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| COURT FILE NUMBER | 2401-05179 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| | IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ALPHABOW ENERGY LTD. |
| APPLICANT | KIKINO METIS SETTLEMENT |
| DOCUMENT | **BENCH BRIEF**<br>**(Lift Stay of Proceedings)** |
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## I. INTRODUCTION

1. This is the bench brief of the Applicant, Kikino Metis Settlement ("**Kikino** "), in support of an application pursuant to s. 11 of the *Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36 ("**CCAA**")[1] to (*inter alia*):

    a. lift the stay of proceedings ("**Stay**") in this Action ("**CCAA Proceedings**") for the purpose of authorizing and permitting Kikino to litigate the MSAT Proceedings (as defined below); and

    b. pursuant to s. 121 of the *Metis Settlements Act*, RSA 2000, c M-14 ("**MSA**"), deem any debt claim due and owing to the Crown in the Right of Alberta as a subrogation of Kikino's claim for the Lease Arrears (as defined below) within the CCAA Proceedings.

2. Section 121 of the MSA[2] empowers Kikino to appear before the Metis Settlement Appeal Tribunal ("**MSAT**") to obtain an award for unpaid surface Lease Arrears (as defined below) owing to it by AlphaBow Energy Ltd. ("**AlphaBow**").[3] In the event the MSAT finds that Kikino is entitled to be paid for the Lease Arrears, s. 121 of the MSA further authorizes the MSAT to direct the Government of Alberta ("**GOA**") to pay the Lease Arrears to Kikino.[4] Further particulars regarding this statutory repayment process are set out below.

3. A key consideration for this Court in determining whether it is appropriate to lift the Stay is whether doing so will cause material prejudice within the CCAA Proceedings to the other stakeholders of AlphaBow ("**Stakeholders**").

4. Kikino submits that its Proven Claim (as defined below) in the CCAA Proceedings is subrogated to the GOA pursuant to s. 121(3) of the MSA. Accordingly, there is no prejudice

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[1] CCAA at s. 11, TAB 1.
[2] MSA at s. 121, TAB 2.
[3] *Ibid*, TAB 2.
[4] *Ibid* at s. 121(2)-(3),TAB 2.

to the Stakeholders within the CCAA Proceedings and it is therefore appropriate for this Court to lift the Stay so that Kikino may litigate the MSAT Proceedings (as defined below).

5. This Brief will address, *inter alia*, the test to lift the Stay, the common law of subrogation, and the principles of paramountcy (in the event that this Court finds that the GOA's debt claim under the MSA is not subrogated).

## II. BACKGROUND

6. The Affidavit of Ameena Quazi sworn on November 3, 2025 ("**Quazi Affidavit**") in support of this Application attaches the MSAT Hearing Package (as defined therein) as Exhibit B. The MSAT Hearing Package is voluminous and has only been attached in its entirety to the Quazi Affidavit to provide a complete and transparent record of the MSAT Proceedings for the benefit of stakeholders in the CCAA Proceedings. For the purposes of this Application, Kikino intends to only rely on pages 4 to 9 of the MSAT Hearing Package.

### A. MSAT Proceedings

7. Section 121 of the MSA provides a statutory right of recovery for unpaid surface lease arrears, as follows:[5]

> 121(1) If an existing mineral lease holder or operator fails to pay money
>
> (a) under a surface lease, or
>
> (b) ordered to be paid by the Existing Leases Land Access Panel or the Land Access Panel,
>
> within 30 days of the date it is due, the person entitled to receive the money may submit to the Land Access Panel evidence of the failure to pay.
>
> (2) On receipt of satisfactory evidence of failure of the existing mineral lease holder or operator to pay, the Land Access Panel may direct the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund the amount of money to which the person is entitled.

[5] *Ibid*, s. 121, TAB 2.

(3) If the President of Treasury Board and Minister of Finance pays money to a person under this section, the amount paid constitutes a debt owing by the existing mineral lease holder or the operator to the Crown in right of Alberta.

(4) If a surface lease and a development agreement are combined in one document, this section applies only to that part of the document concerning the surface lease.

8. To the best of Kikino's knowledge, s. 121 of the MSA has not been judicially interpreted within the context of formal insolvency proceedings.

9. On December 11, 2020, pursuant to s. 121 of the MSA*,* Kikino commenced proceedings before the MSAT for the purpose of obtaining a compensation award for unpaid surface lease obligations owing to it by AlphaBow ("**MSAT Proceedings**").[6]

10. Within the MSAT Proceedings, Kikino alleges that AlphaBow owes Kikino an amount totaling $1,514,325.48 in respect of unpaid surface lease obligations ("**Lease Arrears**") regarding 112 surface leases located on Kikino's lands ("**Surface Leases**") for the period starting on April 1, 2017 and ending on March 31, 2024.[7]

11. On July 5, 2024, at a hearing before the MSAT in the MSAT Proceedings, the MSAT determined that as a result of the CCAA Proceedings and the Stay, the MSAT Proceedings could not continue without leave of this Court.[8] As a result, the MSAT has been holding the MSAT Proceedings in abeyance subject to the outcome of this Application.

### B. CCAA Proceedings

12. On April 26, 2024, this Court in this Action granted an initial order ("**Initial Order**") and an amended and restated order ("**ARIO**") in favour of AlphaBow.[9]

13. The corresponding Stay remains in place regarding AlphaBow as a result of the CCAA Proceedings.

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[6] Quazi Affidavit at Exhibit "A".
[7] *Ibid* at Exhibit "B" at pages 4-7.
[8] *Ibid* at Exhibit "D".
[9] Amended and Restated Initial Order, granted April 26, 2024 ("**Initial Order**").

14. Pursuant to s. 2(1) of the CCAA, a provable claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of s. 2 of the *BIA,* which triggers s. 121(1) of the *BIA* and captures all debts and liabilities, present or future, to which AlphaBow is subject on the date of the granting of the Initial Order, being April 26, 2024 ("**Provable Claim**").[10]

15. On September 20, 2024, this Court granted a claims process Order, providing, *inter alia,* a process for the stakeholders of AlphaBow to prove their claims in the CCAA Proceedings ("**Claims Process Order**").[11]

16. Paragraph 3(a) of the Claims Process Order describes a "Claim" as any right or claim that may be asserted against AlphaBow in connection with any indebtedness, liability or obligation of any kind whatsoever whether or not any indebtedness, liability or obligation is reduced to judgment with respect to any matter, action cause or choses in action which is: (a) based in whole or in part on facts or events occurring prior to the filing of the Initial Order, (b) related to a time period prior to the filing of the Initial Order, or (c) a right or claim of any kind that would be a Provable Claim under the *BIA*.

17. Pursuant to the Claims Process Order, a claim arising prior to the filing of the Initial Order is deemed a Provable Claim, and be subject to compromise within the CCAA Proceedings.

