

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427
ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS,
IN THE PROVINCE OF ONTARIO

FACTUM OF THE RESPONDENT, 1787930 ONTARIO INC.

September 9, 2019

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Court of Appeal File No.: C66871
Court File No.: 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

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PART I - OVERVIEW - NATURE OF CASE AND ISSUES

1. On July 2, 2018, 1787930 Ontario Inc. carrying on business as Messenger Freight Systems (“**Messenger**”) filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”). At that time, Messenger had various debts including an outstanding balance owing to Transit Petroleum Inc. (“**Transit**”) for fuel purchases.
2. On July 3, 2018, Transit initiated a pre-authorized deposit transaction (“**PAD**”) which resulted in a transfer of \$83,734.05 from Messenger to Transit on July 5, 2018 (the “**PAD Payment**”). Transit did not learn of the NOI until after the PAD Payment was completed.
3. Thereafter, Messenger continued to purchase fuel from Transit and Transit continued to supply to Messenger until July 12, 2018 when Messenger’s post-NOI purchases totalled \$84,434.30. Messenger made a partial payment of \$36,000.00 for this post-NOI fuel supply, leaving a balance for post-NOI purchases of \$48,434.30.

4. Messenger moved for a return of the PAD Payment taken by Transit, less the outstanding amounts due for post-NOI purchases and Justice Raikes ordered the return of \$83,734.05, less the outstanding balance of \$48,434.30 for the post-NOI purchases, for a net payment to Messenger of \$35,299.75 on the basis that the PAD transaction was the exercise of a remedy contrary to the automatic stay which arose upon the filing of an NOI under s. 69 of the *BIA*.

Respondent's Compendium, *1787930 Ontario Inc. v. Transit Petroleum*, 2019 ONSC 716 (the "**Decision**"), Tab 7.

5. Transit seeks a review of Justice Raikes' Decision.

6. For the reasons that follow, Messenger submits that there is no palpable and overriding error and no basis to interfere with the Decision. Justice Raikes made two key findings of fact: that the PAD Payment related to pre-NOI debt, and that this was not a payment which the supplier required as a condition of post-NOI supply when the payment was made. As a result, Transit was not entitled to the payment when it was made nor was Transit entitled to keep it.

Ibid, Decision, Tab 7, pages 48 and 51, paragraphs 28(c) and 44(b).

PART II - SUMMARY OF FACTS

7. The following are unchallenged undisputed facts, as found by Justice Raikes:

- (a) Messenger issued its NOI on July 2, 2018;
- (b) The PAD for \$83,734.05 was submitted to [Messenger's credit union] Libro on July 3 and processed on July 5, 2018, three days after the NOI was issued;
- (c) At the time that Transit submitted the PAD Payment, Transit was unaware of the NOI;

- (d) That payment was on account of monies owing by Messenger to Transit for fuel supplied before the NOI was issued;
- (e) After the NOI was issued, Transit supplied additional fuel to Messenger, and the unpaid balance without applying the PAD Payment is \$48,434.30;
- (f) On July 11, 2018, Messenger entered into arrangements with Petro Canada for fuel for its trucks; and
- (g) Messenger severed its fuel supply relationship with Transit on that date.

Ibid, Decision, Tab 7, pages 48 and 49, paragraphs 21 and 28.

8. Justice Raikes also made other findings of fact which were supported by the evidence. By June 2018, Messenger was in arrears for fuel supplied by Transit. Some prior PAD payments had not gone through because of insufficient funds or stop payments. In mid-June, as a result of a Requirement to Pay issued by the Canada Revenue Agency, Messenger's bank account from which PAD transactions had been withdrawn was frozen. Messenger's bank then informed Messenger that it was preparing to appoint a receiver.

Ibid, Decision Tab 7, pages 45, paragraphs 3-4.

9. After Messenger's June 18, 2018 PAD payment to Transit did not go through, Messenger's Financial Controller, Nathan McDaniel, negotiated with Transit's Credit Analyst, Monique Paul, regarding how Messenger would pay for arrears and ongoing supplies. These discussions took place by telephone and email.

Ibid, Decision Tab 7, pages 45 - 47, paragraphs 5-13.

10. Over the course of these discussions a proposal evolved which included a series of PAD payments through July, starting with a payment of 50% of the arrears, being \$83,734.05 and on June 27, 2018 at 5:40 p.m., Messenger's Financial Controller, Nathan McDaniel, wrote to Transit's Credit Analyst, Monique Paul, with a proposal that included a July 5, 2018 PAD payment of \$83,705.00 and three payments on the Thursdays of each subsequent week of \$27,911.35 each toward the arrears.

Ibid, Decision Tab 7, page 46, paragraph 11.

Respondent's Compendium, Second Supplementary Affidavit of Nathan McDaniel sworn October 31, 2018, Exhibit B, Tab 2B, page 12.

11. Ms. Paul wrote back the next morning that "we will accept this proposal with below stipulations." Ms. Paul noted that the change of the PAD from Monday to Thursday would require a change from the current terms of Net 14 to Net 7. She wrote: "We need the above approved no later than 3pm on Friday June 29, 2018, in order to pull the first payment on Thursday, July 5th, 2018."

Respondent's Compendium, Decision Tab 7, pages 46 - 47, paragraph 12.

Respondent's Compendium, Second Supplementary Affidavit of Nathan McDaniel sworn October 31, 2018, Exhibit B, Tab 2B, pages 11 and 12.

12. Mr. McDaniel did not write back with approval: he wrote on June 29, 2019 at 4:05 p.m. that "I just have a few questions regarding the terms ... I want to make sure I am on the same page with you." There were no further communications before Messenger filed its NOI.

Respondent's Compendium, Decision Tab 7, page 47, paragraph 13.

Respondent's Compendium, Second Supplementary Affidavit of Nathan McDaniel sworn October 31, 2018, Exhibit B, Tab 2B, page 10.

13. Justice Raikes found that it was unnecessary to determine whether these emails and discussions resulted in an agreement as any pre-NOI agreement would be void upon the filing of the NOI and, in any event, Transit was unaware of the possibility of the NOI at the time. Justice Raikes further found that if a determination as to a pre-NOI agreement was needed, the issue did not lend itself to determination on the basis of conflicting affidavits and transcripts of cross-examination and therefore would require the trial of an issue.

Respondent's Compendium, Decision Tab 7, page 52, paragraph 47.

14. On Thursday, June 28, 2018, the Bank of Nova Scotia had informed Messenger that it required Messenger to proceed by way of Notice of Intention to File a Proposal ("NOI") failing which the Bank would not forbear from enforcement procedures. Messenger issued its NOI on July 2, 2018.

Ibid, Decision Tab 7, page 47, paragraph 16.

Respondent's Compendium, Second Supplementary Affidavit of Nathan McDaniel sworn October 31, 2018, Exhibit A, Tab 2A, page 8.

15. Unaware of the NOI, Transit submitted the PAD for processing on July 3, 2018 and payment of pre-NOI arrears was processed on July 5, 2018.

Respondent's Compendium, Decision Tab 7, page 48, paragraph 28(b).

Respondent's Compendium, Affidavit of Monique Paul, sworn October 4, 2018, Tab 3, pages 17, paragraphs 13 and 18

16. Thereafter, there was a meeting on July 5, 2018 at which Messenger's representative first informed Transit of the July 2, 2018 NOI. Messenger did not request the return of the PAD Payment at that time.

Respondent's Compendium, Decision, Tab 7, page 48, paragraphs 21-22.

