of a trust which is usually found in practice. But it does not reflect the various ways in which a trust may come into existence, and it fails to mention the possibly surprising fact that one person can be settlor, trustee, and a beneficiary of the same trust.

The essential features of a common law trust, explained further later in this chapter, are a segregated fund comprising an asset or a number of assets, a person or purpose as the object of the trust with exclusive right to the enjoyment of the fund or its dedication, and a person holding title to the asset or assets held in the trust and in some instances administering or managing the fund. The word, "fund", emphasizes that the original asset or assets held in the trust may be disposed of and others acquired in their place. The "fund" is the on-going asset holding at any one time subject to trust terms. As will be seen as the reader moves through this text, the one element that predominates in the common law idea of a trust is segregated property.

However, the relationship between the trustee, having duties and powers, and the beneficiary or purpose, having rights to compel performance of the trusts (or obligations upon which terms the trustee holds), is the traditional way in which the "trust" has been analyzed. And among lawyers of the common law tradition following definition is generally regarded as being one of the best:

> A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.[3]

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[2] F.W. Maitland, *Selected Essays* (1936): "If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea."

[3] G.W. Keeton and L.A. Sheridan, *The Law of Trusts*, 12th ed. (London: Barry Rose Law Publishers, 1993) at 3. This definition was referred to in *VanDenBussche v. Craig VanDenBussche Trust (Trustee of)*, 2009 CarswellMan 557, (sub nom. *VanDenBussche v. VanDenBussche Trust*) (Man. Q.B.) at para. 8. A beneficiary may disclaim his interest at any time before he receives benefits under the trust: *Montreal Trust Co. v. Matthews*, [1979] 3 W.W.R. 621 (B.C. S.C.).

Another familiar definition, and one that has been cited with judicial approval,[4] is:

> A trust is an equitable obligation, binding a person (called a trustee) to deal with property owned by him (called trust property) as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.[5]

Another English author has completed this definition by adding that a trustee may hold property, not for the benefit of persons, but for the furtherance of certain purposes:

> [O]r for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law though unenforceable.[6]

A civilian, on the other hand, would not mention equity and the two forms of title; he would be more likely to see the trust simply as the dedication of property to the carrying out of a purpose, and the obligatory relationship between the property holder/manager and the benefiting person or dedication. A better picture of the trust may emerge not from a definition, but from a bird's eye view of the trust's growth.[7]

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[4] Approved by Romer L.J. in *Green v. Russell*, [1959] 2 Q.B. 226, [1959] 2 All E.R. 525 (Eng. C.A.) at 226 [Q.B.], by Cohen J. in *Re Marshall's Will Trusts*, [1945] Ch. 217, [1945] 1 All E.R. 550 at 219 [Ch.], and approved in Canada in several decisions such as *Tobin Tractor (1957) Ltd. v. Western Surety Co.* (1963), 42 W.W.R. 532, 40 D.L.R. (2d) 231 (Sask. Q.B.) at 542 [W.W.R.]; *Zeidler v. Campbell* (1988), 88 A.R. 321, 29 E.T.R. 113 (Alta. Q.B.), affirmed (1988), 91 A.R. 394, 53 D.L.R. (4th) 350 (Alta. C.A.); *Ford v. Laidlaw Carriers Inc.* (1993), 1 E.T.R. (2d) 117 (Ont. Gen. Div.), varied on other grounds (1994), 12 C.C.P.B. 179 (Ont. C.A.), leave to appeal to S.C.C. refused (1995), [1995] S.C.C.A. No. 34, 191 N.R. 400 (note) (S.C.C.); *Boulos v. Boulos* (1986), 57 Nfld. & P.E.I.R. 181, 24 E.T.R. 56 (Nfld. T.D.); and by both the trial judge and LeDain J. in the Federal Court of Appeal in *Guerin v. R.* (1981), [1982] 2 F.C. 385 (Fed. T.D.), reversed (1982), [1983] 2 F.C. 656, 143 D.L.R. (3d) 416 (Fed. C.A.), reversed [1984] 2 S.C.R. 335, 20 E.T.R. 6 (S.C.C.); *Goreki v. Canada (Attorney General)*, 2005 CarswellOnt 3683, [2005] O.T.C. 712 (Ont. S.C.J.) at para. 56, reversed 2006 CarswellOnt 1745, 265 D.L.R. (4th) 206 (Ont. C.A.); *Alessandro v. R.*, 2007 CarswellNat 2019, 2007 CarswellNat 6036, [2007] 5 C.T.C. 2172, 2007 D.T.C. 1373 (T.C.C. [General Procedure]) at para. 62; *General Motors of Canada Ltd. v. R.*, 2008 T.C.C. 117, 2008 Carswellnat 3153, 2008 CarswellNat 454 (T.C.C. [General Procedure]), at para. 39, (affirmed 2009 FCA 114, 2009 CarswellNat 880, 2009 CarswellNat 3282 (F.C.A.); *VanDenBussche v. VanDenBussche*, *supra*, note 3, at para. 8.

[5] *Underhill and Hayton*, at 2. The fifteenth edition spoke of "property over which [the trustee] has control". It is this wording of which Canadian courts, *supra*, note 4, approved.

[6] Pettit, at 30. *Underhill and Hayton*, at 6, note 2, disputes that any such completion is necessary because both types of purpose trusts are exceptional. Charitable trusts are enforced by the Crown, and non-charitable purpose trusts are simply anomalous.

[7] Various authors have suggested definitions, but perhaps especial mention should be made of the American Law Institute, *Restatement, Trusts 3d*, para. 2. The Yukon has also enacted (S.Y. 2001, c. 11, s. 13), but not proclaimed, an amendment to the territorial *Trustee Act* that would extend validity to trusts for non-charitable purposes.

he is appointed by his principal, or who handles property, the title to which may or may not be in himself for the purpose of the agency, may be a trustee by operation of law. This is because the agent occupies a fiduciary role in relation to his principal.[67] The extent of the agent's fiduciary role depends upon the type of agent he is; some agents have a more intimate and trusted role than others. More is expected of a solicitor *vis-à-vis* the client, for example, than is expected of a rent collector who is merely required to put those moneys aside and pay them over at the end of each month. Once a person is a fiduciary, however, he must ensure that within his fiduciary capacity he does not allow his personal interest to conflict with his duty to his principal. This means that once an agent has been found to have made a personal profit by exercising his office or his principal's property for his own benefit and without his principal's informed consent, he is in breach of his obligation of selfless service and must disgorge that property in favour of his principal.

C. Agents as Express Trustees of Principal's Property

The agent who has to hand over such profit is a constructive trustee of it. Can an agent in this position ever be described as an express trustee? The short answer is in the negative because an agent usually has only possession, while a trustee has legal title. Moreover, the principal has no intention to create a trust. However, the line of distinction is not easily drawn. Does an irrevocable direction to pay given to an agent make the agent a trustee for the intended payee, and render the principal's money held by the agent a trust fund?

A good deal of difficulty on this question arose in the past due to the wording of statutes setting out limitation periods for the commencement of litigation. Under the English Statute of Limitations and its counterparts in common law Canada, constructive trustees could plead statutory protection after the running of the relevant limitation period; express trustees could not. Consequently there was considerable judicial effort in the nineteenth century to argue in hard cases that the agent could not plead the Statute because he was an express trustee. *Coyne v. Broddy*[68] was just such a case. Mrs. Coyne (the plaintiff) had sold her house, and the purchaser had handed over promissory notes (payable to Mrs. Coyne) in discharge of part of the purchase price. The notes were given to Mr. Broddy (the defendant) on the understanding that when the moneys were paid over to him in discharge of the notes, he would retain the moneys on investment and ultimately pay them over to the plaintiff. Several years after such collection, the defendant went bankrupt without having paid the moneys. Was he an express trustee, so that his consignees could not plead the Statute? The Ontario Court of Appeal was able to find on the facts that there was a duty to retain and pay over to the plaintiff at a later date, rather than a duty to hand over immediately as the lower courts had found, and therefore that an express trust was created. There is little doubt that the English cases on this subject, together with their Canadian counterparts following the English cases, should be seen merely as

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[67] See further, *infra*, chapter 11, "Constructive Trusts", Part II B.

[68] (1888), 15 O.A.R. 159 (Ont. C.A.).

a reaction prompted by the unfortunate distinction made by the Statute, and from these cases no generalization of principle can be made as to agency and express trust.[69]

An agent's duties may make him look very like an express trustee, but the true position was succinctly set out by Lord Cottenham L.C. in *Foley v. Hill*, whose words were paraphrased by Boyd C. in *Coyne v. Broddy*:[70]

> ... a factor, partaking of the character of a trustee, as the trustee for the particular matter in which he is employed as factor, sells the principal's goods and accounts to him for the money. The goods remain the goods of the owner or principal till the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with an agent dealing with any property; he obtains no interest himself in the subject matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* trustee for that particular transaction for which he is engaged.

However, it is essential if the agent is to be an express trustee, or to be made by law a constructive trustee, that there be property which the agent was required to keep separate from his own assets. If the agent, who is collecting moneys from third parties for the principal, or is required to pay over the principal's money to a third party, is to be considered a trustee of any kind, it strengthens the case if it is shown the agent was required, contractually or otherwise, to keep those moneys identifiable from other assets.[71] Otherwise, the agent may be a debtor only.[72]

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[69] On changes to limitations legislation see chapter 25, Part IV C 4. In effect, the courts were inferring the intention of such persons as the plaintiff to part with assets on the basis of a trust for the transferor. This avoided the limitation effects of a conclusion that the recipient of the assets was an indebted agent. The distinction between agency and constructive trust is brought out in *Re Swayze*, [1938] O.W.N. 524 (Ont. H.C.) at 528, where an assignee of funds was held to be a debtor, not a trustee.

[70] (1887), 13 O.R. 173 (Ont. Ch.), reversed (1888), 15 O.A.R. 159 (Ont. C.A.) at 184 [O.R.] (an appeal in the Divisional Court), referring to *Foley v. Hill* (1848), 2 H.L. Cas. 28, 9 E.R. 1002 (U.K. H.L.).

[71] A requirement to keep funds identifiable is an important factor to be considered in determining the existence of a trust but it is not determinative. A clear intention to create a trust without a requirement to keep funds separate may suffice for a finding of a trust relationship. Particular attention is needed as to how and why the segregation of funds element was satisfied in the following cases: *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.) at 804; *McEachren v. Royal Bank* (1990), [1991] 2 W.W.R. 702 (Alta. Q.B.); *Mosaic International Construction Ltd. v. International Building Components Inc.*, 2005 CarswellOnt 8184, 15 B.L.R. (4th) 288 (Ont. S.C.J.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.) (see the note by S.H.T. Denstedt (1988), 9 E.T.J. 18); *R. v. Lowden* (1981), 15 Alta. L.R. (2d) 250, 27 A.R. 91 (Alta. C.A.), affirmed [1982] 2 S.C.R. 60 (S.C.C.); *Re General Publishing Co.*, 2002 CarswellOnt 1889, 34 C.B.R. (4th) 186 (Ont. C.A.); *M.A. Hanna Co. v. Provincial Bank of Canada* (1934), [1935] S.C.R. 144, [1935] 1 D.L.R. 545 (S.C.C.); *Henry v. Hammond*, [1913] 2 K.B. 515 (Eng. K.B.); and *Stephens Travel Service International Pty. Ltd. v. Qantas Airways Ltd.* (1988), 13 N.S.W.L.R. 331 (New South Wales C.A.). *Cf. British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.). The cases are discussed in *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2005 CarswellBC 596, 14 E.T.R. (3d) 214 (B.C. S.C.), where it was held that monies received by the film distributor were held in trust. The decision was reversed on appeal [2006 CarswellBC 2476, 26 E.T.R. (3d) 197, 57

I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

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1 (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

2 (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

3 Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.); *Saugestad v. Saugestad*, 2006 CarswellBC 3170, 28 E.T.R. (3d) 210 (B.C. S.C.) at para. 82, reversed in part on other grounds 2008 CarswellBC 123, 37 E.T.R. (3d) 19, 77 B.C.L.R. (4th) 170 (B.C. C.A.); *Re Graphicshoppe Ltd.*, 2005 CarswellOnt 7008, 78 O.R. (3d) 401 (Ont. C.A.) at para. 10; *VanDenBussche v. Craig VanDenBussche Trust (Trustee of)*, 2009 CarswellMan 557, (sub nom. *VanDenBussche v. VanDenBussche Trust*) 247 Man. R. (2d) 174, 55 E.T.R. (3d) 179 (Man. Q.B.); and *Sun Life Assurance Co. of Canada v. Taylor* (2008), 2008 CarswellSask 678, 322 Sask. R. 153, [2009] 2 W.W.R. 286 (Sask. Q.B.).