18. Kikino has proven its claim regarding the Lease Arrears within the CCAA Proceedings ("**Proven Claim**"). The Proven Claim was submitted to counsel for AlphaBow and the Monitor on October 23, 2024.

19. On January 2, 2025, the Court granted a reverse vesting order ("**RVO**") which approved a subscription agreement ("**Subscription Agreement**") in favour of 2628071 AB Ltd. ("**071 AB Ltd.**") whereby the following (among other things) will occur regarding AlphaBow:[12]

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[10] CCAA, *supra* note 1, TAB 1.
[11] Order (Claims Process)granted September 20, 2024 ("**Claims Process Order**").
[12] The Subscription Agreement is appended as Schedule B to the Seventh Affidavit of Ben Li (President and CEO of AlphaBow) dated December 9, 2024 ("**Li Affidavit**"). Paragraphs 24 – 36 of the Li Affidavit describe the Subscription Agreement. Within the Subscription Agreement: (i) "**Transferred Contracts**" means all surface leases related to freehold mineral lands (see paragraph 1.1(cccc) and Schedule B), (ii) the definition of "**Transferred Assets**" includes the Transferred Contracts (see paragraph 1.1(bbbb) and Schedule B), and (iii) Transferred Assets are to be held by the "**Creditor Trust**", which means a trust to be formed pursuant the RVO which will hold both Transferred Assets and Transferred Liabilities, and (iv) "**Transferred Liabilities**" means, among

a. the transfer of the rights and obligations of the Surface Leases out of AlphaBow into the Creditor Trust, as defined in the RVO, pursuant to the Surface Leases falling within the definition of a Transferred Contract under the Subscription Agreement;

b. AlphaBow will reorganize its articles of incorporation for the purpose of 071 AB Ltd acquiring the share capital of AlphaBow; and

c. 071 AB Ltd. will acquire the share capital in AlphaBow free and clear of the rights and obligations set out in the Surface Leases.

20. As a result of the RVO, and once the arrangement pursuant to the Subscription Agreement is closed, the Proven Claim will vest out of AlphaBow into the Creditor Trust.

21. To the best of Kikino's knowledge, the Subscription Agreement has not closed and is subject to certain outstanding conditions precedent.

22. The Proven Claim is therefore a Transferred Asset which is pooled in the Creditor Trust.

23. Notwithstanding the foregoing, and separate from the CCAA Proceedings, Kikino is statutorily entitled to pursue its recovery rights for the Lease Arrears under the MSA. The Stay prevents Kikino from doing so without intervention of this Court.

## III. ISSUE

24. The sole issue to be determined by the Court is whether this Court should exercise its discretion under s. 11 of the CCAA to lift the Stay to allow Kikino to litigate the MSAT Proceedings, taking into consideration the law of subrogation as pertains to s. 121(3) of the MSA.

## IV. LAW AND ARGUMENT

### A. <u>Test for Lifting the Stay</u>

25. Kikino seeks the assistance of this Court to lift the Stay to advance the MSAT Proceedings.

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other things, all liabilities pertaining to the Transferred Assets and arising under the Transferred Contracts (see paragraph 1.1(dddd) and Schedule B).

26. As noted above, the MSAT has determined that the MSAT Proceedings are stayed as a result of the stay provisions in the CCAA Initial Order and cannot continue without leave of this Court in the CCAA Proceedings.[13]

27. The test for lifting a stay of proceedings is succinctly summarized by Madam Justice Romaine in *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 at paras 65 – 68:[14]

> [65] The test for lifting a stay focuses on the totality of circumstances and the relative prejudice to the parties involved: *Alberta Energy Regulator v Lexin Resources Ltd,* 2019 ABQB 23 in the context of a receivership, citing *Alignvest Private Debt Ltd. v Surefire Industries Ltd.,* 2015 ABQB 148 (Alta. Q.B.) at para 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)).
>
> [66] Guidance can be drawn from the provisions (sic) of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***") as amended, in determining whether a stay in CCAA proceedings should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Re Ma,* 2001 CanLII 24076 (ON CA), [2001] O.J. No. 1189 (Ont. C.A.).
>
> [67] Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Re Ma*, at para 3.
>
> [68] In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v Fort Erie Truck & Travel Plaza Inc.* (2005), 2005 CanLII 81263 (ON SC), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at para 18-19. Examples may include hardship caused by the stay or necessity of payment or a situation where it is in the interests of justice to allow the stay to be lifted: *Re Canwest Global Communications Corp*, (2009), 61 CBR (5th) 200 (Ont S.C.J.). The prejudice to the applicant should be different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

28. In Kikino's respectful submission, the only aspect of the test to lift the Stay which is contentious is whether there would be prejudice to the Stakeholders in doing so. Whether there is any prejudice to the Stakeholders by lifting the Stay in favour of Kikino depends on whether this Court determines the GOA's claim pursuant to s. 121 of the MSA is a subrogation of Kikino's Proven Claim.

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[13] Quazi Affidavit at Exhibit "D".

[14] *Bellatrix Exploration Ltd (Re),* 2020 ABQB 809 at paras 65 – 68 ("***Bellatrix***"), TAB 3.

29. As further detailed below, if the GOA's claim under the MSA is subrogated then there is no prejudice to the Stakeholders. The effect is simply that the GOA is subrogated into the current position of Kikino and its Proven Claim within the CCAA Proceedings.

30. If the GOA's claim under the MSA is not subrogated, then this Court would need to consider the issue of prejudice to the Stakeholders in the CCAA Proceedings. This issue is further addressed in section C below.

## B. <u>Law of Subrogation</u>

31. An interpretation of s. 121(3) of the MSA requires a review of the common law principle of subrogation.

32. The principle of subrogation is the substitution of one party in the place of another by operation of law.[15] Specifically, "[t]he doctrine of subrogation is […] said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another".[16]

33. As outlined above, the Lease Arrears were accrued prior to and predate the granting of the Initial Order.[17]

34. The Lease Arrears meet the definition of a Provable Claim under the Claims Process Order, and are deemed to be a Proven Claim within the CCAA Proceedings.

35. Pursuant to s. 121 of the MSA, once the MSAT issues an award to a lessor (i.e. Kikino), the GOA is required to provide payment to the lessor in respect of that award. Thereafter, the payment by the GOA constitutes a debt owing by the operator (i.e. AlphaBow) to the GOA.

36. Given the wording of the MSA, Kikino's position is that the debt due to the GOA following payment remains the same debt obligation which was owing by AlphaBow to Kikino pursuant to the Proven Claim, and which debt accrued prior to the granting of the Initial Order.

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[15] Canadian Encyclopedic Digest, EQU.111.9 Equity- Equitable Doctrines- Subrogation, citing Black's Law Dictionary, 6th ed., s.v. "subrogation", TAB 4.
[16] *R v O'Bryan*, 1900 CarswellNat 13, 7 Ex. C.R. 19 at para 9 ("***O'Bryan***").
[17] Quazi Affidavit at Exhibit "B" at pages 4-7.