Respondent's Compendium, Affidavit of Monique Paul, sworn October 4, 2018, Tab 3, page 17, paragraph 18.

17. There were further communications between Messenger and Transit on July 9, 2018, in which Transit sought to have Messenger provide a security deposit for new fuel purchases. Messenger was not prepared to do so.

Respondent's Compendium, Affidavit of Don Poort sworn October 4, 2018, Tab 4, page 23, paragraph 12.

18. On July 10, 2018, there were further communications between Mr. Poort of Transit and Mr. McDaniel of Messenger, in which Mr. Poort advised that Messenger would be restricted to a daily fuel draw of \$5,000, that Messenger would be required to pay \$85,989.06 to lift the daily draw restriction that day plus further amounts each subsequent day, and that Messenger would be required to pay a \$50,000 deposit.

Ibid, Tab 4, page 23, paragraph 12.

Ibid, Exhibit B, Tab 4B, page 30.

19. Messenger then severed its fuel supply relationship with Transit on July 11, 2019 and made arrangements with Petro Canada for fuel for its trucks.

Respondent's Compendium, Decision, Tab 7, pages 48 - 49,
paragraph 28.

20. Messenger sought the return of the outstanding balance of the PAD payment, leading to the present proceedings.

PART III - POSITION ON ISSUES

21. The standards of review applicable to Justice Raikes' Decision are correctly set out at paragraph 35 of the Appellant's Factum.

22. The starting point for considering the PAD Payment is s. 69(1) of the *BIA*:

Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy ...

23. There is no dispute that Messenger's debts for fuel supplied prior to the filing of the NOI are claims provable in bankruptcy. In fact, Transit filed a Proof of Claim for the pre-NOI debt evidencing no agreement respecting the pre-NOI debt. Nor are the exceptions in subsections (2) and (3) and sections 69.4, 69.5 and 69.6 applicable to the circumstances before the Court. The only question, therefore, is whether the processing of the PAD constituted a remedy against Messenger's property.

24. Messenger respectfully submits that there are no errors in the Decision which would invalidate the resulting relief granted. The decision was correct because:

- (a) a PAD payment in respect of pre-NOI debts is clearly a remedy against Messenger's property;
- (b) the PAD payment was taken in respect of a debt which was a claim provable in bankruptcy;
- (c) no pre-NOI agreement could validate that post-NOI payment (otherwise the objectives of the *BIA* could be circumvented by all pre-NOI creditors); and
- (d) once the NOI was filed, there was no agreement for the Disputed Funds to be applied to pre-NOI debts.

25. Accordingly, Justice Raikes correctly ordered the overpayment for post-NOI fuel supply to be returned.

Response to Specific Appellant's Submissions

Inclusion of the PAD Payment in the Proof of Claim

26. Transit argues that the Motion Judge made an error of fact regarding whether Transit's Proof of Claim filed with the proposal Trustee included the PAD Payment. The Appellant concedes that it is "not entirely clear how this error affected the Motion Judge's reasoning." Whether or not Transit's Proof of Claim included or excluded the PAD Payment is not relevant to whether the PAD Payment was itself a remedy, or whether Transit should be entitled to retain it. Transit has not shown how a correction of the alleged error would result in a change to the result. It is therefore respectfully submitted that if the Motion Judge erred in this finding of fact, it would not call into question the outcome in any event.

Transit's Knowledge of Messenger's Financial Circumstances

27. Transit argues that it was misled as to the reason Messenger's bank account was frozen and it would not otherwise have continued to sell fuel to Messenger. This is not relevant to the question of whether Transit should be entitled to retain the PAD Payment.

28. In its factum at paragraphs 39-40, Transit argues that the Motion Judge erred in stating that Transit was aware of Messenger's financial difficulties as evidenced by the frozen bank account, because Transit was not aware of the true reason the bank account was frozen and that the Motion Judge erred in stating that Transit was aware of Messenger's financial difficulties as evidenced by the NSF payments. But this misapprehends the Motion Judge's finding. Justice Raikes explicitly noted (in paragraph 44(b)) that Transit was not fully aware of the full extent of Messenger's difficulties. In fact, it was that lack of full awareness which informed the Motion Judge's finding that this "was not a case where Messenger shared its plan, went to Transit to secure its future cooperation as a critical supplier and Transit agreed to do so only if its arrears were paid."

Respondent's Compendium, Decision, Tab 7, page 51, paragraph 44(b).

Transit as a Vital Supplier

29. Transit argues that the Motion Judge "misunderstood the significance of Messenger securing Transit's cooperation as a critical supplier after the NOI was filed" and "erroneously relied on the idea that Messenger was able to quickly replace Transit as a supplier."

30. Justice Raikes' finding that Messenger was able to quickly replace Transit as a supplier once it became apparent that the relationship could not continue was open to His Honour on the evidence, especially as nothing in Transit's evidence indicated that prior to the July 9, 2019 communications there was any reason for Messenger to believe that Transit would not continue to

supply its fuel. The Motion Judge's conclusion is also sensible having regard to the fact that, during the period that Transit supplied fuel post NOI, the value of that fuel was almost exactly the amount of the PAD Payment. Had the PAD Payment not been made, Messenger would have had those funds on hand to pay cash for its ongoing fuel needs.

31. There is no conflict in the evidence about the event which Messenger claims initiated the breakdown in the relationship. In his Affidavit at paragraph 12, Don Poort confirms that on July 9, 2018 he raised the possibility that Messenger provide a security deposit. Exhibit B to his Affidavit shows that on July 10, 2018, Transit was seeking to impose daily caps and other payment requirements.

Respondent's Compendium, Affidavit of Don Poort sworn October 4, 2018, Tab 4, page 23, paragraph 12.

Ibid, Exhibit B, Tab 4B, page 30.

32. Justice Raikes rejected Transit's submission that it was a "vital supplier" and there was no palpable and overriding error in making that finding. The balance of the Appellant's submissions are premised on the reversal of this factual finding. Whether addressing the policy considerations or asking this Court to make a finding of fact regarding the existence of an agreement, Transit's submissions presuppose its role as a critical supplier, a role which the Motion Judge refused to ascribe to it.

Authorities Interpreting "Remedy" under s. 69(1) of the BIA

33. Justice Lederman considered the interpretation of the word "remedy" in section 69(1)(a) in *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 2005 CanLII 81263 (ON SC), 29 C.B.R. (5th) 62 at paragraphs 11-12:

- 11 While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of L.B. Leonard and R.G. Marantz in their article, "Debt restructuring under the [Bankruptcy and Insolvency Act](#), June 1, 1995 - Stays of proceedings, under the [Bankruptcy and Insolvency Act](#)" (for the 1995 Insolvency Institute of Canada lectures), "a reorganizing debtor an opportunity to have some "breathing room" during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."
- 12 A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent persons to put forth a proposal it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on the ability, it should not be stayed.
34. Justice Newbould applied this principle in *Re Emergency Door Service Inc.* 2016 ONSC 5284 (CanLII), adding at paragraph 31:
- 31 There is much to say in favour of this principle enunciated by Lederman J. in *Golden Griddle*. It gives effect to the aim of the proposal provisions of the BIA to permit a debtor who had filed a notice of intention to file a proposal some space if needed to achieve a successful proposal.
35. The effect of Transit processing the PAD Payment was to reduce the cash available to Messenger in the amount of \$83,734.05. Any action which reduces the cash available to a restructuring debtor reduces the "breathing room" with which to operate. In this specific case, the cash which Transit retained for itself amounted to an approximately nine-day supply of fuel for Messenger.