4 The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III D.

II. CERTAINTY OF INTENTION

There is no need for any technical words or expressions for the creation of a trust.[5] Equity is concerned with discovering the intention to create a trust; provided it can be established that the transferor had such an intention,[6] a trust is set up. There are indeed certain evidentiary requirements which the law regards as mandatory for the transfer of certain kinds of property. For example, the *Statute of Frauds* in 1677, reproduced in common law Canada, required all trusts of land to be evidenced in writing, and under the wills legislation of the common law provinces and the territories a person's last will and testament must be in writing, which means, of course, that a testamentary trust must be in writing, and form part of the will.[7] But these are requirements of the law of evidence, not of the law of trusts, though, as we shall see, the effect of these statutory evidentiary rules has created a variety of problems for trust lawyers.[8]

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[5] See, e.g., *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) where it was noted that language need not be technical so long as the intention to create a trust can be inferred with certainty.

[6] For an unusual case, see *No. 382 v. Minister of National Revenue* (1957), 16 Tax A.B.C. 274, 57 D.T.C. 48 (Can. Tax App. Bd.) at 282-3 [Tax A.B.C.]. If tax avoidance is the object of a transaction, the courts are likely to be particularly concerned with whether there was indeed an intention to create a trust, or merely a desire to give that appearance. See *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, [1976] C.T.C. 506, 76 D.T.C. 6280 (Fed. C.A.). The fact that the alleged settlor of a number of trusts, purportedly created at the same time, did not know all the details of the scheme in which he was taking part, and that the amount of property initially assigned to the trustees for each trust was minimal, were found to be evidence of a desire only to create appearances. See further, *infra*, chapter 6, note 2.

The question of certainty of intention to create a trust can arise in a wide variety of contexts. One such context that has been considered on several occasions occurs where an employer seeks access to surplus pension funds. If the pension plan is construed such that the employer's contributions are to be held in trust *for the employees* then the employer will not be able to take back surplus contributions. Cases dealing with this issue include *Burke v. Hudson's Bay Co.*, 2010 CarswellOnt 7451, [2010] S.J. No. 34 (S.C.C.); *Mifsud v. Owens Corning Canada Inc.* (2004), 41 C.C.P.B. 81 (Ont. S.C.J.); *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 3 E.T.R. (2d) 1, 115 D.L.R. (4th) 631 (S.C.C.); *LaHave Equipment Ltd. v. Nova Scotia (Superintendent of Pensions)* (1994), 121 D.L.R. (4th) 67 (N.S. C.A.); *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.); *Howitt v. Howden Group Canada Ltd.* (1997), 152 D.L.R. (4th) 185 (Ont. Div. Ct.), leave to appeal allowed (1997), 1997 CarswellOnt 4662 (Ont. C.A.), affirmed (1999), 26 E.T.R. (2d) 1 (Ont. C.A.); *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5) (Administrator of)* (1997), (sub nom. *Central Guaranty Trust Co. (Liquidator of) v. Spectrum Pension Plan (5)*) 149 D.L.R. (4th) 200 (N.S. C.A.); *Crownx Inc. v. Edwards* (1994), 20 O.R. (3d) 710, 120 D.L.R. (4th) 270 (Ont. C.A.).

[7] On the requirement of writing, see chapter 7.

[8] But for the formal requirements in cases such as those involving wills or trusts of land, no formal document is required. A trust may arise simply from the words used (see, e.g., *Lev v. Lev* (1992), 40 R.F.L. (3d) 404 (Man. C.A.); and *Bathgate v. National Hockey League Pension Society* (1992), 98 D.L.R. (4th) 326 (Ont. Gen. Div.), additional reasons at (1992), 98 D.L.R. (4th) 326 at 411 (Ont. Gen. Div.), affirmed (1994), 16 O.R. (3d) 761 (Ont. C.A.), leave to appeal refused (1994), 4 E.T.R. (2d) 36 (S.C.C.)) or from conduct or circumstances (see note 9 below and the accompanying text). In

to have had in mind a transfer *on trust*. This means that the intention to make a gift by way of a handing over is not the intention to make a gift by way of a trust.[14]

The words employed to set up a trust, therefore, must show that the transferee is to take the property not beneficially, but for objects which the transferor describes. The words which nearly always reveal the intention are "in trust", or "as trustee for", but it is well established in common law courts, including those of Canada, that these words are neither conclusive nor indispensable.[15] On the other hand, in a series of Canadian cases, courts have made the point that there is no magic in the word "trust" and that other words may convey the same intention.[16]

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[14] Executory trusts created by the delivery of trust property to trustees can only exist if there is an intention at the moment of transfer to create a trust: *Minister of National Revenue v. Ablan Leon (1964) Ltd.*, *supra*, note 6.

[15] See, e.g., *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Bullock v. Key Property Management Ltd.* (1992), 46 E.T.R. 275 (Ont. Gen. Div.), varied (1997), 33 O.R. (3d) 1 (Ont. C.A.); *McEachren v. Royal Bank* (1990), 78 Alta. L.R. (2d) 158, [1991] 2 W.W.R. 702 (Alta. Q.B.); *Mohr v. C.J.A.* (1991), 40 E.T.R. 12 (B.C. C.A.); affirming (1989), 36 E.T.R. 246 (B.C. S.C.); *Byers v. Foley*, 1993 CarswellOnt 558, 16 O.R. (3d) 641 (Ont. Gen. Div.); *Luscar Ltd. v. Pembina Resources Ltd.* (1995), 165 A.R. 104 (Alta. C.A.), leave to appeal to S.C.C. refused (1995), 31 Alta. L.R. (3d) xli (S.C.C.); *Mohr v. C.J.A.*, 1991 CarswellBC 638, 40 E.T.R. 12 (B.C. C.A.) at 13 [E.T.R.]; and *Mansell Capital Partners LLC v. Kerr*, 2005 CarswellOnt 909, 14 E.T.R. (3d) 198 (Ont. S.C.J.). In a unanimous Federal Court of Appeal decision in *Antle v. R.*, 2010 CarswellNat 4878, 61 E.T.R. (3d) 13 (F.C.A.), it was held that the court could look to extrinsic evidence to determine the true intention of the parties and accepted the trial judge's finding in the circumstances of the case that a trust was not intended even though the trust document was "clear and unambiguous" in expressing an intent to create a trust. Noel J.A. cited *Mohr v. C.J.A.*, 1991 CarswellBC 638, 40 E.T.R. 12 (B.C. C.A.) for the proposition that "while the words 'trust', 'trustees' and 'trust deed'" appeared in the agreement in question those words were not determinative of the issue since "The task of the Court is to construe the agreement against the background facts to determine 'objectively the 'aim' of the transaction'". Noel J. also noted the decision of Iacobucci J. in *Air Canada v. M & L Travel Ltd.*, 1993 CarswellOnt 568, [1993] 3 S.C.R. 787 (S.C.C.) (at para. 30) where the use of the words "in trust" in a document was referred to as "evidence of intention". See also *Fraser v. Minister of National Revenue*, 1991 CarswellNat 385, (sub nom. *Fraser v. R.*) 91 D.T.C. 5123 (Fed. T.D.).

"In trust" are words commonly found written after the name of the payee of guaranteed investment certificates, and term deposit instruments. Such an act creates an inherent ambiguity as to the intent of the investor or depositor, when no trust objects are mentioned. Did he intend the payee to be the trust beneficiary for his personal benefit, to hold on trust for implied third parties or purposes, or to hold on resulting trust for the investor or depositor (i.e., himself)?

[16] *Mulholland v. Merriam* (1873), 20 Gr. 152 (U.C. C.A.); *Cameron v. Campbell* (1882), 7 O.A.R. 361; *Kendrick v. Barkey* (1907), 9 O.W.R. 356 (Ont. H.C.); *Elgin Loan & Savings Co. v. National Trust Co.* (1903), 7 O.L.R. 1 (Ont. H.C.), affirmed (1905), 10 O.L.R. 41 (Ont. C.A.); *Re Garden*, [1931] 2 W.W.R. 849, [1931] 4 D.L.R. 791 (Alta. C.A.); *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.). In the context of all the language of a bequest, Garrow J.A. came to the conclusion in *Canada Trust Co. v. Davis*, 1912 CarswellOnt 872, 2 D.L.R. 644, 25 O.L.R. 633 (Ont. C.A.), affirmed 1912 CarswellOnt 754, 46 S.C.R. 649, 8 D.L.R. 756 (S.C.C.) that the words "in trust", though used, did not have controlling importance, and that no trust had been created. See also *Re Dickin*, 1975 CarswellOnt 363, 7 O.R. (2d) 472, 55 D.L.R. (3d) 504 (Ont. S.C.); and *Willis (Litigation Guardian of) v. Willis Estate*, 2006 CarswellOnt 1757, 23 E.T.R. (3d) 292 (Ont. S.C.J.), affirmed 2007 CarswellOnt 4843, 33 E.T.R. (3d) 187 (Ont. C.A.).

the claim of a trust for the children to be pure sham," said the court. "If there is any trust, it is for the benefit of the husband."[84]

However, if the trust is set up by the husband in circumstances that showed no intention to defeat the wife's entitlement, the court may refuse to declare the trust void. This is so even though the husband always treated the property as his own, included the trust assets in statements as to his personal assets, the trustees were his friends, and during his time as trustee he controlled the trust property. The court, concerned with these "facts", agreed with the husband's submission that it would be "turning trust law upside down" to say that the trust was a sham.[85]

III. CERTAINTY OF SUBJECT-MATTER

For a trust to be validly created, it must also be possible to identify clearly the property which is to be subject to the trust.[86] Moreover, even if the trust property is thus clearly defined, the shares in that property which the beneficiaries are each to take must also be clearly defined. Certainty of subject-matter as a term refers to both of these required certainties.

If the language employed provides clear evidence of the intention to create a trust, no trust can yet come into existence if it is impossible to determine what the trust property is. This is so whether the settlor purports to transfer property or declares himself trustee of his property. "The bulk of my residuary estate" is uncertain; nothing can therefore pass to the trustees or be held by the settlor as trustee.[87] But,

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[84] *Merklinger v. Merklinger* (1992), 11 O.R. (3d) 233 (Ont. Gen. Div.) at 241-242, affirmed (1996), 30 O.R. (3d) 575 (Ont. C.A.).

[85] *Sagl v. Sagl* (1997), 31 R.F.L. (4th) 405 (Ont. Gen. Div.), additional reasons at (1997), 35 R.F.L. (4th) 107 (Ont. Gen. Div.).