37. In addition to Kikino proving its claim for the Lease Arrears within the CCAA Proceedings, Kikino is entitled to avail itself of the statutory relief set out at s. 121 of the MSA.

38. If Kikino is successful in the MSAT Proceedings, and the GOA compensates Kikino for the Lease Arrears, then consideration must be given to the treatment of such compensation within the CCAA Proceedings, taking into account the wording of s. 121(3) of the MSA.

39. Section 121(3) of the MSA states that the amount paid by the GOA constitutes a debt owing by the operator, but does not address how that debt is to be treated within a formal insolvency proceeding. As this Court is aware, CCAA proceedings create a bright line which segregate and compromise debts owing prior to the date of an initial order.

40. In Kikino's respectful submission, s. 121(3) of the MSA recognizes a debt owing to the GOA and facilitates the GOA's ability to recover payments made in respect of a MSAT award from an operator. This provision exists to dispense with any requirement for the GOA to further prove the debt and allows the GOA to proceed straight to judgment and enforcement of the debt as against the operator, if it chooses to do so.

41. Further s. 121(3) of the MSA:

    a. recognizes that the MSAT has already determined the merits of the underlying debt claim, thereby mitigating the risk of multiple and potentially disparate adjudicative decisions regarding the underlying debt; and

    b. does not interfere with the common law principle of subrogation other than to assist the GOA to enforce on its debt a streamlined manner.

42. But for the CCAA Proceedings, the mechanism prescribed by s. 121 of the MSA would be uncontentious regarding the GOA's recovery of the Lease Arrears from AlphaBow: in the ordinary course, the GOA would be entitled to: (i) seek summary judgment of the Lease Arrears debt, (ii) obtain a writ of enforcement, and (iii) pursue enforcement of the Lease Arrears debt as against AlphaBow in accordance with Alberta's civil enforcement legislation.

43. The narrow issue before this Court is whether the CCAA Proceedings impact the GOA's rights of recovery against AlphaBow given that s. 121 is silent regarding the treatment of GOA's claim in a formal insolvency proceeding.

44. If this Court agrees with Kikino's position that the GOA's claim under s. 121(3) of the MSA is subrogated, then the impact of the CCAA Proceedings is that the GOA "steps into the shoes" of Kikino's Proven Claim and there is no prejudice to AlphaBow's Stakeholders.

45. If the Court is of the view that the GOA's claim is not a subrogated claim, then the GOA's debt claim against AlphaBow would be deemed a post-filing obligation which attaches to AlphaBow. This means that notwithstanding the provisions of the Subscription Agreement and purpose of the RVO, 071 AB Ltd. cannot acquire the share capital in AlphaBow free and clear of liabilities owing pursuant to the Surface Leases.

46. Kikino is of the view that the foregoing is not an appropriate outcome because the GOA's debt claim would form a new liability owing by AlphaBow to the GOA notwithstanding the granting and underlying purpose of Initial Order, ARIO, and RVO. The RVO was granted to effectively cleanse AlphaBow so its share capital could be purchased free and clear of such obligations and liabilities. Finding that the GOA claim is not a subrogated claim is at direct odds to this purpose.

47. Further, the underlying Leases Arrears owing under the Surface Leases remain fundamentally unchanged within the CCAA Proceedings. If the GOA pays Kikino's Lease Arrears, the underlying debt obligation is inextricably linked to AlphaBow's failure to pay Kikino for obligations which predate the Initial Order. The reason for the debt remains the same: the GOA extinguished the debt owing to Kikino but the debt subsists for the benefit of the GOA as the paying party.[18]

48. Additionally, the purpose of the CCAA is to, *inter alia,* facilitate the compromise of all pre-filing debt obligations so that a debtor can restructure its business. Creating new post-filing obligations under the MSA runs contrary to the purpose of the CCAA, which raises the potential issue of paramountcy *vis* à *vis* the CCAA and the MSA, further detailed below.

49. An interpretation of the wording of s. 121(3) of the MSA should be done in a way which is harmonious with, and furthers the purpose of, the CCAA.

[18] *O'Bryan*, *supra* note 16 at para 9.

50. In *Rizzo & Rizzo Shoes Ltd., Re,*[19] the Supreme Court of Canada accepted a modern approach to statutory interpretation, finding that a court should consider the subject provision broadly, and in its entirety, looking to the "grammatical and ordinary" meaning in light of the intention, scheme and object of the subject statue and the parliament which enacted it.[20] The issue of paramountcy is further discussed in subsection C(a) below.

## C. <u>Application of the Test to Lift the Stay</u>

51. If this Court finds that the GOA's MSA claim is subrogated to Kikino's Proven Claim in the CCAA Proceedings, then Kikino submits that there is no prejudice to the Stakeholders as the GOA steps into Kikino's position and maintains the *status quo* within the CCAA Proceedings. In such case, no further consideration of prejudice to the Stakeholders is required and this Court can exercise its discretion to lift the Stay to allow Kikino to litigate the MSAT Proceedings.

52. If this Court finds that the GOA's claim is not subrogated, Kikino submits that this Court should lift the Stay in any event.

53. In considering whether to lift the Stay in the CCAA Proceedings, this Court should conduct a fact-specific analysis to determine whether lifting the Stay is appropriate in the circumstances, in consideration of *inter alia,* the following factors:[21]

    a. whether the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds;

    b. there are sound reasons to lift the stay for the benefit of the applicant;

    c. the prejudice suffered by the applicant is qualitatively different from those other creditors within the CCAA Proceedings; and

    d. it is in the interest of justice to lift the stay.

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[19] *Rizzo & Rizzo Shoes Ltd., Re*, 1998 CarswellOnt 1 (S.C.C.) at para 21.
[20] *Ibid* at para 21.
[21] *Bellatrix*, *supra* note 14 at paras 65 – 68.

54. Kikino recognizes and concedes that if the GOA's MSA claim is not subrogated, then there is a potential prejudice to the Stakeholders and AlphaBow if 071 AB Ltd. is not prepared to proceed with the Subscription Agreement because AlphaBow is imposed with a post-Initial Order obligation to repay the GOA for the Lease Arrears.

55. 071 AB Ltd. entered the Subscription Agreement on the understanding that it would acquire the share capital in AlphaBow free and clear of the obligations pursuant to the Surface Leases. Finding that the GOA does not hold a subrogated claim in respect of the Lease Arrears results in a fundamental change in what AlphaBow and 071 AB Ltd. negotiated and set out in the Subscription Agreement.

56. There would also be serious prejudice to Kikino if it is prohibited from availing itself of its statutory rights of recovery under the MSA which would otherwise be accessible outside the CCAA Proceedings.