36. The earlier caselaw which considered actions to be remedies is consistent with this purposive definition of “remedy”. In the *Gene Moses* and *Startek* decisions, Courts held that creditors taking cash from the debtor’s bank account constituted a remedy.

Respondent’s Brief of Authorities, *Re Gene Moses Construction Ltd.*
(1999), 9 C.B.R. (4th) 275 (B.C.S.C.), Tab 4.

Startek Computer Inc. (Trustee of) v. Samtack Computer Inc., 2000
BCSC 1316, Tab 5.

37. In *Re Gene Moses*, the creditor, GE, presented three debit memos to the debtor’s bank and received \$29,149.13. It was held that the presentation of these debit memos constituted the exercise of a remedy contrary to section 69 of the *BIA* and the funds were ordered returned. Although there was a dispute as to whether the creditor was aware of the filing of the NOI, the funds were ordered returned because the creditor’s knowledge was not relevant to the question of whether the debit memos constituted a remedy.

38. Transit attempts to distinguish *Gene Moses* on the basis that the creditor in that case, GE, was not found to be critical to the debtor’s attempt to restructure. But the Motion Judge did not make that finding in respect of Transit either.

39. Transit attempts to distinguish *Gene Moses* on its facts, and specifically that the judge “did not find that the debtor had given any specific authorization to GE to process a PAD.” However, the case was not decided on the basis that the PAD was *unauthorized* and should therefore be returned; it was decided on the basis of the fact that presentation of the debit memos for payment of pre-NOI arrears was an exercise of a remedy to try to collect the debts. There are no distinguishing facts present from which it could be consistently reasoned that presentation of a debit memo for a pre-existing debt constituted a remedy, but the processing of a PAD for a pre-

existing debt did not. A creditor appropriating cash from the debtor and applying that money to the payment of a pre-NOI debt is necessarily exercising a (self-help) remedy.

40. Similarly, in *Startek* a creditor sought to renegotiate a cheque which had been previously returned. Through that mechanism, the creditor was able to obtain payment of funds relating to a pre-NOI debt. In *Startek*, the Court noted that the renegotiation was done without the knowledge or consent of the debtor. By making this finding, the Court rejected any alternative explanation for the withdrawal. A renegotiated cheque and a PAD have the same commercial effect, they permit the creditor to access the debtor's funds to satisfy a pre-NOI debt. They are remedies against the debtor's property.

41. The authorities therefore support the Motion Judge's finding that the PAD Payment was a remedy which was stayed by operation of s. 69(1) of the *BIA*.

The alleged agreement for Transit to retain the PAD Payment

42. Transit argues that the Motion Judge erred in determining that it was unnecessary to determine whether the parties reached an agreement prior to the NOI because such an agreement would not have changed the result.

43. At paragraph 47, Justice Raikes held that it was unnecessary to determine if there was an agreement reached June 28 or at any time before July 5, 2018. That finding is unassailable. Any agreement to pay would have constituted a pre-NOI obligation and, as such, a claim provable in bankruptcy. Even if a debtor could make an agreement in contemplation with a supplier for post-NOI supply, that is not what happened here. Transit admits it was unaware of the NOI until July 5, 2018 so no earlier agreement could have possibly been entered into in contemplation of the NOI.

44. Having found that it was unnecessary to determine if there was an agreement reached, Justice Raikes continued, finding that issue “did not lend itself to determination on the basis of conflicting affidavits and transcripts of cross-examinations. Were it necessary to determine that issue, I would direct a trial of an issue.” The decision of whether to conduct a trial of an issue is a discretionary one and is entitled to deference on appellate review: *Loat v. Howarth*, 2011 ONCA 509 (CanLII) at paragraph 23. Transit’s review of the evidence at paragraphs 62-69 of its factum demonstrates that there were conflicts in the evidence and that the findings of fact sought by the Appellant would have required weighing evidence in a manner the Motion Judge refused to do and drawing inferences the Motion Judge refused to draw.

Respondent’s Brief of Authorities, *Loat v. Howarth*, 2011 ONCA 509 (CanLII), Tab 6, pages 50 - 51, paragraph 23.

45. One of Justice Raikes’ reasons for refusing to find an agreement with respect to the PAD Payment was that it was but one of a series of four payments contemplated in the pre-NOI payment plan negotiation and there was no reason to treat it differently from the other three PADs: Decision at paragraph 44(e). Transit argues (at paragraph 48 of its factum) that this was an error because Messenger “specifically agreed to the payment” of the PAD Payment “so as to ensure the continued supply of fuel which was critical to [its] survival during the restructuring.” Transit’s argument assumes three facts: that there was an agreement (which the Motion Judge did not find), that the continued supply by Transit was critical to Messenger’s survival (which the Motion Judge rejected) and that Messenger could not source fuel elsewhere on short notice (which is demonstrably untrue on the facts of this case in that Messenger did source an alternate on short notice). Furthermore, it ignores the fact that the alleged agreement was before the NOI and long before Transit knew of the NOI.

Respondent's Compendium, Decision, Tab 7, page 51, paragraph 44(b).

The Decision Below is Consistent with the Principles of the Bankruptcy and Insolvency Act

46. Transit claims the Motion Judge erred in finding that it was not open to Messenger to determine which pre-NOI creditors should be paid and to give its consent to payments to some creditors in preference to others. However, the Motion Judge refused to consider Messenger's fraudulent preference argument premised upon this statement (and Messenger does not pursue that argument here). Because Transit was arguing there was a pre-NOI agreement, the Motion Judge's finding was correct. A pre-NOI agreement is stayed by the NOI so it could not be effective, and a post-NOI payment for a pre-NOI debt would be subject to challenge as a preference under sections 91-101 and section 101.1 of the *BIA*, as detailed in the article by E. Patrick Shea relied upon by the Appellant.

Appellant's Book of Authorities, E. Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 C.B.R. (5th) 161., Tab 4.

47. Transit relies upon the article by E. Patrick Shea for the proposition that debtors can effect payment of claims provable in bankruptcy proceedings, and that "payments made in good faith after the date the proposal proceedings are commenced (even payments of pre-filing claims) are intended to be valid." Whether the statement in respect of pre-filing claims is true or not, it need not be decided, because it does not apply on the facts of this case. However, it is notable that while Mr. Shea argues that post-NOI payments are "best analyzed on the basis they are a preference", he does so with the caveat that the *BIA* provisions which permit attacks on preferential transactions do not apply to post-NOI transactions.

48. The general scheme of proposals is that they are made to creditors generally: *BIA* s. 50(1.2)). The trustee investigates and appraises the affairs of the debtor and provides a report to the creditors: *BIA* s. 50(5). If accepted, the proposal is then binding on creditors in respect of their pre-NOI unsecured claims or it may be rejected, leading to the debtor's bankruptcy: *BIA* s. 62(2)(a).

49. The approach which does the least violence to the statutory scheme is to allow the debtor and its creditors to negotiate acceptable terms of a proposal which may result in key suppliers seeing their accounts addressed more generously within the proposal. The ability of creditors to negotiate in this manner is one of the features which distinguishes a proposal from a bankruptcy and aligns with the Court's discretion under the *Companies' Creditors Arrangement Act* ("CCAA") to permit payments to critical suppliers. It provides the necessary transparency to the trustee and other creditors. Had Transit sought to require payment of its pre-filing debts as a condition of further supply, that could have been addressed within the proposal. But that is not what happened here.