[86] This concept applies to all trusts, including alleged statutory trusts. In *Green v. Ontario* (1972), [1973] 2 O.R. 396, 34 D.L.R. (3d) 20 (Ont. H.C.), the plaintiff claimed that s. 2 of the *Provincial Parks Act*, R.S.O. 1970, c. 371, imposed a statutory trust upon the province with regard to dedicated parkland in Ontario. Apart from the fact that the learned judge could find no obligation as trustee imposed on the province, nor who could be the trust beneficiary, he drew attention to the power of the province under the Act "to increase, decrease or even put an end to or 'close down' any park" (at 34 D.L.R. (3d) 31). There was, therefore, he said, no certainty of subject-matter of the alleged trust.

It is sufficient that the property be clearly identified so, for instance, a reference to "Group Insurance coverage provided by the deceased's employer, Moor Business Forms" was sufficient to identify the proceeds of a particular insurance policy. See *Shannon v. Shannon*, 1985 CarswellOnt 699, 19 E.T.R. 1 (Ont. H.C.); and similarly in *Schorlemer Estate v. Schorlemer*, 2006 CarswellOnt 8155, 29 E.T.R. (3d) 181 (Ont. S.C.J.) a reference to "any policies of life insurance on his life through his employer" was sufficient where the person had only one employer and only one policy of insurance.

Though it must be possible to identify the trust property, it is also essential, unless the trustee has given value, that the property is held in title by the trustee. Only then can there be a valid trust.

[87] Certainty of subject-matter (or of the initial trust fund assets) is an essential element in establishing the segregation of the trust fund from other property: *Palmer v. Simmonds* (1854), 2 Drew. 221, 61 E.R. 704; *Bromley v. Tryron* (1951), [1952] A.C. 265, [1951] 2 All E.R. 1058 (U.K. H.L.). Similarly, a reference to "other property" that was to be sold and the proceeds used to form the corpus of a trust was found not to be sufficiently certain because the expression "other property" was capable of several plausible interpretations in the circumstances – see *Re Romaniuk* (1986), 48 Alta. L.R. (2d) 225, 23 E.T.R. 294 (Alta. Surr. Ct.). See also *Almecon Industries Ltd. v. Anchortek Ltd.* (2004), 48 C.B.R.

A. Persons

We saw earlier[118] that the courts in England have distinguished between a mere or non-discretionary trust, a power in the nature of a trust which includes the discretionary trust, and a mere power. Persons, human or incorporated, are the familiar objects of trusts, and the problem of certainty which they present is whether it is possible to say that the persons intended as objects are ascertainable.[119] Ascertainable is a somewhat ambiguous word, but in this context it means two things: first, that it is possible to determine, if the intended beneficiaries are not referred to by name but by a class description, whether any person is a member of that class, and, second, that the totality of the membership of that class is known.[120] Ascertainment means

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[118] *Supra*, chapter 3, Part VII C.

[119] Reference should be made to chapter 3, Part VII, *supra*, where distinction is drawn between the certainty required for a mere power, a power in the nature of a trust which includes a discretionary trust, and a mere or non-discretionary trust.

[120] Both these elements are required for certainty of beneficiaries of a non-discretionary trust. For example, in *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, *supra*, note 111, Brooker J. concluded that winners of a casino jackpot were a sufficiently certain class since it was "possible to determine if an individual is a member of the class by seeing if their poker hand meets the necessary criteria of being a flush or higher in order to win. It is also possible to determine the extent of the class since the class consists only of those people who meet the requirements at the time of winning the jackpot." One difficulty with the analysis in this case was that the funds in question were amounts left after payment of all winners to the point that the casino discontinued its operations. Thus, amounts remaining would have been for future jackpot winners had the casino continued to operate. Could the totality of this class have been known? In *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2001), *supra*, note 95, Wilson J. made the following comment on the *Arkay Casino* case, "It seems to me to say, without a declaration to that effect in any trust instrument, that all the world is a member of the beneficiary class, as anyone could walk in to play the game. There being no description of the class, it cannot be said whether or not it is certain, and a class that includes everyone in the world surely is not certain." Also in *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.), funds had been deposited with Canada Trust Co, pursuant to an agreement in which Canada Trust was referred to as "trustee". The funds were to provide security for the payment of the farmers who had sold grain to the purchaser on a deferred payment basis. Price Waterhouse had been appointed as a receiver of the purchaser and argued that there was no trust on the basis, among other reasons, that the class of beneficiaries was uncertain. Forsyth J. noted that it was possible to determine whether any given person was a member of the class of farmers who had sold grain to the purchaser on a deferred payment basis and that, indeed, a complete list of the class could be determined since Price Waterhouse itself had created a complete list.

Two things should be noted: (1) the difficulty of finding the members of the class is irrelevant, if the description is such that it is possible to say who is or is not in the class, and to list the persons who make up the class. "The whereabouts or continued existence of some of its members at the relevant time matters not": *per* Lord Upjohn in *Re Gulbenkian's Settlement* (1968), [1970] A.C. 508, [1968] 3 All E.R. 785 (U.K. H.L.) at 524 [A.C.]; (2) "The question of certainty must be determined as of the date of the document declaring the donor's intention": *ibid*., i.e., the date of the deed, writing, or verbal declaration which is to take effect *inter vivos*, or the date of the testator's death when his will is the instrument of creation. However, it should be observed that certainty exists as at the moment of the instrument taking effect even though the instrument creates a successive interest in a class of persons, the actual membership of which can only be known when that interest vests in possession. E.g., *Kinsela v. Caldwell* (1975), 132 C.L.R. 458 (Australia H.C.): to the next-of-kin of the settlor, and in the shares the intestacy laws of New South Wales would then distribute the settled

TAB 4

HTR-86 Conditions attached to trusts.

Halsbury's Laws of Canada - Trusts (2020 Reissue)

Maria Elena Hoffstein (Main Title Contributor)

HTR-86

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VI. Limitations on the Creation of Trusts

3. Trusts Imposing Invalid Conditions

(1) General

Conditions attached to trusts.

Conditions are often attached to the dispositions of a trust. Such conditions may exist to prevent a gift from vesting unless certain conditions are satisfied (a condition precedent), or to cause the gift to be divested from the beneficiary in the event that the condition occurs (a condition subsequent). Determining whether a condition is precedent or subsequent will depend on the intentions of the settlor and the language used in the instrument. These conditions can be void or voidable on a number of grounds.

Conditions that are void. When a condition is contrary to public policy, such as when the settlor attempts to impose restraints on the freedom of a beneficiary to marry, the condition is void. Similarly, when a condition is repugnant to the gift, meaning that it attempts to limit the donee's absolute interest in the property, it is considered void. Conditions that limit the enjoyment of the property until after the beneficiary or beneficiaries solely entitled to it become *sui juris*, contrary to the rule in *Saunders v. Vautier*,[1] and conditions that interfere with the legal devolution of property are repugnant to the gift and therefore void.[2] Two other common reasons that conditions fail is due to their uncertainty and impossibility. Conditions that are uncertain are void and conditions that are impossible to satisfy may be voided. These are discussed below.

Restrictions on religious behaviour. Conditions which restrain religious behaviour are not necessarily contrary to public policy unless they also interfere with an established head of public policy, such as marital relations or parental duties.[3] The common law supports a testator's freedom to dispose of his property as he chooses and religious conditions are seen as an expression of this selection.[4] Although the English common law does not consider restrictions on religious behaviour to be contrary to public policy, the civil law of Québec holds such conditions to be void as contrary to good morals.[5] More recently, courts have found conditions that discriminate against freedom of religion to be contrary to public policy.[6] This will be discussed below.

Conditions precedent and subsequent. A condition precedent that is void will render the gift void. However, a condition subsequent which is void makes the gift absolute and free of the condition.[7] Similarly, if the condition is voidable and is avoided by the beneficiary, is *in terrorem*, is repugnant to the gift, or does not happen at all, then the gift becomes absolute and free of the condition.[8] Since the law prefers for gifts to take effect, the courts are reluctant to find that a condition is void. When they do, they will tend to construe it as a condition subsequent in order for the gift to become absolute.[9] A distinction can be made between a condition subsequent and a determinable limitation, which uses words of limitation to describe how long the gift shall last. For example, the gift

may be “to A so long as he does not marry”. If the determining event is void for being contrary to public policy, illegality or uncertainty, the entire gift will fail.[10]

Footnote(s)

1 (1841), Cr. & Ph. 240, 41 E.R. 482.

2 *Kee Estate (Re)*, [1973] B.C.J. No. 370, 41 D.L.R. (3d) 317 (B.C.S.C.).

3 *Going (Re)*, [1951] O.J. No. 455, [1951] O.R. 147 (Ont. C.A.); *Sandbrook (Re)*, [1912] 2 Ch. 471 (Ch. Div.).

4 *Blathwayt v. Cawley*, [1976] A.C. 397 (H.L.).

5 *Klein v. Klein*, [1967] C.C.S. No. 553, [1967] C.S. 300 (Que. S.C.); (QC) *Freedom of Worship Act*, CQLR, c. L-2.

6 See *Canada Trust Co. v. Ontario Human Rights Commission*, [1990] O.J. No. 615, 69 D.L.R. (4th) 321 (Ont. C.A.); *Murley Estate (Re) v. Murley (Guardian of the Estate of*, [1995] N.J. No. 177, 130 Nfld. & P.E.I.R. 271 (Nfld. T.D.).

7 *Wilkinson (Re)*, [1926] Ch. 842; See also *McColgan (Re)*, [1969] 2 O.R. 152 (Ont. H.C.J.).

8 See C.H. Sherrin, R.F.D. Barlow & R.A. Wallington, *Williams' on Wills*, 8th ed. (London: Butterworths, 2002) at 358. Conditions *in terrorem* are discussed in subsection 3(2): Conditions Contrary to Public Policy, below.

9 For example, *Melnik v. Sawycky*, [1977] S. J. No. 370, 80 D.L.R. (3d) 371 (Sask. C.A.), where the court had to determine whether a condition was precedent or subsequent.

10 *Moore (Re)*; *Trafford v. Macononcie* (1888), 39 Ch. D. 116 (C.A.); *Moore v. Royal Trust Co*. (*sub nom. Moore Estate (Re)*), [1954] C.C.S. No. 1227, [1954] 3 D.L.R. 407 (B.C.S.C.), revd [1955] C.C.S. No. 928, [1955] 4 D.L.R. 313 (B.C.C.A.), vard [1956] S.C.J. No. 64, [1956] S.C.R. 880 (S.C.C.).

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TAB 5

19 SEP 2023

Canadian Commercial Reorganization: Preventing Bankruptcy

Canadian Commercial Reorganization: Preventing Bankruptcy § 3:14

Canadian Commercial Reorganization: Preventing Bankruptcy | Richard H. McLaren

Sabrina Gherbaz

Chapter 3. The Application Process

I. Stay of Proceedings Under the Companies' Creditors Arrangement Act

C. Extending the Initial Stay; Lifting of the Stay

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§ 3:14. Lifting of the Stay

Legal Topics

The court has the discretion to terminate a stay or to lift it with respect to certain creditors. Unlike under the BIA, there is no statutory test under the CCAA to guide the court in terminating or lifting a stay against a certain creditor. An opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay.[1]

Generally, the courts will lift a stay order where:

1. The plan is likely to fail.[2]
2. The applicant shows hardship (the hardship must be caused by the

stay itself and be independent of any pre-existing condition of the applicant creditor).[3]

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor company's existence).[4]
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of the creditors.[5]
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.[6]
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.[7]
7. There is a real risk that a creditor's loan will become unsecured during the stay period.[8]
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.[9]
9. It is in the interests of justice to do so.[10]

These nine factors were cited with approval and considered in *Canwest Global Communications Corp. (Re)*,[11] in a motion to lift the stay of proceedings. The court found that if the stay were lifted, the prejudice to the debtor parties would be great and the proceedings contemplated by the moving parties would be extraordinarily disruptive to the restructuring process. The court held that because the balance of convenience, the assessment of relative prejudice and the relevant merits favoured the debtor companies, the motion was not granted and refused to lift the stay. In a subsequent case in the *Canwest* proceedings, *Canwest Global Communications Corp. (Re)*,[12] the same

situation occurred, and a creditor sought a declaration that the stay of proceedings be lifted. The court cited these nine factors with approval and decided that because none of these situations were present, the stay should not be lifted. In arriving at this conclusion, the court also considered the lack of support from the monitor, the prejudice to other creditors who were subject to the stay, and that it would be a time consuming distraction from the restructuring process. The court only partially lifted the stay for the limited purpose of permitting the creditor to claim for a minimal pre-filing debt owed to it. In a later *Canwest* proceeding, *Canwest Global Communications Corp. (Re)*,[13] the court also cited these nine factors with approval in the context of a labour dispute where the union sought to lift the stay of proceedings with respect to an employee's outstanding grievance so that it could be adjudicated in accordance with the collective agreement. The court held that grievances should generally be adjudicated along with other claims pursuant to the provisions of a claims procedure within the context of CCAA proceedings. However, this case was unique in that, given the stage of the CCAA proceedings, the seniority of the employee and the fact that the stay with regard to the employer had been lifted, the court held that the balance of convenience and the interests of justice favoured lifting the stay to permit grievances to be adjudicated in accordance with the terms of the collective agreement.