57. By enacting s. 121 of the MSA, legislators sought to provide surface lease claimants the right to recover surface lease arrears from the GOA notwithstanding the financial status of the operator. In Kikino's respectful submission, even within formal insolvencies, the GOA bears the risk of enforcement and collection against an operator.

58. It is Kikino's submission that the prejudice in denying a creditor the ability to avail itself of its statutory remedies is qualitatively different from the prejudice to the Stakeholders within the CCAA Proceedings, and should outweigh the prejudice to the Stakeholders as a whole. In this regard, Kikino notes that approximately 77 decisions have been rendered by the Land and Property Rights Tribunal ("**LPRT**"), granting non-Indigenous surface lease claimants recovery for prefiling lease arrears owing by AlphaBow from the GOA under the *Surface Rights Act,* RSA 2000, c S-24[22] notwithstanding the CCAA Proceedings.[23]

59. Recognition that the GOA's MSA claim is subrogated to AKikino's Proven Claim resolves the competing prejudices between Kikino and the Stakeholders.

[22] *Surface Rights Act,* RSA 2000, c S-24, s. 36, TAB 7.
[23] LPRT written decisions regarding AlphaBow, TAB 8. For brevity given the volume, the LPRT written decisions have been hyperlinked, but not reproduced in their entirety within the Book of Authorities.

60. Kikino ought to be able to avail itself of the rights of recovery within the MSA in a way in which will not offend or frustrate the operation of the CCAA. Kikino submits that this principle of harmonious interpretation of legislation provides a sound and juristic reason to lift the Stay for Kikino's benefit.

61. It is important to consider that s. 121 of the MSA grants the GOA a debt claim, but does not provide a mechanism for direct collection from an operator. It is in the GOA's discretion to determine what steps, if any, it will take to pursue and enforce on its statutorily prescribed debt. The GOA is not obligated or required to pursue an operator for this debt.

62. In Kikino's view, any such loss suffered as result of the operation of s. 121 of the MSA is prescribed to be borne by the GOA. While the MSA imposes the debt claim in favour of the GOA, there is nothing in the MSA that situates the GOA in a different position than within the CCAA Proceedings. If legislature wanted to enhance the GOA's debt recovery position in formal insolvency proceedings, specific and clear language in the MSA would need to provide for same; no such language exists in the MSA in this regard.

### a. Paramountcy

63. The doctrine of paramountcy will apply where there is a conflict of operation or purpose between federal legislation and provincial legislation.[24]

64. In this case, the issue of paramountcy only warrants consideration in the event that this Court finds that the GOA's claim is not subrogated and the debt obligation remains owing by AlphaBow, notwithstanding the RVO.

65. Kikino submits that an interpretation which leads to the carving out of the GOA's claim under the MSA as a post-filing CCAA obligation in the CCAA Proceedings frustrates AlphaBow's ability to restructure.

[24] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 ("***Redwater***") at para 65, TAB 9.

66. The Supreme Court of Canada in *Redwater*, citing *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, found that "[t]he party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose".[25]

67. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility. […] In the absence of 'very clear' statutory language to the contrary, [i]t is presumed that Parliament intends its laws to co-exist with provincial laws."[26] However, if there is a genuine conflict, the federal legislation must prevail.[27]

68. In the event that this Court determines that the GOA's MSA is not subrogated to Kikino's Proven Claim in the CCAA Proceedings, Kikino urges this Court to resolve the competing statutory objectives of the CCAA and MSA in favour of the CCAA. An interpretation of s.121(3) of the MSA which allows the GOA to recover its debt as against AlphaBow as a post-filing debt obligation frustrates the fundamental purpose of the CCAA of allowing an insolvent debtor to restructure its affairs and to compromise all debts which predate the granting of an initial order under the CCAA.

## V. RELIEF SOUGHT

69. For the reasons described above, Kikino respectively requests from this Honourable Court an Order lifting the Stay with respect to the MSAT Proceedings.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED NOVEMBER 3, 2025.**

**MLT AIKINS LLP**

Per: ______________________________

Dana M. Nowak/Carly Toronchuk
Counsel for the Applicant, Kikino Metis Settlement

[25] *Ibid* citing *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.,* 2015 SCC 53 at para 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 66.
[26] *Ibid* at para 66.
[27] *Ibid* at para 64.

## VI. AUTHORITIES

| TAB | AUTHORITY |
|---|---|
| 1 | *Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36 |
| 2 | *Metis Settlements Act*, RSA 2000, c M-14 |
| 3 | *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 |
| 4 | *CED (online), Equity – Equitable Doctrines, "Subrogation" (11)* |
| 5 | *R v O'Bryan*, 1900 CarswellNat 13, 7 Ex. C.R. 19 |
| 6 | *Rizzo & Rizzo Shoes Ltd., Re*, 1998 CarswellOnt 1 (S.C.C.) |
| 7 | *Surface Rights Act*, RSA 2000, c S-24 |
| 8 | *LPRT Decisions from April 26, 2024 to the date of this Brief*<br>**For brevity, these decisions have been linked but not attached herein* |
| 9 | *Orphan Well Association v Grant Thornton Ltd., 2019 SCC 5* |

**KeyCite treatment**
**Most Recently Cited in:**National Bank of Canada v. Sunterra Food Corporation, 2025 ABKB 599, 2025 CarswellAlta 2429 | (Alta. K.B., Oct 14, 2025)

R.S.C. 1985, c. C-36, s. 11

# s 11. General power of court

Currency

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

**Amendment History**
1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

**Currency**
Federal English Statutes reflect amendments current to July 30, 2025
Federal English Regulations Current to Gazette Vol. 159:7 (March 26, 2025)

**End of Document** 

  

**KeyCite treatment**
**Most Recently Cited in:** Canadian Natural Resources Limited v. Elizabeth Métis Settlement, 2020 ABQB 210, 2020 CarswellAlta 583, [2020] A.W.L.D. 1284, [2020] A.W.L.D. 1301, [2020] A.W.L.D. 1302, 14 R.P.R. (6th) 30, 10 Alta. L.R. (7th) 389, [2021] 1 W.W.R. 405, 316 A.C.W.S. (3d) 782 | (Alta. Q.B., Mar 27, 2020)

R.S.A. 2000, c. M-14, s. 121

# s 121. Recovery of compensation

Currency

**121.Recovery of compensation**
**121(1)** If an existing mineral lease holder or operator fails to pay money

(a) under a surface lease, or

(b) ordered to be paid by the Existing Leases Land Access Panel or the Land Access Panel,

within 30 days of the date it is due, the person entitled to receive the money may submit to the Land Access Panel evidence of the failure to pay.

**121(2)** On receipt of satisfactory evidence of failure of the existing mineral lease holder or operator to pay, the Land Access Panel may direct the President of Treasury Board and Minister of Finance to pay out of the General Revenue Fund the amount of money to which the person is entitled.