50. Transit's policy-based argument is that the payment of pre-NOI amounts can be consistent with the purpose of the proposal provision in the *BIA*, to permit the debtor to continue in business. Transit argues that the PAD Payment to Transit did not impair its ability to reorganize but helped it remain in business because it resulted in Transit supplying fuel over the next nine days.

51. It may be true that the transfer of \$83,734.05 from Messenger to Transit assisted Transit in procuring nine day's fuel in almost exactly that amount, but it does not follow that treating the funds as a payment of pre-NOI debts was necessary to ensure a supply of fuel and Messenger's ability to reorganize. Section 65.1 of the *BIA* provides that Transit was not permitted to terminate the fuel supply agreement by reason only of the insolvency or NOI, although it could require

payment terms such as prepayment for post-NOI supply. The PAD funds ultimately constituted an overpayment of post-NOI supply, and so the Motion Judge correctly ordered the overpayment returned.

52. Nor does it follow that permitting Transit to apply the PAD Payment to the pre-NOI debt would not impair Messenger's ability to reorganize. Doing so would deprive Messenger of \$83,734.05 with which it could fund its post-NOI obligations.

53. In any event, no determination of whether debtors can prefer certain critical creditors in post-NOI dealings need be made in this case. The Motion Judge found this "is not a case where Messenger shared its plan, went to Transit to secure its future cooperation as a critical supplier and Transit agreed to do so only if its arrears were paid." This was a finding of fact that there was no post-NOI agreement between the parties for Messenger to pay pre-NOI debt as a condition of supply. It was open to the Motion Judge to make this finding on the evidence and His Honour is entitled to deference.

There was no Post-NOI Agreement for payment of Pre-NOI Debts

54. Transit argues throughout that Messenger permitted it to "be paid and retain" the PAD Payment: Factum of the Appellant at paragraphs 5, 6, 38, 41 and 62. Its argument is that Messenger "entered into the agreement for the [PAD] Payment prior to the NOI and to ensure ongoing supply post-NOI." But nowhere in Transit's Factum does it claim that after the NOI, Messenger agreed that the PAD Payment should be applied to pre-NOI debts. Even if Messenger allowed the PAD Payment to be withdrawn and retained by Transit to ensure ongoing supply, it was only to the credit of post-NOI supply, since the NOI stayed any remedy against Messenger or its property for pre-NOI debts.

55. Transit's evidence is that it learned of the NOI in a July 5, 2018 meeting. At its highest, Transit's evidence of the July 5 meeting is that Messenger allowed Transit to take the funds because Messenger required Transit as an ongoing supplier. In its evidence, Transit does not state that Messenger agreed to apply the funds to pre-NOI debts.

56. In his Affidavit, Trevor Chambers alleges that Messenger's owner, Louise Vonk, "indicated that she was aware the terms of payment between Transit and [Messenger] would change for the post-NOI purchases and she was willing to do whatever was necessary to keep Transit as their supplier of fuel." But Transit's evidence does not include an allegation that Messenger agreed on how the withdrawn funds were to be used. There is no assertion in the evidence that after the NOI was filed, Messenger agreed to applying the funds to pre-NOI debts.

Respondent's Compendium, Affidavit of Trevor Chambers sworn
October 4, 2018, Tab 5, page 35, paragraph 14.

57. Nowhere in Transit's evidence do its affiants state that, but for the alleged agreement to apply the PAD Funds to pre-NOI debts, Transit would have refused to continue supply. Transit cannot therefore argue that Messenger allowed Transit to apply the PAD Payment to pre-NOI Debts in order to secure ongoing post-NOI supply.

58. In the absence of a post-NOI agreement that Transit was a critical supplier and that it should be allowed to retain the PAD Payment and apply it to pre-NOI debts as a condition of ongoing supply, the only purpose of the *BIA* at play is the objective to treat all creditors fairly. The Motion Judge did not err in finding that it was contrary to that objective of the *BIA* to permit Transit to retain the monies received in excess of the post-NOI supply.

No Prejudice to Transit

59. The PAD Payment was either a remedy against Messenger's property for a pre-NOI debt or a payment toward post-NOI obligations. In either case, the Motion Judge was correct to order the excess after payment of post-NOI debts to be returned to Messenger.

60. Transit is not prejudiced by this result, or by its continued post-NOI supply. The Motion Judge's disposition results in Transit being fully paid for all fuel supplied post-NOI. The unpaid pre-NOI supply remains a debt to be addressed through the proposal process, which process exists to ensure Messenger's creditors are treated fairly.

61. On the basis of the undisputed facts, having regard to the facts that remain in dispute, and in the absence of a compelling policy reason to permit Transit to retain a preferential payment of its post-NOI debt, there is no reason to interfere with the result of the Motion.

PART IV - ADDITIONAL ISSUES

62. Messenger does not have additional issues with the Motion Judge's Decision which it seeks for this Court to reconsider.

63. Transit has also appealed from the costs award dated March 13, 2019. As the cost award was challenged by way of separate appeal, Messenger's submissions in respect of the costs order are found in its factum dated June 13, 2019 in respect of that appeal.

PART V - ORDER REQUESTED

64. For all of the above reasons, the Respondent therefore respectfully requests that the Appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September 2019.



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for the purpose of the Appeal

Court of Appeal File No.: C66871
Court File No.: 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427
ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS,
IN THE PROVINCE OF ONTARIO

CERTIFICATE

I estimate that 45 minutes will be needed for my oral argument of the appeal, not including
reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto this 9th day of September 2019.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *1787930 Ontario Inc. v. Transit Petroleum*, 2019 ONSC 716, at paragraphs 3 – 13, 16, 21 – 22, 28, 44b, 47.
2. *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 2005 CanLII 81263 (ON SC), 29 C.B.R. (5th) 62 at paragraphs 11-12.
3. *Re Emergency Door Service Inc.* 2016 ONSC 5284 (CanLII), at paragraph 31.
4. *Re Gene Moses Construction Ltd.* (1999), 9 C.B.R. (4th) 275 (B.C.S.C.)
5. *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.*, 2000 BCSC 1316
6. *Loat v. Howarth*, 2011 ONCA 509 (CanLII) at paragraph 23.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

1. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, Sections 50(1.2), 50(5), 62(2)(a), 65.1, 69(1)(2)(3), 69.4, 69.5, 69.6.

Future property not to be considered

(7) In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

Where subsection (6) ceases to apply

(8) The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be, or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate.

R.S., 1985, c. B-3, s. 49; 1992, c. 1, s. 15, c. 27, s. 17; 1997, c. 12, s. 29; 2004, c. 25, s. 31(E); 2005, c. 47, s. 33.

PART III

Proposals

DIVISION I

General Scheme for Proposals

Who may make a proposal

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

- (a)** an insolvent person;
- (b)** a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;
- (c)** a liquidator of an insolvent person's property;
- (d)** a bankrupt; and
- (e)** a trustee of the estate of a bankrupt.

Where proposal may not be made

(1.1) A proposal may not be made under this Division with respect to a debtor in respect of whom a consumer

Exclusion des biens futurs

(7) Il n'est pas tenu compte pour la détermination des avoirs réalisables du failli des biens que celui-ci peut acquérir ou qui peuvent lui être dévolus avant sa libération.

Cessation d'effet du paragraphe (6)

(8) Le séquestre officiel peut ordonner que le paragraphe (6) cesse de s'appliquer au failli s'il détermine que les avoirs réalisables de celui-ci, déduction faite des réclamations des créanciers garantis, dépassent cinq mille dollars ou le montant prescrit, ou que les coûts de réalisation de ces avoirs représentent une partie importante de leur valeur réalisable, et s'il estime pareille mesure indiquée.