In *Timminco Ltd. (Re)*,[14] Justice Morawetz applied the *Canwest* principles in a motion to lift the stay brought by a class action claimant. The claimant sought the lifting of the stay to allow the class action to proceed on the condition that any potential execution exclude Timminco's assets. This would effectively limit recovery in the class action to the proceeds of insurance policies, or the personal assets of the directors and officers in the case of fraud. The court considered the amount of time that Timminco executives would be required to spend dealing with the class action should it be allowed to proceed, and the effect this would have on the sales process Timminco was undergoing.

The court found that the class action could cause a delay in the sales process, and therefore could have a negative impact on Timminco's creditors. Having considered the relative prejudice to the parties and the balance of convenience, Morawetz J. concluded that it was premature to lift the stay with respect to the class action claim.

Again in *Timminco Ltd., Re*,[15] the same Class Action Plaintiffs successfully obtained an order to lift the stay. As part of the completion of a court approved sale of substantially all the assets of Timminco, the company sought court approval for a Claims Procedure Order (“CPO”) that would bar any additional claims against any directors, officers, or Timminco Entities. The Class Action Defendants did not file a proof of claim by the required date. The Class Action Plaintiffs argued that it is not fair and reasonable to allow the Defendants to bar and extinguish their class action claims through the use of an interim and procedural court order. Adding that, the CCAA process should not be used in a tactical manner to achieve result collateral to the proper purposes of the legislation. The Class Action Defendants argued that the CPO sets a final claims-bar date, and the Class Action Plaintiffs did not file by the deadline. The court ultimately exercised its discretion and lifted the stay, holding that the purpose of the stay is to restrain conduct that could impair the ability of the debtor company to continue in business and the debtor's ability to focus efforts on negotiating a compromise or arrangement. In the circumstances of the case, distributions had already been made to secured creditors, and there was no prospect of a CCAA plan that would provide a compromise of the claims against directors and officers. With no prospect of compromise or arrangement and with the sales process completed there was no need to maintain the status quo to allow the debtor to focus and concentrate its efforts on negotiating a compromise or arrangement. As such, the court held that on the principle of equity and fairness dictated that the class action plaintiff can move forward with the claim and the stay was lifted.

Similarly, in *Sino-Forest Corporation (Re)*,[16] the court held that the class action plaintiffs were not prejudiced by the stay since it provided time for greater clarity to be brought to the proceedings given an upcoming appeal regarding an equity claims decision that was granted leave.

The question of whether a court has the jurisdiction to lift a stay of proceedings was examined by the Supreme Court of Canada in *Ted Leroy Trucking Ltd. (Re)*.[17] The Supreme Court of Canada held that when determining whether to lift a stay, or more generally make any type of order, the court should take a hierarchical approach in which it first relies on an interpretation of the provisions of the CCAA before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceedings. In this case, the debtor company commenced proceedings under the CCAA, obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor's outstanding debts was an amount of unremitted Goods and Services Tax (“GST”) payable to the Crown. The chambers judge ordered the debtor company to hold back and segregate, in the monitor's trust account, an amount equal to the unremitted GST pending the outcome of reorganization. When it was concluded that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. At this time, the Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion and allowed the assignment into bankruptcy. The question of whether the chambers judge exceeded its CCAA authority by lifting a stay to allow the debtor company to make an assignment in bankruptcy was brought before the Supreme Court of Canada. The Supreme Court of Canada held that whether a court has jurisdiction to grant such an order is found in an interpretation of the CCAA. In this case, the court determined that the chambers judge did not exceed its CCAA authority by lifting a stay to allow the debtor company to make an

assignment in bankruptcy under the BIA. Lifting the stay ensured that the Crown did not receive priority over any of the debtor's assets, creating a disadvantage to other creditors. In addition, lifting the stay allowed a bridge between the CCAA and the BIA proceedings, ensuring a harmonious transition between reorganization and liquidation. Thus, the chambers judge was correct in lifting the stay and disallowing any creditors' claims during the transition from CCAA proceedings to liquidation.

A stay will be granted where it is not contrary to the purpose of the CCAA. The CCAA attempts to strike a compromise between an insolvent debtor company and its creditors, to the end that the company is able to continue in business. The court will lift a stay of proceedings where it does not adversely affect the restructuring effort. The court allowed a stay of proceedings to be lifted in *United Properties Ltd. (Re)*.[18] In this case, the stay was being lifted three years after the plan of arrangement had been approved, thus the court concluded that the plan must be close to completion. There was no evidence before the court to show that lifting the stay would result in prejudice to the company. Similarly, in *Yukon Zinc Corp., Re*[19] the court found that the applicants' issues to be decided only related to a statute unique to the Yukon, the *Miners Lien Act*,[20] As such, lifting the stay of proceedings would not interfere with the issues before the court in the CCAA proceedings. In addition, there was no application before the court in the CCAA proceedings to address the applicants' issues. Therefore, there were no problems with multiplicity of proceedings or conflicting decisions and the order sought to lift the stay of proceedings was granted to a limited extent.

In the case of *Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada cie, Re*[21] a motion to lift the stay was considered. In *Montréal, Maine & Atlantic Canada Co., Re*, a railway company (MMA) was granted CCAA protection following the train crash in the

town of Lac-Megantic, QC, which resulted in the death of 47 people. A dispute arose between an MMA insurer (Travelers) and MMA regarding the coverage and the scope of the coverage granted to MMA under an insurance policy. The main dispute between the parties concerned insurance for lost profits that Travelers believed was wrongfully issued. The motion brought by Travelers sought to lift the stay granted in favour of MMA. By its motion, Travelers asked permission to file a motion for declaratory judgment before the United States District Court of the District of Maine. Justice Dumas rejected the motion on two grounds. First, it was held that Travelers claim was within the scope of the CCAA and did not warrant lifting the stay on their behalf. Travelers' indemnity payments were undoubtedly an asset of the debtor over which the court has jurisdiction. Secondly, Justice Dumas rejected the argument that the District of Maine was the more appropriate forum. Justice Dumas relied on the purpose of the CCAA as outlined in *AbitibiBowater Inc., Re*.[22] In *AbitibiBowater*, the Supreme Court of Canada indicated the necessity of a single proceeding under the CCAA to allow the court to maintain status quo while negotiating a plan. Permitting another jurisdiction to hear the motion was not warranted in light of this general principle of the CCAA.

In *Puratone Corp., Re*[23] the court considered whether the stay should be lifted to pursue a series of actions for fraud. In determining an outcome, the court relied on s. 11.02(3) of the CCAA, and its interpretation from *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* 24 In *ICR* the Saskatchewan Court of Appeal held that there must be “sound reasons”, consistent with the purpose of the CCAA to lift the stay. The search for sound reasons included consideration of: (1) the balance of convenience, (2) the relative prejudice to the parties, and (3) the merits of the proposed action. In *Puratone* a group of grain suppliers, known as the “ITB Group”, filed a motion to lift a stay in order to commence actions against an insolvent purchaser (“Puratone”) and

its directors and officers. Puratone was a commercial hog producer who had not reimbursed the ITB Group for supplying their grain two weeks before Puratone was granted their initial order under the CCAA. It was alleged that the grain was used by Puratone to feed their hogs that were ultimately sold as part of the going concern sale approved by the court. The ITB Group argued that the supply transactions was fraudulent as Puratone was gearing up for its CCAA application and must have then known that it would have been unable to pay for the grain once an initial order was pronounced.

The court ruled that the stay should be lifted for both the action against Puratone and its directors and officers. The claim against Puratone essentially translated into a priority claim between competing creditors for the holdback money that had not yet been dispersed. The two major secured creditors of Puratone who were entitled to the holdback money disputed the ITB Group's claim. The ITB Group argued that equity mandated the creation of a constructive trust declaring Puratone held the grains in trust for the ITB Group, entitling ITB to the grain's full value. The secured creditors argued that it would be unfair to subordinate their priority status. The court recognized that it would be a reasonable remedy to grant a constructive trust if the ITB Group could prove fraud on the part of Puratone. The court held that meeting the evidentiary requirement for demonstrating knowledge of fraud was a high threshold that should not be necessary before a proper discovery process. The court also noted that they would generally not impose a constructive trust where the remedy jeopardizes the priority of innocent secured creditors. The disputing secured creditors' commercial relationship with Puratone was sufficient evidence to indicate they may have known the ITB Group would not be reimbursed. The judge felt that these factors gave the case reasonable cause of action. The court also held that the balance of convenience and relative prejudice favoured the ITB Group. In considering the former, the court noted that the purpose of the CCAA is to maintain status quo for a period of time so that a

debtor company can focus on restructuring without undue interference. Because the assets of Puratone had been sold as a going concern, no formal restructuring would occur and the balance of convenience was in the ITB Group's favour. The judge resolved any prejudice upon the parties by making ITB Group liable for losses the secured creditors would incur from a postponed payment of the holdback money if ITB were unsuccessful in their action.

Similar reasons were used for the Puratone claims when considering the three factors from *ICR* in lifting the stay for the claim against the directors and officers. The requirement to produce evidence of fraud on behalf of the directors and officers at this point was, again, not necessary. The control the directors and officers have of the company led to the reasonable inference that at least some of them would have been aware of the fraud committed by Puratone and be liable if it was found. The balance of convenience again favoured the ITB Group, and there was no prejudice to the directors and officers in having to face the ITB claim sooner rather than later.

Allegations of fraud contributed to a partial lifting of the stay in *Growthworks Canadian Fund Ltd., Re*.[25] The Ontario Superior Court of Justice granted an extension of the stay but required the debtor defend allegations of fraud in proceedings commenced prior to the CCAA application. The court rejected both parties' applications for summary trial to resolve liability on the fraud matter. The court found that disagreement between the parties on how to proceed with the material issues would result in inefficient expenditure of judicial time and increased legal costs for the debtor. With no prospect of resolving the ongoing fraud claim, or establishing an evidentiary record generative to the larger proceedings, the costs of a summary trial outweighed any potential benefits to the parties and undermined the remedial purpose of the CCAA.

Decisions regarding whether to grant or lift a stay are discretionary and are therefore typically accorded a high degree of deference. In *Homburg Invest Inc. (Re)*,[26] the Quebec Court of Appeal rejected the creditor's request for leave to appeal a lower's court decision not to lift a stay. The lower court held that an application to lift the stay of proceedings that prevents it from enforcing its first ranking mortgage and related security on condominium developments owned by two subsidiaries of Homburg in Calgary was not granted. The appeal court held that in order for it to grant leave an appeal must be *prima facie* meritorious. Since discretionary orders are not typically reversed at the appellate level, the court found that the applicant failed to meet this criterion.