**121(3)** If the President of Treasury Board and Minister of Finance pays money to a person under this section, the amount paid constitutes a debt owing by the existing mineral lease holder or the operator to the Crown in right of Alberta.

**121(4)** If a surface lease and a development agreement are combined in one document, this section applies only to that part of the document concerning the surface lease.

**Amendment History**
2006, c. 23, s. 51(2); 2013, c. 8, s. 16

**Currency**
Alberta Current to Gazette Vol. 121:7 (April 15, 2025)

# Court of Queen's Bench of Alberta

**Citation: Bellatrix Exploration Ltd (Re), 2020 ABQB 809**



**Date:** 20201222
**Docket:** 1901 13767
**Registry:** Calgary

## In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

-and-

### In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

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**Reasons for Decision**
**of the**
**Honourable Madam Justice B.E. Romaine**

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## I Introduction

[1] The ultimate issue in this application is whether BP Canada Energy Group ULC or the First Lien Lenders to Bellatrix Exploration Ltd. have priority to certain funds held by the Monitor and by Bellatrix pending resolution of disputed claims. These claims include BP's breach of contract claim arising from Bellatrix's purported disclaimer of, and ongoing failure to perform under, a GasEDI agreement between Bellatrix and BP.

[2] Bellatrix has obtained protection from its creditors under the *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36, as amended. It holds approximately US$14.2 million of the funds in issue and approximately US$1.6 million is held by PricewaterhouseCoopers Inc. in its capacity as Court-appointed Monitor of Bellatrix.

## II Relevant Facts

[3] Bellatrix and BP were parties to a GasEDI Base contract for the short-term sale and purchase of natural gas and a Special Provisions for GasEDI Base Contract, both dated as of March 1, 2010 (collectively, with transaction confirmations, the "GasEDI Agreement").

[4] Bellatrix and BP entered into two transaction confirmations pursuant to the terms of the GasEDI Agreement, dated as of December 12, 2017.

4. The plaintiff's claim and the cross-claim need not arise out of the same contract; and

5. Unliquidated claims are on the same footing as liquidated claims.

[57] The Court noted at para 19:

> The important point for invoking equitable set-off is the close connection of the transactions. Would it be manifestly unjust to require the appellants to pay the costs of the February and March deliveries in view of the fact that they will suffer significant losses due to the early termination of the same contract that called for the delivery of gas in February and March? In our view, such a requirement is unjust.

[58] In *Blue Range*, the CCAA debtor terminated the contracts. Here, BP's position is that the GasEDI Agreement has not been terminated, remains in full force and effect and that Bellatrix is required to perform the agreement.

[59] The First Lien Lenders and Bellatrix submit that BP does not meet the test for equitable set-off because it would not be "manifestly unjust" to allow Bellatrix to claim the December payment without taking into consideration the cross-claim.

[60] They point out that, in a letter dated February 11, 2020, Bellatrix's counsel advised BP on its position on the ability of a CCAA debtor to elect non-performance of an agreement. Bellatrix responded that the EFC Decision did not deal with the issue of performance or set-off. Bellatrix has been consistent in its position throughout the CCAA proceedings. Despite this, BP did not apply to lift the stay or to claim a right of set-off until this application was filed.

[61] While I have found later in this decision that BP's delay in taking action would not disentitle it from a equitable remedy, BP has not established an equitable ground for being protected, and therefore fails the *Telford* test for that reason. BP is not entitled to set-off the December payment, whether or not the GasEDI Agreement is an EFC.

[62] Bellatrix submits that, since BP does not fit within the permitted set-off provisions of section 34(8), but for the agreement among Bellatrix, BP and the Monitor to have the Monitor hold the December payment in trust, BP would have been in violation of the stay under the initial CCAA order had it purported to withhold the December payment. If it had unilaterally withheld the payment, BP would have deprived Bellatrix of substantial liquidity at a time when Bellatrix was seeking to pursue its strategic process to identify a going concern transaction for the benefit of its many stakeholders, relying on funds drawn under its Interim Financing Facility, and Bellatrix would have been unable to make various payments to secured and other unsecured creditors.

[63] However, as I have found that BP has neither a legal nor an equitable right of set-off, it is not necessary that I decide this issue.

C. Is BP entitled to lift the stay to permit it to obtain and enforce a judgement against the sale proceeds?

[64] As a corollary to the relief of lifting the stay, BP asks the Court to direct immediate payment of the alleged damages to BP out of the sale proceeds, less the December payment.

[65] The test for lifting a stay focuses on the totality of circumstances and the relative prejudice to the parties involved: *Alberta Energy Regulator v Lexin Resources Ltd*, 2019 ABQB 23 in the context of a receivership, citing *Alignvest Private Debt Ltd. v Surefire Industries Ltd.*, 2015 ABQB 148 (Alta. Q.B.) at para 40 and 43 (appeal on other grounds dismissed, [2015] A.J. No. 1234 (Alta. C.A.)).

[66] Guidance can be drawn from the provisisons of section 69.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended, in determining whether a stay in CCAA proceedings should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant: *Re Ma*, [2001] O.J. No. 1189 (Ont. C.A.).

[67] Lifting the stay is not routine: there must be sound reasons to relieve against the stay: *Re Ma*, at para 3.

[68] In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted: *Golden Griddle Corp. v Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.) at para 18-19. Examples may include hardship caused by the stay or necessity of payment or a situation where it is in the interests of justice to allow the stay to be lifted: *Re Canwest Global Communications Corp*, (2009), 61 CBR (5th) 200 (Ont S.C.J.). The prejudice to the applicant should be different qualitatively from that suffered by other creditors, who also lose, in whole or part, the benefit of their contracts by reason of the debtor's insolvency.

[69] BP submits that it suffers unique harm from the breach of the GasEDI Agreement, and argues that such prejudice favours the lifting of the stay to allow it to enforce its damages claim against Bellatrix. However, BP does not provide any valid reason why its damages claim is unique.

[70] First, BP submits that it is a post-filing creditor. This is incorrect: its damages claim arises from a pre-filing contract, whether it is an EFC or not.

[71] Second, BP notes, relying on *Bank of Montreal v Probe Exploration Inc*., [2000] AJ No 1752, that courts are reluctant to interfere with the rights of contractual parties in a liquidation scenario where the result would be to prefer the interests of the debtor and its primary secured creditor. However, I agree with the First Lien Lenders that the *Probe* case is distinguishable from the situation of Bellatrix's failure to perform under the GasEDI Agreement.

[72] In *Probe*, the unique facts included the existence of an intercreditor agreement that contemplated the mutual intent between the secured creditor and the party opposing the termination of the agreement at issue that any purchaser of Probe would be bound by Probe's obligations under the contract.