L.R. (1985), ch. B-3, art. 49; 1992, ch. 1, art. 15, ch. 27, art. 17; 1997, ch. 12, art. 29; 2004, ch. 25, art. 31(A); 2005, ch. 47, art. 33.

PARTIE III

Propositions concordataires

SECTION I

Dispositions d'application générale

Admissibilité

50 (1) Sous réserve du paragraphe (1.1), une proposition peut être faite par :

- a)** une personne insolvable;
- b)** un séquestre au sens du paragraphe 243(2), mais seulement relativement à une personne insolvable;
- c)** le liquidateur des biens d'une personne insolvable;
- d)** un failli;
- e)** le syndic de l'actif d'un failli.

Inadmissibilité

(1.1) Il ne peut être fait de proposition aux termes de la présente section relativement au débiteur à l'égard de qui une proposition de consommateur a été produite aux termes de la section II tant que l'administrateur désigné

proposal has been filed under Division II until the administrator under the consumer proposal has been discharged.

To whom proposal made

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

Idem

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

Classes of secured claims

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

- (a)** the nature of the debts giving rise to the claims;
- (b)** the nature and rank of the security in respect of the claims;
- (c)** the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;
- (d)** the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and
- (e)** such further criteria, consistent with those set out in paragraphs (a) to (d), as are prescribed.

Court may determine classes

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

Creditors' response

(1.6) Subject to section 50.1 as regards included secured creditors, any creditor may respond to the proposal as

dans le cadre de la première proposition n'a pas été libéré.

Destinataires

(1.2) La proposition est faite aux créanciers en général, étant entendu qu'elle s'adresse, selon ce qu'elle prévoit, soit à la masse de ceux-ci, soit aux diverses catégories auxquelles ils appartiennent; elle peut en outre, sous réserve du paragraphe (1.3), être faite aux créanciers garantis d'une ou de plusieurs catégories.

Idem

(1.3) La proposition portant sur des réclamations garanties d'une catégorie particulière doit être faite à tous les créanciers garantis dont la réclamation appartient à cette catégorie.

Catégories de créances garanties

(1.4) Peuvent faire partie de la même catégorie les créances garanties des créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

- a)** la nature des créances donnant lieu aux réclamations en cause;
- b)** la nature de la garantie en question et le rang qui s'y rattache;
- c)** les recours dont les créanciers peuvent se prévaloir, abstraction faite de la proposition, et la mesure dans laquelle ils pourraient, en se prévalant de ces recours, obtenir satisfaction à leurs réclamations;
- d)** le sort réservé à leurs créances par la proposition et, notamment, la mesure dans laquelle celles-ci seraient payées aux termes de la proposition;
- e)** tous autres critères — compatibles avec ceux énumérés aux alinéas a) à d) — qui peuvent être prescrits.

Décision du tribunal

(1.5) Sur demande présentée après le dépôt de l'avis d'intention ou de la proposition, le tribunal peut, en conformité avec le paragraphe (1.4), déterminer quelles sont, dans le cadre de cette proposition, les diverses catégories de créances garanties; il peut également déterminer à quelle catégorie appartient telle créance garantie en particulier.

Réponse des créanciers

(1.6) Sous réserve de l'article 50.1, tout créancier peut répondre à la proposition qui a été faite aux créanciers en

made to the creditors generally, by filing with the trustee a proof of claim in the manner provided for in

- (a) sections 124 to 126, in the case of unsecured creditors; or
- (b) sections 124 to 134, in the case of secured creditors.

Effect of filing proof of claim

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

Voting

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

Documents to be filed

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

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

Filing of documents with the official receiver

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

Approval of inspectors

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

Proposal, etc., not to be withdrawn

(4) No proposal or any security, guarantee or suretyship tendered with the proposal may be withdrawn pending the decision of the creditors and the court.

général en déposant auprès du syndic une preuve de réclamation de la manière prévue :

- a) aux articles 124 à 126, dans le cas des créanciers non garantis;
- b) aux articles 124 à 134, dans le cas des créanciers garantis.

Effet du dépôt d'une preuve de réclamation

(1.7) Pour l'application des dispositions de la présente section qui suivent le présent article, la mention d'un créancier non garanti vaut également mention d'un créancier garanti qui a déposé une preuve de réclamation aux termes du paragraphe (1.6), et la mention d'une réclamation non garantie vaut mention de la réclamation garantie de ce créancier.

Vote

(1.8) Toutes les décisions relatives à une proposition, sauf celles portant sur son acceptation ou son rejet, sont prises par résolution ordinaire des créanciers à qui la proposition a été faite.

Documents à déposer

(2) Sous réserve de l'article 50.4, les procédures relatives à une proposition commencent, dans le cas d'une personne insolvable, par le dépôt, auprès d'un syndic autorisé, et, dans le cas d'un failli, par le dépôt, auprès du syndic de l'actif, d'une copie de la proposition indiquant les termes de la proposition et les détails des garanties ou cautions proposées, et signée par l'auteur de la proposition et les cautions proposées, le cas échéant, ainsi qu'une copie du bilan prescrit.

Envoi au séquestre officiel

(2.1) Le syndic envoie les documents visés au paragraphe (2) au séquestre officiel de la localité du débiteur au moment du dépôt de la proposition en application du paragraphe 62(1).

Approbaton des inspecteurs

(3) Une proposition visant un failli doit être approuvée par les inspecteurs avant que toute autre mesure soit prise à son égard.

Une proposition ne peut être retirée

(4) Nulle proposition ni aucun cautionnement ou garantie offerts avec cette proposition ne peuvent être retirés en attendant la décision des créanciers et du tribunal.

Assignment not prevented

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

Duties of trustee

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

Trustee to file cash-flow statement

(6) The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

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

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

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

Creditors may obtain statement

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

Exception

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

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

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

Interprétation

(4.1) Le paragraphe (4) n'a pas pour effet d'empêcher une personne insolvable visée par une proposition de faire une cession par la suite.

Fonctions du syndic

(5) Le syndic fait, ou fait faire, relativement aux affaires et aux biens du débiteur une évaluation et une investigation qui lui permettent d'estimer avec un degré suffisant d'exactitude la situation financière du débiteur et la cause de ses difficultés financières ou de son insolvabilité, et il en fait rapport à l'assemblée des créanciers.

État de l'évolution de l'encaisse

(6) Le syndic qui dépose, à l'égard d'une personne insolvable, une proposition aux termes du paragraphe 62(1) est tenu de joindre à celle-ci :

a) un état établi par l'auteur de la proposition — ou une version révisée d'un tel état lorsqu'on en a déjà déposé un à l'égard de la même personne insolvable aux termes du paragraphe 50.4(2) —, appelé « l'état » au présent article, portant, projections au moins mensuelles à l'appui, sur l'évolution de l'encaisse de la personne insolvable, et signé par lui et par le syndic après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi et signé, en la forme prescrite, par le syndic;

c) un rapport contenant les observations — prescrites par les Règles générales — de l'auteur de la proposition relativement à l'établissement de l'état, établi et signé, en la forme prescrite, par celui-ci.

Copies de l'état

(7) Sous réserve du paragraphe (8), tout créancier qui en fait la demande au syndic peut obtenir une copie de l'état.

Exception

(8) Le tribunal peut rendre une ordonnance de non-communication de tout ou partie de l'état, s'il est convaincu que sa communication à l'un ou l'autre ou à l'ensemble des créanciers causerait un préjudice indu à la personne insolvable et que sa non-communication ne causerait pas de préjudice indu au créancier ou aux créanciers en question.

revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.