Where the stay has been extended beyond the creation stage and for the duration of the plan, there may be additional considerations as to whether a stay may be lifted for specific creditors. The court may look to several factors when determining whether to exercise its discretion under s. 11(4) of the 1997 Act, such as:

(a) the extent of the applying creditor's actual knowledge and understanding of the proceedings;

(b) the economic effect on the applying creditor and debtor corporation;

(c) fairness to other creditors; and

(d) the terms of the court-sanctioned plan.

Such discretion must be exercised in the context of the scheme and purpose of the Act.[27]

The purpose of the Act must be considered when determining if a post-filing creditor has the right to lift a stay to sue a debtor under the protection of an extended stay, pursuant to s. 11(4) of the CCAA, without obtaining leave. Parliament did not include s. 11.3 in the 1997

amendments to the CCAA for the purpose of granting a post-filing creditor the right to sue without obtaining leave. Section 11.3 does not limit the authority of the court to stay all proceedings. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Section 11.3 must be construed so as not to defeat the overall objectives of the Act to promote the re-organization and restructuring of companies. A more logical and consistent reading of s. 11.3 is that this section of the CCAA permits a supervising judge to determine if a post-filing creditor should be permitted to proceed against a debtor subject to a stay.[28]

In certain circumstances a party may have a claim provable in bankruptcy that requires litigation to determine the amount. The stay may be lifted to allow the litigation to take place if the claim will affect the classification of creditors and the voting procedure. However, the litigation must fit within the timetable for formulating the plan of arrangement.[29] Moreover, the court may use its power under s. 11 to stay the enforcement of such litigation if it materially affects or prejudices the integrity of the CCAA proceeding.[30] An application to lift a stay will not be implemented where it would allow the applicant to act offensively. In *JTI-MacDonald Corp. (Re)*,[31] Farley J. did not vary a stay order in CCAA proceedings as such a motion would have permitted the Quebec Minister of Revenue to pursue litigation against an insolvent company. Farley J. stated that “a CCAA stay order should be taken in context … it is to be used as a shield, not as a sword”.[32] However, Farley J. temporarily lifted the stay for the sole purpose of allowing the Minister to file responding material in response to a company's appeal in order to “even up matters so that the MRQ is not put in any disadvantages position”.[33] This stay was lifted in a related case, *JTI-MacDonald Corp. (Re)*,[34] after the litigation had come to a close. The

initial stay was imposed for the sole purpose of preventing a legal claim of $1.5 billion from the government. As part of the settlement the government agreed to terminate the CCAA proceedings, including the discharge of the monitor, the termination of Court-ordered charges, and termination of a stay of proceedings. The court was satisfied that the termination of the proceeding would likely improve the cash flow of the business and would not unduly prejudice other stakeholders. No protection was needed from other creditors as the legal claim was the exclusive focus of the CCAA proceedings.

In *Ivaco Inc. (Re),*[35] the Ontario Court of Appeal affirmed Farley J.'s decision to lift a stay and allow Ivaco to be petitioned into bankruptcy. Ivaco had been granted CCAA protection after its operations had become financially troubled and the corporation had become insolvent. Early in the CCAA proceedings, another ordered stayed the obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. It became apparent that no successful restructuring would be possible and virtually all the assets were sold. The issue then turned to whether the stay should be lifted, allowing creditors to deplete the proceeds pool, prior to providing protection for the unpaid pension claims. In affirming Farley J.'s decision, the Court of Appeal rejected that appellant's argument that position of the pension beneficiaries was a superior concern. The Court of Appeal held that the motions judge had accurately concluded the all creditors had sacrificed something to permit Ivaco to stay in order to attempt a reorganization, therefore the lifting of the stay was not unfairly done.

Further, the Court of Appeal found that as the CCAA proceedings had been spent and there were no longer any compromises to be negotiated, the BIA was the more appropriate regime to deal with distribution. As the creditors had already met the technical requirements for bankruptcy, their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order.[36] The motions judge properly

recognized that bankruptcy proceedings would potentially reverse the priority accorded to the pension claims outside of bankruptcy, and the Court of Appeal was of the view that he correctly weighed all competing considerations.

In a related case, *Ivaco Inc. (Re)*,[37] Ground J. noted that when the court makes the determination to lift a stay in a CCAA proceeding, the court has the jurisdiction to impose conditions on the lifting of the stay in a CCAA proceeding. With respect to allowing the commencement of proceedings by lifting a stay, the court said they would impose conditions on payment of security for costs, set a very tight timetable for the action to proceed and institute limitations on document and oral discovery.

Similarly to *Ivaco Inc (Re)*, in *Grant Forest Products Inc. v. GE Canada Leasing Services Co.,* 38 a motion was filed to lift the stay to permit creditors to petition the insolvent company, Grant Forest Product Inc. (GFPI), into bankruptcy. In *Grant Forest*, a secured creditor argued that its interests in lifting the stay should prevail. Otherwise a deemed trust, which did not exist at the time of the Initial Order, would *de facto* be given priority by the requirement that GFPI make pension wind-up deficiency payments to pay priorities that would not be recognized under the BIA. It was held that by allowing a priority to arise in the middle of insolvency (excluding that of DIP financing) for the purpose of enhancing recovery would likely result in credit being much more difficult to obtain, negatively affecting the flexible nature of the CCAA. In addition, Justice Campbell noted that the Supreme Court of Canada in *Indalex Ltd., Re*,[39] limited the deemed trust provisions of the *Pension Benefit Act*[40] to obligations prior to insolvency. Since the wind-up deficiencies arose after the Initial Order, the court felt that to deny relief of lifting the stay would be at odds with that decision.

However, the Court of Appeal in in *Grant Forest Products Inc. v. Toronto-*

Dominion Bank, 41 subsequently clarified that the facts and the issues of the case differed from those in *Indalex* based on two distinctions. First, the wind-up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In *Grant Forest*, neither of the plans had been declared wound up at the time the Initial Order was made. Second, the BIA played no part in *Indalex*. Despite the irrelevance of *Indalex*, the court reaffirmed that the CCAA judge did not err in lifting the stay and that the priority of the proceeds was with the secured creditors. Further, the court reinforced that the creditors' desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order and that a finding of federal paramountcy was based on the BIA.

In *Tucker v. Aero Inventory (UK) Ltd.,* 42 foreign representatives, who were appointed by the English court to manage the affairs of the foreign debtor, brought a motion for an order lifting the stay and to file an assignment in bankruptcy. A bankruptcy filing would allow the foreign representatives to preserve their right to pursue any reviewable transactions, settlements and preferences or undervalue transactions that took place during the BIA review period. The purpose of the assignment into bankruptcy was to maximize the debtor companies' assets, this was found to be consistent with actions a creditor representative in Canada would take. The stay was lifted to permit the bankruptcy filing.

In the additional reasons to *Bank of Montreal v. Peri Formwork Systems Inc.,* 43 the Court of Appeal clarified an order that it had previously made. In that order the court held that a construction lienholder had priority over a receiver's borrowing charge. The borrowing charge had been granted after the CCAA stay had expired and was thus outside the umbrella of the stay. The parties disagreed as to when the order took effect. The construction lienholder argued that its priority should be restored so that it had priority over all the security that the borrowing

charge covered. The receiver and bank argued that the construction lienholder should only have priority over the security from the date of the order. The court held that the lien had priority over all the security covered by the borrowing charge. The order had not changed the priorities. Instead, it set aside an earlier order that had incorrectly stated the priorities. The court was declaring a priority that had always existed, and was not creating a new priority. The order was not being applied retroactively because the court was recognizing the priority as it had existed prior to the earlier incorrect order.[44]

In *Laurentian University of Sudbury*[45] the plaintiff, BR, sought to lift the stay of CCAA proceedings for Laurentian University of Sudbury ("LU") in order to pursue a civil lawsuit against LU for vicarious liability in relation to a sexual assault. BR's argument was made on the basis of s. 19(2)(i) of the CCAA which exempts certain claims from being dealt with by compromise or arrangement, including awards of damages in civil proceedings in respect of sexual assault. The Ontario Superior Court of Justice held that the exception in s. 19(2)(b)(i) did not apply. In coming to this conclusion, the court relied on the Supreme Court's reasoning in *Montréal (Ville) c. Restructuration Deloitte Inc.*[46] that s. 19(2) of the CCAA must be interpreted narrowly in respect of the fact that the provision puts certain creditors in a better position than others and that liability must be proven, not inferred. The Ontario Superior Court of Justice held that BR had not proven the elements of s. 19(2)(b)(i), as she had only made a claim against LU for vicarious liability, but not yet obtained an award of damages in respect of a sexual assault. Therefore, the court found no basis to lift the stay of proceedings to allow BR to pursue her claim outside the CCAA Claims Process.

Cross-References

Repair and Storage Liens

- See *Secured Transactions in Personal Property in Canada* (3rd Edition) (McLaren): Chapter 3 Scope - II. Included Transaction - E. Repair and Storage Liens

Liens and Trusts

- See *Secured Transactions in Personal Property in Canada* (3rd Edition) (McLaren): Chapter 3 Scope - III. Excluded Transactions - § 3:48 Liens given by Statute or Rule of Law

Perfection by Registration

- See *Secured Transactions in Personal Property in Canada* (3rd Edition) (McLaren): Chapter 5 Perfection - III. Perfection by Registration

Priority in Bankruptcy

- See *Secured Transactions in Personal Property in Canada* (3rd Edition) (McLaren): Chapter 7 Priority - VII. Priority Rules in the Context of Bankruptcy

Footnotes

1 This statement was quoted and cited with approval noted in Canwest Global Communications Corp. (Re) (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J.), at para. 32. The court refused to lift a stay because none of the enumerated factors, set out in the following paragraph, were such that the stay should be lifted. This same statement was also cited with approval in a subsequent case in the *Canwest* proceedings, Canwest Global Communications Corp. (Re), 2010 CarswellOnt 5225, 2010 ONSC 3530. None of the enumerated situations were present, so just as in the previous *Canwest* case, the

court refused to lift the stay to allow a creditor to bring a claim. The above statement, as well as these enumerated factors, were also considered and cited with approval in Canwest Global Communications Corp. (Re) (2011), 75 C.B.R. (5th) 156 (Ont. S.C.J.), in the context of a labour grievance where the union sought to lift the stay of proceedings with respect to an employee's outstanding grievance so that it could be adjudicated in accordance with the collective agreement. The court held that grievances should generally be adjudicated along with other claims pursuant to the provisions of a claims procedure within the context of CCAA proceedings. However, this case was unique in that given the stage of the CCAA proceedings, the seniority of the employee and the fact that the stay with regard to the employer had been lifted, the court held that the balance of convenience and the interests of justice favoured lifting the stay to permit grievances to be adjudicated in accordance with the terms of the collective agreement. In Air Canada (Re) (2004), 47 C.B.R. (4th) 177 (Ont. S.C.J.), the defendants Air Canada and United Airlines Inc. were trying to reorganize under the CCAA. The plaintiffs brought a second motion to lift the stay for the purpose of carrying on in the proposed class proceedings with the case in the Federal Court. The court found that the plaintiffs failed to focus on the test for lifting a stay in a CCAA context and were attempting to proceed with litigation unimpeded. The court found this to be contrary to the purpose of the CCAA as it was designed to facilitate the making of compromises between companies and their creditors. Holding creditors at bay is necessary for arrangements to have any prospect of success. Therefore, lifting the stay would have had extremely adverse effects on the defendants' restructuring efforts. The court found that the plaintiffs did not present any truly new evidence to support the motion and dismissed the motion to lift the stay with some costs awarded to the defendants. In Ivaco Inc. (Re), [2006] O.J. No. 5029 (S.C.J.), the plaintiff brought a motion to interpret cost adjustments related to