[73] BP submits in proposing the lifting of the stay that Bellatrix has abused and violated the CCAA process. As noted later in this decision, there is no basis for this allegation.

[74] BP also submits that the stay should be lifted because the GasEDI Agreement as an EFC is entitled to certain benefits. These benefits do not imply a right to lift the stay in the context of a damages claim. Section 34(10) of the *Act* makes it clear that such a claim merely makes the holder a creditor, in this case an unsecured creditor. The unique risks inherent in the status of an

**CED Equity § 11**

**Canadian Encyclopedic Digest**

**Equity**
Prepared by Elizabeth Portman, B.A., LL.B.: January 1997, Updated by the legal editorial staff of Thomson Reuters Canada: September 2024

**II. Doctrines of Equity**

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§ 11. **Subrogation**

Topic Summary

**Subrogation** means the substitution of one person in the place of another for a legal claim, so that the person substituted succeeds to the rights of the other in relation to the claim.[1] The principle of **subrogation** is an equitable one merely, and will be carried out in the exercise of a proper discretion with due regard to the legal and equitable rights of others.[2] It was invented as a means of avoiding injustice by conferring on a person not previously entitled to sue in law or equity a status to assert against a person or property a claim recognized as fair and just but which is not maintainable in contract or tort.[3] The doctrine is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for **subrogation**, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his or her own.[4]

**Subrogation** embraces succession to the rights and remedies possessed by an insured against a contractor or tortfeasor, and also to the right to demand from the insured the money paid over to him or her by the insurer where satisfaction has been received by the insured from those directly, indirectly, or primarily responsible.[5]

If an insurer exercises its right of **subrogation** to the rights of its insured and brings an action against the tortfeasor, it must do so in the name of the insured and not in its own name. When the insured has brought an action for damages for personal injury and has agreed to amend the pleadings to protect the **subrogated** interest of the insurer, a separate action by the insurer for property damage should not be permitted to proceed.[6]

The doctrine of **subrogation** does not, as a general rule, apply in favour of a party who has not paid any sum of money or given any other thing in satisfaction or extinguishment of a security, claim, or demand, or partly so, or paid anything by way of buying in a security or the like.[7] In a proper case for the application of the doctrine, an obligation extinguished by a payment made by a third person is treated in law as still subsisting for the benefit of that third person; the third person is substituted in the place of the creditor as to rights, remedies, and securities.[8]



Footnotes

1 Black's Law Dictionary, 6th ed., s.v. "**subrogation**".

2 Bull v. North British Canadian Investment Co. (1889), 1889 CarswellOnt 13 (S.C.C.); Guerin v. Manchester Fire Assurance Co. (1898), 29 S.C.R. 139 (S.C.C.); **see also** Grace v. Kuebler (1917), [1918] 1 W.W.R. 182 (Alta. C.A.); Morrison v. Canadian Surety Co. (1954), 12 W.W.R. (N.S.) 57 (Man. C.A.); Morguard Trust Co. v. Schneider (1993), 8 Alta. L.R. (3d) 330 (Alta. Master) (mortgagee delaying nearly seven years in applying for deficiency judgment on C.M.H.C.-insured mortgage after obtaining Rice

order; delay inordinate and prejudicial; C.M.H.C. barred as acquiring only by **subrogation** rights held by mortgagee); Insurance Corp. of Newfoundland v. Young (1992), 103 Nfld. & P.E.I.R. 167 (Nfld. T.D.); reversed in part (1995), 127 Nfld. & P.E.I.R. 82 (Nfld. C.A.) (truck slipping brakes and hitting plaintiffs' house, causing severe damage; plaintiffs compensated under insurance policy not taking into account any deduction for depreciation; depreciation deductible from any indemnity paid by truck's insurers; **subrogating** insurer to be in no better position against third party than insured would be; **subrogated** claim limited to cost of repair or replacement less depreciation).

3 Morrison v. Canadian Surety Co. (1954), 12 W.W.R. (N.S.) 57 (Man. C.A.).

4 R. v. O'Bryan (1900), 7 Ex. C.R. 19 (Can. Ex. Ct.); **see also** Fortin v. Li (1992), [1993] 1 W.W.R. 709 (B.C. S.C.) (plaintiff's employer maintaining plaintiff's full salary pursuant to contractual salary continuance agreement while plaintiff recovering from personal injuries; employer having no contractual **subrogation** right, and unable to establish contract as one of indemnity; employer having no equitable right of **subrogation**); **but see** Hewitt, Re (1933), 1933 CarswellOnt 64 (Ont. H.C.) (creditor with tainted second mortgage, subsequently set aside, paying voluntarily to first mortgagee to protect security; held to be volunteer not entitled to **subrogation**); Glass v. Munsen (1865), 12 Gr. 77 (U.C. Ch.) (person lending money to intestate's widow and natural guardian of intestate's children to pay debts of intestate; such person standing in equity in place of creditors paid, and entitled to sustain suit for administration as creditor); Harris v. Carnegie, [1933] O.R. 844 (Ont. C.A.) (solicitors in position of sureties to mortgagee paying defendant's taxes entitled to **subrogation**); Bayda v. Canada North Dakota Land Co. (1913), 4 W.W.R. 1333 (Sask. S.C.) (purchaser of land assigning benefit of contract without worker vendor's consent; purported cancellation by vendor; assignee **subrogated** to purchaser's rights).

5 Globe & Rutgers Fire Insurance Co. v. Truedell (1927), 60 O.L.R. 227 (Ont. C.A.).

6 Wellington Insurance Co. v. Beaudin (1992), 11 C.C.L.I. (2d) 129 (Ont. Gen. Div.) (separate action contrary to Insurance Act, s. 242(1), and amounting to abuse of process).

7 Coursolles v. Fookes (1889), 16 O.R. 691 (Ont. Ch.); Vienneau v. Flieger (1999), 28 C.P.C. (4th) 300 (N.B. Q.B.) (accused receiving legal aid; accused bringing action against arresting officers and town after Crown staying criminal proceedings; law society claiming right of recovery against defendants on basis of **subrogation**; doctrine of **subrogation** not applicable; law society not insuring accused for losses caused by defendants' tortious conduct; law society not making payments of any nature to accused; law society not paying off accused's debts to counsel for legal services rendered under legal aid certificate so as to trigger doctrine of **subrogation**; law society not assuming obligation of other).

8 R. v. O'Bryan (1900), 7 Ex. C.R. 19 (Can. Ex. Ct.); **see also** Commercial Union Assurance Co. of Canada v. Surrey (City) (1996), 27 C.L.R. (2d) 106 (B.C. S.C.); affirmed (1997), 32 C.L.R. (2d) 1 (B.C. C.A.); leave to appeal refused (1997), 224 N.R. 151 (note) (S.C.C.) (statutory trust given priority over surety's **subrogated** owner's set-off rights).