Non-approval of proposal by court

(2) Where the court refuses to approve a proposal in respect of an insolvent person a copy of which has been filed under section 62,

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

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

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

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

(3) [Repealed, 1992, c. 27, s. 25]

Costs when proposal refused

(4) No costs incurred by a debtor on or incidental to an application to approve a proposal, other than the costs incurred by the trustee, shall be allowed out of the estate of the debtor if the court refuses to approve the proposal.

R.S., 1985, c. B-3, s. 61; 1992, c. 27, s. 25; 1997, c. 12, s. 38; 2005, c. 47, s. 40; 2017, c. 26, s. 8(E).

Filing of proposal

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

Determination of claims

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

(a) the notice of intention; or

réattribuer au débiteur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l'intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition n'en stipulent autrement.

Refus d'approuver une proposition

(2) Lorsque le tribunal refuse d'approuver une proposition visant une personne insolvable, proposition dont une copie a été déposée aux termes de l'article 62 :

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

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

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

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer sa nomination ou lui substituer un autre syndic autorisé.

(3) [Abrogé, 1992, ch. 27, art. 25]

Frais lorsque la proposition est refusée

(4) Si le tribunal refuse d'approuver une proposition, il ne peut être accordé sur l'actif du débiteur aucuns frais qu'a entraînés ou occasionnés pour ce dernier une demande d'approbation de la proposition sauf ceux qu'a subis le syndic.

L.R. (1985), ch. B-3, art. 61; 1992, ch. 27, art. 25; 1997, ch. 12, art. 38; 2005, ch. 47, art. 40; 2017, ch. 26, art. 8(A).

Dépôt d'une proposition

62 (1) Le syndic dépose, auprès du séquestre officiel, une copie de toute proposition visant une personne insolvable ainsi que du bilan prescrit.

Détermination des réclamations — personne insolvable

(1.1) S'agissant de la proposition visant une personne insolvable, le moment par rapport auquel les réclamations des créanciers, à l'exception de celles visées au paragraphe 14.06(8), sont déterminées est celui du dépôt de l'avis d'intention ou, à défaut, de la proposition.

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

Determination of claims re bankrupt

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

On whom approval binding

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

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

When insolvent person is released from debt

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

Certain persons not released

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

R.S., 1985, c. B-3, s. 62; 1992, c. 27, s. 26; 1997, c. 12, s. 39; 2005, c. 47, s. 41; 2007, c. 36, s. 23.

Default in performance of proposal

62.1 Where

- (a)** default is made in the performance of any provision in a proposal,
- (b)** the default is not waived
 - (i)** by the inspectors, or
 - (ii)** if there are no inspectors, by the creditors, and
- (c)** the default is not remedied by the insolvent person within the prescribed time,

Détermination des réclamations — failli

(1.2) S'agissant de la proposition visant un failli, le moment par rapport auquel les réclamations des créanciers, à l'exception de celles visées au paragraphe 14.06(8), sont déterminées est celui où il est devenu un failli.

Personnes liées par l'approbation

(2) Une fois acceptée par les créanciers et approuvée par le tribunal, la proposition lie ces derniers relativement :

- a)** à toutes les réclamations non garanties;
- b)** aux réclamations garanties qui en faisaient l'objet et dont les créanciers ont voté, par catégorie, en faveur de l'acceptation par une majorité en nombre et une majorité des deux tiers en valeur des créanciers garantis présents personnellement ou représentés par fondé de pouvoir à l'assemblée et votant sur la résolution proposant son acceptation.

Cas où la personne insolvable est libérée d'une dette

(2.1) Toutefois, l'acceptation d'une proposition par les créanciers et son approbation par le tribunal ne libèrent la personne insolvable d'une dette ou obligation visée au paragraphe 178(1) que si la proposition prévoit expressément la possibilité de transiger sur cette dette ou obligation et que le créancier intéressé a voté en faveur de l'acceptation de la proposition.

Certaines personnes non libérées

(3) L'acceptation d'une proposition par un créancier ne libère aucune personne qui ne le serait pas aux termes de la présente loi par la libération du débiteur.

L.R. (1985), ch. B-3, art. 62; 1992, ch. 27, art. 26; 1997, ch. 12, art. 39; 2005, ch. 47, art. 41; 2007, ch. 36, art. 23.

Défaut d'exécution

62.1 Le syndic doit, selon les modalités prescrites — notamment en ce qui a trait aux délais et à la forme —, informer tous les créanciers ainsi que le séquestre officiel de la survenance de la situation suivante :

- a)** il y a défaut d'exécution d'une des dispositions de la proposition;
- b)** les inspecteurs ou, en l'absence d'inspecteurs, les créanciers ne font pas abstraction du défaut;
- c)** la personne insolvable omet de remédier au défaut dans les délais prescrits.

1992, ch. 27, art. 27.

shall be valued by the court and shall be paid in cash on approval of the proposal.

R.S., 1985, c. B-3, s. 65; 2004, c. 25, s. 35(F).

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

- (a) the insolvent person is insolvent; or
- (b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

“(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

- (i) the notice of intention, if one was filed, or
- (ii) the proposal, if no notice of intention was filed.”

Idem

(3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

- (a) the insolvent person is insolvent;
- (b) a notice of intention or a proposal has been filed in respect of the insolvent person; or
- (c) the insolvent person has not paid for services rendered, or material provided, before the filing of
 - (i) the notice of intention, if one was filed, or
 - (ii) the proposal, if no notice of intention was filed.

Certain acts not prevented

(4) Nothing in subsections (1) to (3) shall be construed

ou contribution par les créanciers doit stipuler que la réclamation de tout créancier qui décide de ne pas participer à la proposition sera évaluée par le tribunal et payée en espèces lors de l'approbation de la proposition.

L.R. (1985), ch. B-3, art. 65; 2004, ch. 25, art. 35(F).

Limitation de certains droits

65.1 (1) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit de résilier ou de modifier un contrat — notamment de garantie — conclu avec cette personne ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif que la personne en question est insolvable ou qu'un avis d'intention ou une proposition a été déposé à son égard.

Idem

(2) Lorsque le contrat visé au paragraphe (1) est un bail ou un accord de licence, l'interdiction prévue à ce paragraphe vaut également, avec les mêmes modalités, dans le cas où la personne insolvable n'a pas payé son loyer ou ses redevances, selon le cas, ou n'a pas effectué quelque autre paiement de nature semblable à l'égard d'une période antérieure au dépôt de l'avis d'intention ou, à défaut d'avis d'intention, de la proposition.

Idem

(3) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès de cette personne au seul motif qu'elle est insolvable, qu'un avis d'intention ou une proposition a été déposé à son égard ou qu'elle n'a pas payé certains services rendus, ou du matériel fourni, avant le dépôt de l'avis d'intention ou, à défaut d'avis d'intention, de la proposition.

Exceptions

(4) Les paragraphes (1) à (3) n'ont pas pour effet :

(a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed;

(b) as requiring the further advance of money or credit; or

(c) [Repealed, 2012, c. 31, s. 415]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

Powers of court

(6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with that Act and the by-laws and rules of that Association.

(8) [Repealed, 2007, c. 29, s. 92]

Permitted actions

(9) Despite subsections 69(1) and 69.1(1), the following actions are permitted in respect of an eligible financial contract that is entered into before the filing, in respect of an insolvent person of a notice of intention or, where no notice of intention is filed, a proposal, and that is terminated on or after that filing, but only in accordance with the provisions of that contract:

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie valable, dans la mesure où pareille fourniture ou utilisation a eu lieu après le dépôt de l'avis d'intention ou, à défaut, de la proposition;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

c) [Abrogé, 2012, ch. 31, art. 415]

Incompatibilité

(5) Les paragraphes (1) à (3) l'emportent sur les dispositions incompatibles de tout contrat, celles-ci étant sans effet.