asset purchase agreements and to lift a stay in CCAA proceedings and commence an action against the defendant seeking separate damages. With respect to the interpretation of cost adjustments, the court allowed the stay to be lifted and a trial to proceed if issues were limited strictly to the interpretation. With respect to the request to lift the stay to sue for separate damages, the court determined that the applicant had failed to establish any damages and did not set forth a reasonable, or even tenable, cause of action. The stay was not lifted to allow the plaintiff to sue for damages. In Smurfit-Stone Container Canada Inc. (Re) (2009), 61 C.B.R. (5th) 92 (Ont. S.C.J.), related businesses were under CCAA protection and the American equivalent. Fund managers of debt notes issued by Finance II to sister company Smurfit Canada were not able to have the stay lifted despite potential conflict of interest issues. The fund managers were concerned that Finance II's interest would be compromised as it had overlapping directors and officers with Smurfit Canada. The parties requested Finance II make an assignment into bankruptcy so a trustee could be installed. The request was denied as there was no evidence that the interests of the fund managers were not being accounted for. The court found there was a real issue in determining whether Finance II's claims were debt or equity, but this concern could be dealt with in the plan or by a motion, making the relief requested premature. Also see, 505396 B.C. Ltd., Re, 2013 CarswellBC 2638, 2013 BCSC 1580 (B.C. S.C.), where the court found a secured creditor, VFS, had not met the heavy onus required to successfully lift the stay. VFS was unsuccessful in fitting itself within any of the nine circumstances articulated in Canwest Global Communications Corp., Re (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J. [Commercial List]), and no additional sound reasons for lifting the stay were apparent. VFS still retained its security over the assets and still had a claim against those assets. As well, the court was convinced that the lifting the stay would adversely affect the interest of the other stakeholders. As such, no

principled basis was found to exempt VFS from the stay order.

Where an application is made to set aside or vary a stay order, the application should be made to the judge who made the original order: Philip's Manufacturing Ltd. (Re) (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84 (C.A.), leave to appeal to S.C.C. refused 15 C.B.R. (3d) 57*n*.

2 In Inducon Development Corp. (Re) (1991), 8 C.B.R. (3d) 306 (Ont. Ct. (Gen. Div.)), Farley J. stated that: “It is of course … fruitless to proceed with a plan that is doomed to failure at a further stage.” In deciding whether the a plan is doomed to failure, the Court of Appeal in Stelco Inc. (Re), [2005] O.J. No. 4733 (C.A.), stated that it is a matter of judgment of the supervising judge to determine whether the plan is doomed to fail. A supervising judge may find merits in the plan even though the creditor with veto power did not want to accept the plan. In Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 4 C.B.R. (3d) 311 at p. 315, [1991] 2 W.W.R. 136 (B.C.C.A.), Gibbs J.A. stated:

> … the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that *the attempt is doomed to failure*. [Emphasis added.]

Thus, it is clear that an opposing party may attempt to have a stay lifted by presenting evidence that the plan or arrangement will fail. Such evidence may include proof that the requirements of s. 6 of the CCAA will not be met. This ground for denying an initial order, or subsequent extension of a stay, was also considered in Rio Nevada Energy (Re) (2000), 283 A.R. 146 (Q.B.). In this case, the major secured creditor opposed an extension of the initial stay on the

grounds that any proposal or plan would be “doomed to failure”. One issue was the manner in which the “doomed to failure” test was to be applied and who bore the burden of proof. The court held that the “doomed to failure” ground for preventing or terminating CCAA proceedings is not merely a factor to be considered in whether the court should grant an extension of the stay, but rather is a separate issue. The court found this preferable as it would ensure that the burden of proof is applied appropriately. In seeking an initial order, or an extension of a stay, the debtor has the burden of proving the requisites for a stay, but does not have the burden of proving that a plan would not be doomed to failure. Conversely, the applicant seeking termination of CCAA proceedings bears the burden of proving that any plan is “doomed to failure” (*Philips Manufacturing (Re)*, *Bargain Harold's*). The court also noted that two standards have been suggested for determining whether a plan is “doomed to failure”. The first is that the applicant creditor must lead evidence showing that an attempt at a plan is indeed doomed to failure (*Philips Manufacturing*; Sharp-Rite Technologies (Re) (2000), 94 A.C.W.S. (3d) 421, [2000] B.C.J. No. 135 (S.C.), at para. 25, affd 19 C.B.R. (4th) 135, 2000 BCCA 402). The second is lower, the applicant only needing to show that there is no reasonable change that any plan would be accepted (citing *Bargain Harold's*). Noting that the first standard would be extremely difficult to demonstrate, especially in the earlier stages of a CCAA proceeding, the court adopted the second standard as the proper one to follow. In Hickman Equipment (1985) Ltd. (Re) (2003), 224 Nfld. & P.E.I.R. 62, 5 P.P.S.A.C. (3d) 124 (Nfld. & Lab. S.C.T.D.), the debtor applied for relief under the CCAA. The court granted the relief sought, including an order staying proceedings against the debtor. However, once it became apparent that the debtor would not be able to formulate a scheme of arrangement under the CCAA which would be acceptable to its creditors, the court granted an application by the debtor and a secured creditor which sought to

discontinue the stay so that a petition in bankruptcy could be filed. See also Marine Drive Properties Ltd. (Re) (2009) 52 C.B.R. (5th) 47 (B.C.S.C.), where the court concluded that a plan of arrangement was doomed to fail, and there was therefore no reason to continue the order. In making this decision, the court considered the petitioner's equity situation, the nature of the petitioner's business, the fact that foreclosure proceedings were currently ongoing to all of the petitioners' developments, and the financing arrangement between the petitioners and their creditors. The petitioner's inability to find financing, the subsequent falling real estate market in British Columbia, and the global credit crunch seriously impacted the petitioners in this case. In addition, many mortgagees were now opposed to any compromise, and a number brought motions to set aside the order. See also NFC Acquisition GP Inc. (Re) (2012), 212 A.C.W.S. (3d) 732, 2012 ONSC 1244 (Comm. List), where in light of a breakdown in an auction process to sell the debtor's assets, the Bank of Montreal (BMO) secured creditor declared the process to be in default. As a result, BMO refused to fund the debtor's operations any further. In response, the debtor ceased to conduct business and dissolved its board. The dissolution left a large quantity of inventory and assets in jeopardy as the nature of the debtor's business was meat production. This meant that a portion of their inventory consisted of non-durable goods. In order to maximize the benefit to the debtor's stakeholders in the wake of the failure of the sales process, the court allowed the stay on the debtor to be lifted. This allowed BMO to appoint a receiver to effectively and quickly liquidate the debtor's assets and maximize the value.

3 In Alberta-Pacific Terminals Ltd. (Re) (1991), 8 C.B.R. (3d) 99 (B.C.S.C.), the harbour commission had an operating agreement with Fraser Surrey Docks Ltd. (“FSDL”). FSDL ran into financial difficulties and sought protection under the CCAA. The court ordered a stay of proceedings against the petitioners, prohibiting

the commission from taking any steps to terminate the agreement and ordering that any contracts that might give a benefit to any petitioner be maintained. The stay left the management of FSDL a significant area of discretion in the application of its cash flow. The commission applied for an order directing the payment of the amounts that fell due monthly under the operating agreement. Huddart J. stated that it was not appropriate for the court to intervene with management's exercise of its discretion without some reason, such as evidence of hardship to the commission or erosion of its property. As there was no evidence of any hardship to the commission, the court held that FSDL should not be ordered to pay moneys pursuant to the operating agreement pending the termination of the stay.

4 In Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98 (B.C.S.C.), an *ex parte* order was made to give the debtor protection from its creditors so that it could prepare a plan. The order provided that the debtor pay off creditors owed less than $200,000 because these creditors might be faced with insolvency if not paid. Unsecured creditors owed more than $200,000 alleged that the order did not maintain the *status quo*. RT Inc. applied to vary the order to allow payment of creditors in financial hardship. The court stated that if RT Inc. would be forced to close without payment, thus jeopardizing the reorganization and existence of the debtor, the doctrine of necessity of payment could come into play. The court concluded, however, that there was no evidence to suggest that RT Inc. would be forced to close without payment. In EarthFirst Canada Inc. (Re) (2009), 1 Alta. L.R. (5th) 311 (Q.B.), Earthfirst Canada Inc. (“EarthFirst”) was under the protection of an initial order granted under the CCAA, but sought to establish a “hardship fund” that would be used to allow it to pay pre-filing obligations owing to certain suppliers and contractors operating in the community near which it was developing a wind farm project.

Having not received payment from EarthFirst in several months, some of these local contractors and suppliers faced immediate financial difficulty, including the inability to fund payroll and purchase critical supplies to continue operations. If some relief was not available, these local operations faced bankruptcy. This could have led to a domino effect, as these businesses were dependant on the continued development of the project, which in turn was dependant on the continued involvement of the suppliers and contractors. The court thus determined that the future benefit to the company of these relatively modest payments of pre-filing debt to protect the project, EarthFirst's primary asset, was considerable and outweighed the prejudice to other creditors.

5 In Algoma Steel Corp. v. Royal Bank of Canada (1992), 93 D.L.R. (4th) 98, 11 C.B.R. (3d) 11 (C.A.), leave to appeal to S.C.C. refused 59 O.A.C. 326*n*, 145 N.R. 395*n*, representatives of a child who had suffered serious injuries when a wheel manufactured by Kelsey-Hayes Canada Ltd. broke away from a truck brought an action against Kelsey-Hayes. In turn, Kelsey-Hayes sought contribution and indemnity from Algoma, the manufacturer of the steel used in the wheel. All proceedings against Algoma were stayed by an order under the CCAA as a plan of arrangement had been approved. Kelsey-Hayes argued that the existence of the plan did not prevent the court from permitting them to sue Algoma. The court stated [at p. 102] that:

> … generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable … it is not to be interfered with by the court unless: (a) the Act authorizes the court to affect the plan, and (b) there are compelling reasons justifying the court's action. Generally speaking again, the court ought not to interfere where to do so would

> prejudice the interests of the company or the creditors. But where no prejudice would result and the needs of justice are to be met, the court may act if the C.C.A.A., properly interpreted, authorizes intervention.

Subsequently, when determining whether any of the parties would be prejudiced, the court found that several interests would be prejudiced if the leave by the court had the effect of giving potential access to assets over and above the policy limits. The court concluded that only insurance proceeds that might become available to Algoma could be the subject of any recovery against Algoma.

In Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd. (1997), 75 A.C.W.S. (3d) 204 (Ont. Ct. (Gen. Div.)), the court applied the test set out in *Algoma* in considering a motion to have the stay under the Plan lifted with respect to claims by a landlord. The court denied the motion, stating that allowing the landlord to pursue its claims would prejudice the interests of other creditors and threaten the continued existence of the Plan itself. Furthermore, the court rejected the landlord's claim that a lifting of the stay was necessary to ensure that the “needs of justice” be met, holding that the landlord's contentions did not have the substance to constitute, and in the words of the Court of Appeal in *Algoma*, “compelling reasons” for the court to interfere in this case. See also Ivaco Inc. (Re) (2007), 29 C.B.R. (5th) 145 (Ont. S.C.J.), where the court ordered a lift on the stay of proceedings allowing the Ontario Pension Benefits Guarantee Fund (“PBGF”) to make a payment to the fund of the salaried employees of Ivaco. Without the payment and upon the bankruptcy of Ivaco the non-unionized pensioners would have suffered harm because the assets of Ivaco were not sufficient to cover the large unfunded pension liability. The court allowed the lift

reasoning that the payment by the PBGF to the fund of the salaried employees would never form any part of Ivaco's estate. The payment could not affect the validity or quantum of any claim by Ivaco's creditors. In Humber Valley Resort Corp. (Re) (2008), 280 Nfld. & P.E.I.R. 268 (N.L.S.C. (T.D.)), the court refused to lift a stay for M Inc., which held capital leases on the debtor's equipment. The court concluded that, when lifting a stay, a court must strike a balance between the prejudice to the creditor if the stay is not lifted and the prejudice to the debtor and other creditors if the stay is lifted. In this case, the court was not satisfied that the prejudice to M Inc. would substantially outweigh the prejudice to the debtor. In addition, the court was also not satisfied that M Inc. used its best efforts in its own interest or in the interest of the debtor when marketing the equipment. See also Smurfit-Stone Container Canada Inc. (Re) (2009), 61 C.B.R. (5th) 92 (Ont. S.C.J.), where the court refused to lift a stay after considering the potential prejudice to both the creditors and debtors. The debtor company was part of a group of related corporations undergoing CCAA and American proceedings. The judge considered the potential prejudice to the corporate group's reorganization as a whole when deciding not to lift the stay. In Azure Dynamics Inc. (Re), 2012 BCSC 781, the court refused to lift the stay sought by one creditor after considering the prejudice to the debtor company and that creditor. The creditor alleged two prejudices. First, the creditor claimed that the debtor's continued consumption of products that the creditor supplied was prejudicial. Second, the creditor claimed they are prejudiced because of the ongoing professional costs being incurred, which were secured by a ranking prior to the creditor. Regarding both prejudices, the court stated that there were other creditors affected in the same way. Therefore, the creditor attempting to lift the stay was not in any special position. Further, the court added that the prejudice relating to professional costs was balanced against what was seen as being a reasonable prospect that there would be a

successful restructuring, which would ultimately benefit all parties. As such, the cost of these professionals during restructuring was seen simply as a requirement to take advantage of that opportunity. The court found that lifting the stay would greatly prejudice the debtor company's ongoing efforts at restructuring. The judge held that the creditor's concerns could not override the interests of all stakeholders in allowing the restructuring scheme to continue, and that the application to lift the stay was dismissed. In Comstock Canada Ltd., Re, 2013 CarswellOnt 13598, 2013 ONSC 6043, [2013] O.J. No. 4374 (Ont. S.C.J. [Commercial List]), the court lifted the stay of proceedings since maintaining it would have been prejudicial to the creditor company. This case was in the context of a real estate project, which the court recognized inherent difficulties with given that construction and real estate companies operate on a project-by-project basis and each project is the subject of specific-purpose financing. The debtor company acknowledged that it would be unable to continue its performance of the Project and had no issue with the creditor company entering into a new contract with the replacement contractor on the Project. The creditor company argued that it was being prejudiced against and that it did not want to be involved in two contracts at the same time. Based on this, the court found that the Project would not be an asset that would form part of the Sale and Investor Solicitation Process under the CCAA proceedings and therefore would not be associated with the reorganization or liquidation process leaving no principled basis on which a stay of proceedings should be maintained.

6 In Scaffold Connection Corp. (Re) (2000), 15 C.B.R. (4th) 289, [2000] 7 W.W.R. 516 (Alta. Q.B.), a motion by two creditor companies was made to have a mechanics lien registered against the debtor company *nunc pro tunc*. The creditor companies argued that their claim would be prejudiced, as the limitation period in the *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6, would expire before the

stay was concluded. After reviewing the different ways in which limitation periods are dealt with in the context of an insolvency statute stay, the court held that the limitation period was "postponed" and only resumed once the stay was concluded. The court pointed to the wording of the actual stay order to find that the limitation period was extended by a period of time equal to the duration of the stay of proceedings and any further order of the court. In PSInet Ltd. (Re) (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J.), a parent company thought it was an unsecured creditor in the assets of its subsidiary. The parent company later realized it held a security interest in the assets but the period of perfection had lapsed. The parent company tried to reperfect it under s. 30(6) of the PPSA. The court lifted the stay granted under the CCAA and allowed the parent company to reperfect its interest. The parent company re-established priority over the unsecured creditors even though it was previously unaware that it held a security interest and had been negligent in letting the original registration expire. In Ivaco (Re) (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J.), an insurance financier sought an order lifting the stay of proceedings imposed under the CCAA. The insurance financier had provided insurance premium financing to Ivaco and wanted to realize on its security by cancelling the insurance policy and retaining the premiums refunded by the insurance company. The insurance financier argued that its security was being depleted with the passage of time. The court refused to lift the stay. It was held that the insurance premium financing contract was an unsecured pre-filing obligation which would be dealt with under the Plan. Granting permission to the insurance financier to recover the unearned premiums would have given the insurance financier priority over secured and unsecured creditors. See also Stelco Inc. (Re) (2005), 253 D.L.R. (4th) 524 (Ont. C.A.), revg 49 C.B.R. (4th) 283 (S.C.J.), where the insurance financier moved for the same relief it had sought in *Ivaco*. Stelco had been given protection from creditors under the CCAA. Once again, the

insurance financier sought an order lifting the stay of proceedings imposed under the CCAA because the insurance financier had provided insurance premium financing to Stelco and wanted to realize on its security — the unearned insurance premium. The court refused to lift the stay of proceedings. To lift the stay of proceedings and allow the insurance financier to cancel the insurance contract and collect the unearned premiums would be to give the insurance financier an inappropriate advantage over other unsecured and secured creditors. Cafo appealed this decision. On Appeal, the Court of Appeal did not revisit this issue. Rather, the court focused on whether in substance unearned premiums are exempted from the scope of the PPSA. In holding that unearned premiums are exempt, the court noted that values of certainty, uniformity, and ease of commerce are promoted if the unearned insurance premiums are outside the scope of the PPSA. The court refused to determine the effect if any on the priority between Cafo and other secured creditors and added that such matters awaited resolution another day using the general BIA or common law principles. Stelco had recently obtained protection from creditors under the CCAA. Once again, the insurance financier sought an order lifting the stay of proceedings imposed under the CCAA because the insurance financier had provided insurance premium financing to Stelco and wanted to realize on its security — the unearned insurance premiums. The court refused to lift the stay of proceedings. To lift the stay of proceedings and allow the insurance financier to cancel the insurance contract and collect the unearned premiums would be to give the insurance financier an inappropriate advantage over other unsecured and secured creditors. In JTI-MacDonald Corp. (Re) (2004), 5 C.B.R. (5th) 76 (Ont. S.C.J.), a stay was immediately lifted for the limited purpose of issuing a petition in bankruptcy within the five-year limitation period. Nearly identical facts are found in Ascent Ltd. (Re) (2006), 18 C.B.R. (5th) 269 (Ont. S.C.J.), in which an order had been made while the bankrupt was in

notice of intention proceedings, to hold for an insurance financier a reserve of cash as the equivalent of a wasting asset in the form of an insurance premium instalment contract, pending the outcome of the decision in *Stelco Inc. (Re)*. When the bankrupt failed to set aside the funds, the insurance premium continued to be paid and the secured interest wasted away, forcing the financier to bring an application appealing the denial of the proof of claim for a property interest in the funds that were to be set aside, on the basis of unjust enrichment of the bankrupt. The court held that the bankrupt was unjustly enriched, and imposed a remedial constructive trust over assets of the bankrupt in the amount of the prior court order not complied with, to prevent injustice to commercial morality.

7 In Timber Lodge Ltd. v. Timber Lodge Ltd. (Creditors of) (1992), 17 C.B.R. (3d) 126, 104 Nfld. & P.E.I.R. 104 (P.E.I.S.C.), the court lifted the stay to permit the creditors to take whatever action they deemed necessary, because the company was no closer to making a plausible proposal than it had been when it originally applied for the stay. In Air Canada (Re) (2003), 121 A.C.W.S. (3d) 994 (Ont. S.C.J.), the applicant made an *ex parte* application for CCAA protection and ancillary relief. In granting the relief sought, the court noted that the application was a product of intense, virtually round-the-clock work over a period of a few days. As a result, the application would contain some glitches, which would have to be thought through. The court accepted the application nonetheless and encouraged the parties involved to make appropriate use of a comeback clause to demonstrate to the court that the relief sought was warranted, with or without amendment. In Azure Dynamics Inc. (Re), 2012 BCSC 781, the court refused to lift the stay. The creditor seeking to lift the stay was very pessimistic that the debtor had a “kernel of a plan”. However, the judge looked to the debtor's significant efforts to obtain further financing, which indicated that there was substantial evidence that there was a “kernel of a plan”. The court held that the

debtor should be given a reasonable chance to explore the formulation of a plan because some interest from DIP financiers shows progress. Further, the court commented that proceedings were ongoing for only three weeks and in that time, it cannot be said that there has been any failure on the debtor's part to show progress in its restructuring efforts.

8 Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 *sub nom. Elan Corp. v. Comiskey* (C.A.); Rio Nevada Energy Inc. (Re) (2000), 102 A.C.W.S. (3d) 18, [2000] A.J. No. 1596 (Q.B.).

9 In PSInet Ltd. (Re) (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J.), a motion was brought by a creditor company to have a stay lifted to allow a lapsed registration of the creditor company's GSA to be re-registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA"). The court held that despite the creditor company's lack of knowledge for a lengthy period of its perfected and subsequent lapsed registration it should not be prevented from re-registering and lifted the stay for that purpose. However, the court imposed certain conditions as a prerequisite to that permission pursuant to its discretionary CCAA jurisdiction. The creditor company was held responsible for all parties' costs related to their request to re-register. Finally, the court suggested that the creditor, as the owner of the debtor company, should compensate other creditors affected by the creditor company's unawareness of the lapse of registration of their interest. See also TRG Services Inc. (Re) (2006), 26 C.B.R. (5th) 203 (Ont. S.C.J.), in which C, a creditor with a security interest that had attached but was unperfected, sought the lifting of a stay of CCAA proceedings in order to register and perfect its security interest, to take priority over unsecured creditors. C filed for proof of claim nearly six months after the initial CCAA order which had included a come-back clause asking all

creditors to apply for an amendment to the order within seven days of issuance of same. The court held that since C held a valid security interest, it had the discretion to lift the stay order to permit the creditor to register and perfect its security interest. The court held that through negative inference, the PPSA implies that a holder of a security interest has priority over an unsecured creditor of the debtor. Only if the security interest is unperfected and the competing creditor has seized the collateral is this priority lost. The court acknowledged that a ruling according secured creditor status to the holder of a deliberately unregistered and unperfected security interest would create enormous uncertainty in the CCAA process and would lead to many potential inequities. Where any prejudice was incurred by the other creditors who had made reorganization efforts, the court allowed the creditors to ask C to bear reasonable expenses associated to its delay in perfection. See also 3S Printers Inc. (Re), 2011 BCSC 630, where a stay order was lifted because there was an adverse change in the insolvent's cash flow and the insolvent failed to demonstrate any reasonable prospect of developing a plan that provided working capital.

10 In 360networks inc. (Re) (2003), 45 C.B.R. (4th) 151, [2003] B.C.J. No. 1553 (S.C.), the court held that it was in the interests of justice to lift the stay of proceedings and allow a party to file a petition and abridge the notice requirements for the hearing of that petition. This allowed the party's petition to be heard at the same time as its appeal of a notice of disallowance regarding a claim for the purposes of the plan of arrangement. The court concluded that the extent of the party's unsecured claim for the purposes of the restructuring plan may depend on the outcome of the petition's claims. The court also concluded that there was a possibility of inconsistent findings if the claims were determined on separate occasions and, as a result, these inconsistent holdings could produce an injustice to one of the parties. This paragraph was cited

with approval in Canadian Airlines Corp. (Re) (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.). Also, in Humber Valley Resort Corp. (Re) (2008), 280 Nfld. & P.E.I.R. 268 (N.L.S.C. (T.D.)), the court referred to this paragraph as cited in *Canadian Airlines Corp.* with approval.