1900 CarswellNat 13
Exchequer Court of Canada

R. v. O'Bryan

1900 CarswellNat 13, 7 Ex. C.R. 19

# The Queen on the Information of the Attorney-General for the Dominion of Canada, Plaintiff and Ellen O'bryan; the British and Foreign Marine Insurance Company (Limited); Moir, Son & Co.; Hugh I). McKenzie; Charles Cochran, and J. Norman Ritchie, Administrators of the Estate of James S. Cochran and William F. Pickering, and John White, Defendants

The Judge of the Exchequer Court

Judgment: November 15, 1900

Counsel: *H. Mellish* for plaintiff,
*W.W. Walsh, H. McInnes*, and *J.A. Chisholm* for the defendants.

Subject: Civil Practice and Procedure; Evidence
**Related Abridgment Classifications**
**Equity**
III Equitable doctrines
III.9 Subrogation
**Evidence**
XX Miscellaneous
**Headnote**
**Equity --- Equitable doctrines — Subrogation**
Substitution of rights.
Subrogation has been defined as a legal fiction by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another. It is independent of any contractual relations between the parties.
**Evidence --- Application of Evidence Acts**
Exchequer Court -- Conflict between Evidence Acts -- Dominion Act to prevail.

***The Judge of the Exchequer Court* now delivered judgment. :**

1 The Crown in this case offers to pay to the defendants, or to such of them as are entitled thereto, the sum of one thousand dollars as compensation for the lands described in the information, and it is conceded by all parties that the amount is sufficient. The claim of the defendant, Ellen O'Bryan, to a first charge upon the same in respect of her right of dower in the lands in question is not disputed by any one; and a declaration has already been made that she is entitled to be paid the sum of one hundred and ninety-two dollars and ninety-seven cents in satisfaction of her right of dower.

2 For the balance of eight hundred and seven dollars and three cents there are on the present appeal from the report of the learned referee two claimants; the defendant John White, and the defendant company The British and Foreign Marine Insurance Company, Limited. If the latter should succeed against White, a question would arise between them and the defendants Moir, Son & Co., which by arrangement between themselves has been deferred and is not now in controversy.

3 The Crown acquired title to the lands in question on the 19th of August, 1898. The allegation in the fifth paragraph of the information that it was acquired on the 3rd of November, 1894, is an error that has been corrected by an admission of the parties interested, filed in this court on the 5th of July last.

4 The question, then, is as to the respective rights or interests of the defendant White, and The British and Foreign Marine Insurance Company, Limited, in the lands mentioned in the information on the 19th day of August, 1898.

5 One Edward O'Bryan, who died some years prior to 1898, had in his lifetime been seized in fee of these and other lands in the City and County of Halifax, subject to a number of judgments that had been recorded against them. At present we are concerned with two only of these charges upon the lands of the deceased, one a judgment in favour of Hugh D. McKenzie for $1,019.61, duly registered on the 20th of June, 1891; and the other in favour of The British and Foreign Marine Insurance Company, Limited, for $755.48, duly registered on the 3rd of May, 1892. The judgment that McKenzie held against O'Bryan was obtained upon a promissory note of which one Horley was the maker for O'Bryan's accommodation, and upon which McKenzie had also obtained a judgment against Horley. The debt due by O'Bryan and Horley to McKenzie was discharged by the defendant White, under circumstances to be referred to, and he claims to be subrogated to McKenzie's rights at the time in the judgment registered against O'Bryan's lands. On the 1st day of June, 1891, the City of Halifax, in consideration of $20,200, conveyed to O'Bryan the property and premises at Halifax known as "The City Market Property." On the 20th of the same month O'Bryan mortgaged the property to one Corbett to secure the repayment of the sum of $20,000. The deed, the mortgage, and McKenzie's judgment were all registered on the same day, the 20th of June, 1891. On the same day also an indenture by way of agreement under seal was made and executed between O'Bryan and Corbett by which the interest of O'Bryan in any money he might be entitled, on the sale of the said property, to receive after Corbett's claims were satisfied, was assigned to Corbett to pay the sum of $4,000, with interest, to the defendant White. This indenture was duly recorded on the 29th of June, 1891. White finding that the McKenzie judgment constituted a prior charge to the agreement by which he became interested in "The City Market Property" paid or discharged the judgment, under, he alleges, an agreement with O'Bryan that he, White, should in respect of such judgment stand in McKenzie's shoes. McKenzie was not a party to the agreement and at the time knew nothing of it. Being paid, he signed on the 11th of June, 1891, a satisfaction piece in respect of the judgment against Horley, whose goods were at the time under seizure. By an indenture bearing date of the 4th of May, 1898, but in fact executed and registered after the Crown had acquired title to the lands, the compensation for which is in question here, McKenzie assigned any interest that he had in the said judgment to the defendant White.

6 Now it is, I think, clear that White's position as to the compensation money, and his claim thereto, is not in any way assisted by this assignment. In determining who is entitled one must look at the state of the title and the condition of things as they existed on the 19th day of August, 1898, when the lands became vested in the Crown. If at that date White was not entitled, the subsequent assignment will not assist, though of course it does not prejudice, his claim.

7 With reference to the arrangement between White and O'Bryan, to which McKenzie was not a party, by which it was intended that White should have McKenzie's rights in the judgment against O'Bryan, it is contended that such an agreement made with the judgment-debtor only is sufficient. In support of that view reference is made to the *American and English Encyclopedia of Law*, (Volume 24, page 291,) where it is stated that such a convention or agreement may be made either with the debtor or creditor. But it will be observed that the cases, on the authority of which that proposition is made, were decided by the Supreme Court of Louisiana, and in that State as in the Province of Quebec, the rules of law as to subrogation form part of the Civil Code. (Civil Code, Lower Canada, Arts. 1154-1157; Revised Code Louisiana (1870) Arts. 2159-2162). By the laws both of the Province and State mentioned subrogation is either conventional or legal, and the convention may be either with the creditor or the debtor, under the circumstances mentioned in the Code. But in the latter case certain prescribed incidents are necessary to the validity of the proceeding. There is no similar law in force in the Province of Nova Scotia; and the requisites of a valid subrogation in such a case are wholly wanting here.

8 There is, however, a subrogation which takes place by operation of law, which is recognized not only by the Civil Law on which the Codes referred to are founded, but which has been adopted and followed by courts administering the common law of England.

9 With reference to this doctrine I cannot, I think, do better than to give at length an extract from the opinion of the Supreme Court of the United States delivered by Mr. Justice Miller in the case of *The Aetna Life Insurance Company v. Middleport*: [1]

 

One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could for that reason be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor * * * * * * * *

These propositions are very clearly stated in a useful monograph on the *Law of Subrogation*, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from the civil law, and 'it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies and securities of another..... It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one, who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another.'