Pouvoirs du tribunal

(6) À la demande d'une des parties à un contrat ou d'une entreprise de service public, le tribunal peut déclarer les paragraphes (1) à (3) inapplicables ou applicables uniquement dans la mesure qu'il précise, si le demandeur le convainc que l'application de ces paragraphes lui causerait vraisemblablement de sérieuses difficultés financières.

Contrats financiers admissibles

(7) Le paragraphe (1) :

a) ne s'applique pas aux contrats financiers admissibles;

b) n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements constituée par la *Loi canadienne sur les paiements* de cesser d'agir, pour une personne insolvable, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à cette loi et aux règles et règlements administratifs de l'Association.

(8) [Abrogé, 2007, ch. 29, art. 92]

Opérations permises

(9) Malgré les paragraphes 69(1) et 69.1(1), si le contrat financier admissible conclu avant le dépôt d'un avis d'intention relatif à une personne insolvable ou, à défaut, d'une proposition la visant est résilié lors de ce dépôt ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre la personne insolvable et les autres parties au contrat;

(a) the netting or setting off or compensation of obligations between the insolvent person and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (9) are owed by the insolvent person to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the insolvent person with a claim provable in bankruptcy in respect of those net termination values.

1992, c. 27, s. 30; 1997, c. 12, s. 41; 2001, c. 9, s. 573; 2004, c. 25, s. 36(E); 2005, c. 47, s. 43; 2007, c. 29, s. 92; 2012, c. 31, s. 415.

Disclaimer or rescission of agreements

65.11 (1) Subject to subsections (3) and (4), a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) may — on notice given in the prescribed form and manner to the other parties to the agreement and the trustee — disclaim or rescind any agreement to which the debtor is a party on the day on which the notice of intention or proposal was filed. The debtor may not give notice unless the trustee approves the proposed disclaimer or rescission.

Individuals

(2) In the case of an individual,

(a) they may not disclaim or rescind an agreement under subsection (1) unless they are carrying on a business; and

(b) only an agreement in relation to the business may be disclaimed or rescinded.

Court may prohibit disclaimer or rescission

(3) Within 15 days after the day on which the debtor gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement is not to be disclaimed or rescinded.

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (9), des sommes sont dues par la personne insolvable à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée, pour l'application des alinéas 69(1)a) et 69.1(1)a), être un créancier de la personne insolvable et avoir une réclamation prouvable en matière de faillite relativement à ces sommes.

1992, ch. 27, art. 30; 1997, ch. 12, art. 41; 2001, ch. 9, art. 573; 2004, ch. 25, art. 36(A); 2005, ch. 47, art. 43; 2007, ch. 29, art. 92; 2012, ch. 31, art. 415.

Résiliation de contrats

65.11 (1) Sous réserve des paragraphes (3) et (4), le débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) peut — sur préavis donné en la forme et de la manière prescrites aux autres parties au contrat et au syndic et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel il est partie à la date du dépôt de l'avis ou de la proposition.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut effectuer la résiliation que s'il exploite une entreprise et, le cas échéant, seuls les contrats relatifs à l'entreprise peuvent être résiliés.

Contestation

(3) Dans les quinze jours suivant la date à laquelle le débiteur donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au syndic, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Stay of proceedings — directors

69.31 (1) Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the corporation's obligations or an action seeking injunctive relief against a director in relation to the corporation.

Resignation or removal of directors

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

1997, c. 12, s. 65.

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration.

1992, c. 27, s. 36; 1997, c. 12, s. 65.

Non-application of certain provisions

69.41 (1) Sections 69 to 69.31 do not apply in respect of a claim referred to in subsection 121(4).

No remedy, etc.

(2) Notwithstanding subsection (1), no creditor with a claim referred to in subsection 121(4) has any remedy, or shall commence or continue any action, execution or other proceeding, against

Suspension des procédures — administrateurs

69.31 (1) Entre la date où une personne morale insolvable a déposé l'avis d'intention prévu au paragraphe 50.4(1) ou une proposition et la date d'approbation de la proposition ou celle de sa faillite, nul ne peut intenter ou continuer d'action contre les administrateurs relativement aux réclamations contre eux qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations dont ils peuvent être, ès qualités, responsables en droit.

Exception

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la personne morale ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Démission ou destitution des administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la personne morale est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 65.

Déclaration de non-application

69.4 Tout créancier touché par l'application des articles 69 à 69.31 ou toute personne touchée par celle de l'article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu'il estime indiquées, donner suite à la demande s'il est convaincu que la continuation d'application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu'il serait, pour d'autres motifs, équitable de rendre pareille décision.

1992, ch. 27, art. 36; 1997, ch. 12, art. 65.

Précision

69.41 (1) Les articles 69 à 69.31 ne s'appliquent pas aux réclamations visées au paragraphe 121(4).

Recours interdits

(2) Malgré le paragraphe (1), le créancier d'une réclamation mentionnée au paragraphe 121(4) n'a aucun recours et ne peut intenter ou continuer d'actions, exécutions ou autres procédures relativement aux biens du failli

Assignment of book debts

(2) An assignment of existing or future amounts receivable as payment for or commission or professional fees in respect of services rendered by a debtor who is an individual before the debtor became bankrupt is of no effect in respect of such amounts earned or generated after the bankruptcy.

1992, c. 27, s. 35; 1997, c. 12, s. 61; 2005, c. 47, s. 59.

Stay of Proceedings

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

- (i)** the insolvent person's insolvency,
- (ii)** the default by the insolvent person of an obligation under the security agreement, or
- (iii)** the filing by the insolvent person of a notice of intention under section 50.4,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

- (i)** subsection 224(1.2) of the *Income Tax Act*, or
- (ii)** any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

Cession de créances comptables

(2) La cession de sommes — échues ou à percevoir — à titre de paiement, de commission ou d'honoraires professionnels pour la prestation de services, faite par un débiteur qui est une personne physique avant qu'il ne fasse faillite, est sans effet sur les sommes de même provenance qui sont gagnées après sa faillite.

1992, ch. 27, art. 35; 1997, ch. 12, art. 61; 2005, ch. 47, art. 59.

Suspension des procédures

Suspension des procédures en cas d'avis d'intention

69 (1) Sous réserve des paragraphes (2) et (3) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt par une personne insolvable d'un avis d'intention aux termes de l'article 50.4 et la date du dépôt, aux termes du paragraphe 62(1), d'une proposition relative à cette personne ou la date à laquelle celle-ci devient un failli :

a) les créanciers n'ont aucun recours contre la personne insolvable ou contre ses biens et ne peuvent tenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

b) est sans effet toute disposition d'un contrat de garantie conclu entre la personne insolvable et un créancier garanti qui prévoit, pour l'essentiel, que celle-ci, dès qu'elle devient insolvable, qu'elle manque à un engagement prévu par le contrat de garantie ou qu'elle dépose un avis d'intention aux termes de l'article 50.4, est déchu des droits qu'elle aurait normalement de se servir des avoirs visés par le contrat de garantie ou de faire d'autres opérations à leur égard;

c) est suspendu l'exercice par Sa Majesté du chef du Canada des droits que lui confère l'une des dispositions suivantes à l'égard de la personne insolvable, lorsque celle-ci est un débiteur fiscal visé à cette disposition :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui, à la fois :

(A) renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(B) prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

Limitation

(2) The stays provided by subsection (1) do not apply

(a) to prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention under section 50.4 was filed from dealing with those assets;

(b) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person more than ten days before the notice of intention under section 50.4 was filed, from enforcing that security, unless the secured creditor consents to the stay;

(c) to prevent a secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security if the insolvent person has, under subsection 244(2), consented to the enforcement action; or

(d) [Repealed, 2012, c. 31, s. 416]

d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents;

d) est suspendu l'exercice par Sa Majesté du chef d'une province des droits que lui confère toute disposition législative provinciale à l'égard d'une personne insolvable, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est **une province instituant un régime général de pensions** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un **régime provincial de pensions** au sens de ce paragraphe.