11 Canwest Global Communications Corp. (Re) (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J.). See also 505396 B.C. Ltd., Re, 2013 CarswellBC 2638, 232 A.C.W.S. (3d) 34, 2013 BCSC 1580 (B.C. S.C.), a British Columbia case that relied on the nine factors cited with approval in Canwest Global Communications Corp., Re (2009), 61 C.B.R. (5th) 200, 2009 CarswellOnt 7882, [2009] O.J. No. 5379, 183 A.C.W.S. (3d) 634 (Ont. S.C.J. [Commercial List]) In 505396 B.C. Ltd., Re, 2013 CarswellBC 2638, 232 A.C.W.S. (3d) 34, 2013 BCSC 1580 (B.C. S.C.), the application to lift the stay was dismissed as the circumstances did not fall within one of the enumerated factors considered and the applicant failed to satisfy the heavy onus imposed on it.

12 Canwest Global Communications Corp. (Re), 2010 CarswellOnt 5225, 2010 ONSC 3530.

13 Canwest Global Communications Corp. (Re) (2011), 75 C.B.R. (5th) 156 (Ont. S.C.J.).

14 Timminco Ltd. (Re), 2012 ONSC 2515 (Comm. List).

15 Timminco Ltd., Re, 2014 CarswellOnt 9328, 2014 ONSC 3393 (Ont. S.C.J.).

16 Sino-Forest Corporation (Re), 2012 CarswellOnt 14102, 2012 ONSC 6275 (Ont. S.C.J. [Commercial List]).

17 Ted Leroy Trucking Ltd. (Re) (2010), 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379 *sub nom. Century Services Inc. v. Canada (Attorney General)*.

18 United Properties Ltd. (Re) (2005), 22 C.B.R. (5th) 274 (B.C.S.C.).

19 Yukon Zinc Corp., Re (2015), 5 P.P.S.A.C. (4th) 9, 2015 CarswellBC 3121 (B.C. S.C.).

20 R.S.Y. 2002, c. 151.

21 Montréal, Maine & Atlantic Canada Co./Montréal, Maine & Atlantique Canada cie, Re, 2013 CarswellQue 10709, 2013 QCCS 5194 (C.S. Que.).

22 AbitibiBowater Inc., Re (2012), 352 D.L.R. (4th) 399, (*sub nom. Newfoundland and Labrador v. AbitibiBowater Inc.*) [2012] 3 S.C.R. 443 (S.C.C.), at para. 21.

23 Puratone Corp., Re (2013), 295 Man. R. (2d) 55 (Man. Q.B.), leave to appeal allowed 2014 CarswellMan 30, 2014 MBCA 13.

24 ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd (2007), 33 C.B.R. (5th) 50 (Sask. C.A.).

25 Growthworks Canadian Fund Ltd., Re, 2014 CarswellOnt 4620, 2014 ONSC 2253 (Ont. S.C.J. [Commercial List]).

26 Homburg Invest Inc. (Re), 2012 CarswellQue 3446 (Que. C.A.).

27 These factors were outlined by the Supreme Court in Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, [1995] 2 W.W.R. 404 (B.C.S.C.), affd 31 C.B.R. (3d) 157, [1995] 4 W.W.R. 364 (C.A.), where the court, after considering all of the factors, did not grant the creditor leave to commence an action against the debtor. On appeal, the Court of Appeal found that, in keeping with the purpose of the CCAA and the debtor corporation's plan, all future obligations are stayed under a plan. The plan had defined a “claim” to be “an amount alleged by a person to be owed to it by or any obligation … for which a valid proof of claim could have been filed … but … was

not so filed”. This was held to include contingent claims such as Mr. Lindsay's. Mr. Lindsay had been receiving pension benefits from a pension plan established for the benefit of the employees of Transtec Canada Ltd. and guaranteed by its holding company, Alberta-Pacific Terminal Ltd. When the principal debtor defaulted under its pension plan payments, the pensioner sought payment from the guarantor. The pensioner claimed not to be a creditor because its principal debtor was not in default when the Alberta-Pacific plan was approved and thus was outside the stay in favour of the guarantor. The Court of Appeal held that the pensioner was a creditor under the plan and bound by its terms despite never having filed a proof of claim. The court also upheld the trial decision by concluding that the inadvertent failure to notify a single creditor is not fatal to a debtor's plan.

28 Section 11.3 was construed narrowly in ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 33 C.B.R. (5th) 39 (Sask. Q.B.), affd 33 C.B.R. (5th) 50 (C.A.). The realtor claimed that by the addition of s. 11.3 in the 1997 amendment of the CCAA, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave. Pursuant to its interpretation of s. 11.3 of the CCAA, the realtor believed it was not subject to the stay of proceedings imposed by the Initial Order and requested to commence an action against Bricor and the CRO. The court denied this contention and held that leave was required to commence an action. An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the CCAA, which is to promote reorganization and restructuring of companies. The realtor's request to commence an action against Bricore and the CRO was denied. This ruling was affirmed in the Saskatchewan Court of Appeal.

29 In Ivaco Inc. (Re), [2006] O.J. No. 5029 (S.C.J.), the court allowed a

stay to be lifted in order to interpret cost adjustments to asset purchase agreements and disallowed another stay related to an action for damages. The court stated that if it had allowed the second stay, it would have also imposed a condition fixing a very tight timetable for the action to proceed and also instituted limitations on document and oral discovery.

30 In Cadillac Fairview Inc. (Re) (1995), 30 C.B.R. (3d) 17 (Ont. Ct. (Gen. Div.)), the court lifted the stay to allow litigation to determine the value of ongoing claims arising from the termination of various advisory agreements. The value of the claims would have a significant impact on the plan of compromise if the advisors were given veto power over the plan or, at the very least, the calculation of assets available to creditors under the plan would be affected. Farley J. held that as the claims were of sufficient importance and the litigation was capable of fitting within the tight CCAA timetable, the stay would be lifted so the litigation could proceed. As the action had been brought in Chicago, the court went on to assert the applicability of the stay of proceedings to the Chicago action and asserted its jurisdiction over the pending civil proceedings. In a later judgment, Cadillac Fairview Inc. (Re) (1995), 52 A.C.W.S. (3d) 1343 (Ont. Ct. (Gen. Div.)), the court allowed the proceedings to continue in Chicago. Farley J. cited the Chicago court's competence to decide the issue and its willingness to accommodate the tight CCAA schedule as reasons for allowing the litigation to proceed outside Canada. The court also cited the principles of comity, outlined in Amchem Products Inc. v. British Columbia (Workers' Compensation Board) (1993), 102 D.L.R. (4th) 96, [1993] 1 S.C.R. 897, that governed the recognition of the Chicago court's jurisdiction over the issue. However, in a subsequent decision in Cadillac Fairview Inc. (Re) (1995), 54 A.C.W.S. (3d) 265 (Ont. Ct. (Gen. Div.)), Farley J. ordered a stay of enforcement of the Chicago proceedings. Cadillac Fairview (U.S.) had brought a motion that if

the Chicago proceedings concluded with a judgment against the Cadillac Fairview Group or Cadillac Fairview (U.S.), the judgment should be stayed or enforced only pursuant to the CCAA plan or order. The court found that the Chicago litigation was material to the reorganization proceedings because of the size of the claim and could therefore affect the CCAA process because of the involvement of the Cadillac Fairview Group. The court held that the stay of enforcement was necessary in order to maintain the integrity of the CCAA proceedings. The court stepped back from its first order (which extended the stay until the conclusion of the Chicago litigation) and suggested an application under other legislation. The Cadillac Fairview Group did so by applying for a stay of enforcement under § 304 of the U.S. Bankruptcy Code. A clause was added to the original CCAA order to allow Cadillac Fairview (U.S.) to proceed under the American provision.

31 JTI-MacDonald Corp. (Re) (2005), 10 C.B.R. (5th) 208 (Ont. S.C.J.).

32 JTI-MacDonald Corp. (Re) (2005), 10 C.B.R. (5th) 208 (Ont. S.C.J.), para. 6.

33 JTI-MacDonald Corp. (Re) (2005), 10 C.B.R. (5th) 208 (Ont. S.C.J.).

34 JTI-MacDonald Corp. (Re) (2010), 70 C.B.R. (5th) 310 (Ont. S.C.J.).

35 Ivaco Inc. (Re) (2006) 275 D.L.R. (4th) 132, 25 C.B.R. (5th) 176 (Ont. C.A.), leave to appeal to S.C.C. granted 277 D.L.R. (4th) viii, leave discontinued October 31, 2007, affg 12 C.B.R. (5th) 213, [2005] O.J. No. 3337 (S.C.J.).

36 In a subsequent case, Indalex Ltd. (Re) (2011), 331 D.L.R. (4th) 352 (Ont. C.A.), leave to appeal to S.C.C. allowed 337 D.L.R. (4th) iv, the Court of Appeal commented in *dicta* that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation.

37 Ivaco Inc. (Re) (2006) 275 D.L.R. (4th) 132, 25 C.B.R. (5th) 176 (Ont. C.A.), leave to appeal to S.C.C. granted 277 D.L.R. (4th) viii, leave discontinued October 31, 2007, affg 12 C.B.R. (5th) 213, [2005] O.J. No. 3337 (S.C.J.).

38 Grant Forest Products Inc. v. GE Canada Leasing Services Co., 2013 CarswellOnt 14057, 2013 ONSC 5933 (Ont. S.C.J. [Commercial List]), affirmed (2015), 26 C.B.R. (6th) 218, 2015 ONCA 570 (Ont. C.A.).

39 Indalex Ltd., Re (2013), 354 D.L.R. (4th) 581, 2013 SCC 6 (S.C.C.).

40 R.S.O. 1990, c. P.8.

41 Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 387 D.L.R. (4th) 426, 26 C.B.R. (6th) 218 (Ont. C.A.).

42 Tucker v. Aero Inventory (UK) Ltd. (2010), 65 C.B.R. (5th) 314 (Ont. S.C.J.).

43 Bank of Montreal v. Peri Formwork Systems Inc. (2012), 346 D.L.R. (4th) 495 (B.C.C.A.), additional reasons 90 C.B.R. (5th) 288 (B.C. C.A.), leave to appeal to S.C.C. refused 2013 CarswellBC 105, 2013 CarswellBC 104.

44 Also see Mission Creek Mortgage Ltd. v. New Recreations Ltd. (2014), 10 C.B.R. (6th) 121 (B.C. C.A.)., where the court distinguished the case from *Peri Formwork* on the basis that the disputed order was made under the provisions of the CCAA, unlike in *Peri Formwork* where the CCAA proceedings had been terminated. Additionally, the priorities arising between lienholders and the mortgagee were under an original mortgage, rather than funds advanced pursuant to new financing unrelated to the original mortgage, as was the situation in *Peri Formwork*. The different factual situation prevented the court from using *Peri Formwork* as

applicable authority.

45 Laurentian University of Sudbury (2022), 100 C.B.R. (6th) 141, 2022 ONSC 3013 (Ont. S.C.J.).

46 Montréal (Ville) c. Restructuration Deloitte Inc. (2021), 94 C.B.R. (6th) 1, 2021 SCC 53 (S.C.C.).

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WAYGAR CAPITAL INC., AS AGENT FOR NINEPOINT CANADIAN SENIOR DEBT MASTER FUND L.P. Applicant	and	QUALITY RUGS OF CANADA LIMITED et al. Respondents	Court File No.: CV-23-00703292-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

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