Exceptions

(2) Le paragraphe (1) n'a pas pour effet :

a) d'empêcher le créancier garanti de faire des opérations à l'égard des avoirs garantis de la personne insolvable dont il a pris possession — en vue de les réaliser — avant le dépôt de l'avis d'intention prévu à l'article 50.4;

b) d'empêcher le créancier garanti, sauf s'il a consenti à la suspension, qui a donné le préavis prévu au paragraphe 244(1) plus de dix jours avant le dépôt de l'avis d'intention prévu à l'article 50.4 de mettre à exécution sa garantie;

c) d'empêcher le créancier garanti qui a donné le préavis prévu au paragraphe 244(1) de mettre à exécution sa garantie si la personne insolvable a consenti à l'exécution au titre du paragraphe 244(2).

d) [Abrogé, 2012, ch. 31, art. 416]

Limitation

(3) A stay provided by paragraph (1)(c) or (d) does not apply, or terminates, in respect of Her Majesty in right of Canada and every province if

(a) the insolvent person defaults on payment of any amount that becomes due to Her Majesty after the filing of the notice of intention and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1

Exception

(3) L'alinéa (1)c) ou d) ne s'applique pas, ou cesse de s'appliquer, à Sa Majesté du chef du Canada ou de la province en cause dans les cas suivants :

a) la personne insolvable manque à ses obligations de paiement d'un montant qui devient dû à Sa Majesté après le dépôt de l'avis d'intention et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est **une province instituant un régime général de pensions** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un **régime provincial de pensions** au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

of that Act, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection.

R.S., 1985, c. B-3, s. 69; 1992, c. 27, s. 36; 1997, c. 12, s. 62; 2000, c. 30, s. 145; 2005, c. 3, s. 12, c. 47, s. 60; 2007, c. 36, s. 34; 2009, c. 33, s. 23; 2012, c. 31, s. 416.

Stay of proceedings — Division I proposals

69.1 (1) Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est **une province instituant un régime général de pensions** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un **régime provincial de pensions** au sens de ce paragraphe.

L.R. (1985), ch. B-3, art. 69; 1992, ch. 27, art. 36; 1997, ch. 12, art. 62; 2000, ch. 30, art. 145; 2005, ch. 3, art. 12, ch. 47, art. 60; 2007, ch. 36, art. 34; 2009, ch. 33, art. 23; 2012, ch. 31, art. 416.

Suspension des procédures en cas de dépôt d'une proposition

69.1 (1) Sous réserve des paragraphes (2) à (6) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt d'une proposition visant une personne insolvable et :

a) soit sa faillite, soit la libération du syndic, les créanciers n'ont aucun recours contre elle ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

b) soit sa faillite, soit la libération du syndic, est sans effet toute disposition d'un contrat de garantie conclu entre elle et un créancier garanti qui prévoit, pour l'essentiel, que celle-ci, dès qu'elle devient insolvable, qu'elle manque à un engagement prévu par le contrat de garantie ou qu'est déposé à son égard un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), est déchu des droits

(a) property of a bankrupt that has vested in the trustee; or

(b) amounts that are payable to the estate of the bankrupt under section 68.

1997, c. 12, s. 65.

No stay, etc., in certain cases

69.42 Despite anything in this Act, no provision of this Act shall have the effect of staying or restraining, and no order may be made under this Act staying or restraining,

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

2001, c. 9, s. 574.

Provincial legislation

69.5 Except for paragraphs 69(1)(c) and (d) and 69.1(1)(c) and (d), sections 69 to 69.3 do not affect the operation of any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(a) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(b) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection,

and for the purpose of this section, the provision is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in

dévolus au syndic ou aux montants à verser à l'actif de la faillite au titre de l'article 68.

1997, ch. 12, art. 65.

Restrictions

69.42 Malgré les autres dispositions de la présente loi, aucune disposition de la présente loi ne peut avoir pour effet de suspendre ou restreindre et aucune ordonnance ne peut être rendue, pour suspendre ou restreindre :

a) l'exercice par le ministre des Finances ou par le surintendant des institutions financières des attributions qui leur sont conférées par la *Loi sur les banques*, la *Loi sur les associations coopératives de crédit*, la *Loi sur les sociétés d'assurances* ou la *Loi sur les sociétés de fiducie et de prêt*;

b) l'exercice par le gouverneur en conseil, le ministre des Finances ou la Société d'assurance-dépôts du Canada des attributions qui leur sont conférées par la *Loi sur la Société d'assurance-dépôts du Canada*;

c) l'exercice par le procureur général du Canada des pouvoirs qui lui sont conférés par la *Loi sur les liquidations et les restructurations*.

2001, ch. 9, art. 574.

Effet sur les lois provinciales

69.5 À l'exception des alinéas 69(1)(c) et d) et 69.1(1)(c) et d), les articles 69 à 69.3 n'ont pas pour effet de porter atteinte à l'application de toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, ou des intérêts, pénalités ou autres montants y afférents, qui :

a) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*;

b) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est **une province instituant un régime général de pensions** au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un **régime provincial de pensions** au sens de ce paragraphe.

Pour l'application du présent article, la disposition en question est réputée avoir, à l'encontre de tout créancier

paragraph (a), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in paragraph (b), and in respect of any related interest, penalties or other amounts.

1992, c. 27, s. 36; 2000, c. 30, s. 147.

Meaning of regulatory body

69.6 (1) In this section, **regulatory body** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — sections 69 and 69.1

(2) Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the insolvent person and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

- (a)** a viable proposal could not be made in respect of the insolvent person if that subsection were to apply; and
- (b)** it is not contrary to the public interest that the regulatory body be affected by the stay provided by section 69 or 69.1.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the insolvent person and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

2007, c. 36, s. 37.

et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée à l'alinéa a), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée à l'alinéa b), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

1992, ch. 27, art. 36; 2000, ch. 30, art. 147.

Définition de organisme administratif

69.6 (1) Au présent article, **organisme administratif** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par les Règles générales.

Organisme administratif — suspensions prévues aux articles 69 ou 69.1

(2) Sous réserve du paragraphe (3), les suspensions prévues aux articles 69 ou 69.1 ne portent aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la personne insolvable par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la personne insolvable et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

- a)** il ne pourrait être fait de proposition viable à l'égard de la personne insolvable si ce paragraphe s'appliquait;
- b)** la suspension demandée au titre des articles 69 ou 69.1 n'est pas contraire à l'intérêt public.

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer par ordonnance, sur demande de la personne insolvable et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

2007, ch. 36, art. 37.

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF
1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST.
THOMAS, IN THE PROVINCE OF ONTARIO

Court of Appeal File No.: C66871
Court File Nos.: 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**FACTUM OF THE RESPONDENT,
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