*Sheldon on Subrogation*. [2]

In par. 240 it is said: 'The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment, or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own.'

This is sustained by a reference to the cases of *Shinn v. Budd* [3] : *Sandford v. McLean* [4] : *Hoover v. Epler* [5] . In *Gadsden v. Brown* [6] , Chancellor Johnson says: — 'The doctrine of subrogation is a pure unmixed equity having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty.'

This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere.

Chancellor Walworth, in the case of *Sandford v. McLean* [7] ; said: — 'It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely exting uished.'

In *Memphis & Little Rock Railroad v. Dow* [8] , this court said; — 'The right of subrogation is not founded on contract. It is a creation of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties.'

In the case of *Shinn v. Budd*, [9] the New Jersey Chancellor said: [10]

> Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit

 

> of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession." (Code Napoléon, book 3, tit. 3 art. 1251; Civil Code of Louisiana, art. 2157; 1 Pothier on Oblig. part 3, c. 1, art. 6, sec. 2.) 'We are ignorant, say the Supreme Court of Louisiana, of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs not to all who pay a debt, but only to him who, being bound for it, discharges it.' *Nolte & Co. v. Their Creditors* [11] ; *Curtis v. Kitchen* [12] ; *Cox v. Baldwin* [13] . The principle of legal substitution, as adopted and applied in our system of equity, has, it is believed, been rigidly restrained within these limits.

The cases here referred to as having been decided in the Supreme Court of Louisiana are especially applicable, as the Code of that State is in the main founded on the civil law from which this right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the appellate court of the State of Illinois, *Suppiger v. Garrels* [14] ; the substance of which is thus stated in the syllabus: —

> Subrogation in equity is confined to the relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer.

10 The doctrine of subrogation by operation of law has also been adopted and acted upon by courts of the Province of Ontario. *Brown v. McLean* [15] *; Abell v. Morrison* [16] .

11 It is objected, however, to White's claim that McKenzie's judgment was paid; and that the discharge of Horley discharged O'Bryan. That must, I think, be conceded; but it is not conclusive against White, for it is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit. Then it is further objected to White's claim that he did not pay O'Bryan's debt to protect an interest in the property from the expropriation of which the right to compensation arises. He paid it to protect his interest in other lands of O'Bryan. But if he ought, under the circumstances disclosed in this case, to be subrogated by operation of law to McKenzie's rights under the judgment (and I think he ought to be) then he is, it seems to me, entitled to be subrogated to all and not to part only of the latter's rights and interests therein.

12 There is a question of evidence to which some reference ought perhaps to be made. All of White's testimony relative to the arrangement whereby McKenzie's rights and interests in the judgment against O'Bryan were to be reserved to White, was objected to as inadmissible in view of the provisions of Chapter 107 of *The Revised Statutes of Nova Scotia*, 5th Series, "Of Witnesses and Evidence". After consideration the learned referee admitted the evidence, and I think rightly. By the 21st section of *The Canada Evidence Act*, 1893 [17] , it is provided that in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, shall, subject to the provisions of that and other Acts of the Parliament of Canada, apply to such proceedings. By the 3rd section of the Act it is provided that a person shall not be incompetent to give evidence by reason of interest or crime. *The Nova Scotia Evidence Act* contains a similar provision [18] ; but it also contains a proviso [19] that in any proceeding brought by or against the executor or administrator of a deceased person, it shall not be competent for any other of the parties to such proceeding to give evidence of dealings, agreements or conversations with the deceased. The present proceeding, however, is not one by or against the executor or administrator of O'Bryan. That is one answer to the objection. Then the Canadian statute expressly provides that a witness shall not be incompetent by reason of interest, and there is no qualification or proviso. In a proceeding in this court the Act of Parlia ment and not the proviso contained in the Nova Scotia statute must be followed. The question is, however, of no considerable importance in this case, if White's right to compensation depends upon legal and not upon conventional subrogation.

13 In the opinion of the learned referee, White's proof of the amount of his claim against O'Bryan was unsatisfactory. He seems, however, to think that the was at least as much due to him as would exhaust the sum with which the court has to deal, and in that view I am inclined to concur. I think, however, that it would not be unreasonable, if the other claimants desire it, to

  

send the matter back to the referee to take further evidence as to the state of the accounts bet ween White and O'Bryan, it being understood of course that in respect of any such further proceeding the costs must abide the event.

14 If the other claimants do not desire this, there will be a declaration that the defendant White is entitled to the balance of the compensation money, that is, to the sum of eight hundred and seven dollars and three cents; and (with the exception of the defendant Ellen O'Bryan, as to whose costs an order has already been made) there will be no costs to any of the defendants, either against the Crown, or as between themselves.

*Judgment accordingly.*

Solicitors of record:
Solicitors for plaintiff: — *W.B. Ross*.
Solicitors for defendant Moir Son & Co.: — *J.A. Chisholm*
Solicitors for defendant The British and Foreign Marine Insurance Co.: — *W.H. Fulton*
Solicitors for defendant Hugh D. McKenzie: — *W.A. Henry*
Solicitors for defendant Ellen O'Bryan: — *W.W. Walsh*
Solicitors for added defendant John White: — *Drysdale & McInnes*.

Footnotes

1 124 U.S.R. at p. 547.

2 Pars. 2, 3.

3 14 N.J. Eq. (1 McCarter) 234.

4 3 Paige, 117.

5 52 Penn. 522.

6 Speer's Eq. (So. Car.) 37, 41.

7 3 Paige, 122.

8 120 U.S. 287.

9 14 N.J. Eq. (1 McCarter) 234.

10 At pp. 236, 237.

11 9 Martin 602;

12 8 Martin 706;

13 1 Miller's Louis. R. 147.

14 20 Bradwell Ill. App. 625.

15 18 Ont. R. 533.

16 19 Ont. R. 669.

17 56 Vict. c. 31.

18 R.S.N.S. 5th ser. c. 107, s. 15.

 

19 Section 16.

**Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited** *Appellants*

*v.*

**Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited** *Respondent*

and

**The Ministry of Labour for the Province of Ontario, Employment Standards Branch** *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.*

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

**Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited** *Appelants*

*c.*

**Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited** *Intimée*

et

**Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi** *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.*

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

*tion in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of ". . . the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2^e^ éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

Alberta Statutes
**Surface Rights Act**

**KeyCite treatment**
**Most Recently Cited in:** Machan v. Lexin Resources Ltd., 2025 ABLPRT 908011, 2025 CarswellAlta 2447 | (Alta. L.P.R.T., Oct 15, 2025)

R.S.A. **2000**, c. **S**-**24**, s. 36

## s 36. Compensation

Currency

**36.Compensation**
**36(1)** In this section, **"operator"** means any person who, at the time of non-payment under a **surface** lease, **right** of entry order or compensation order, became liable to pay the money in question because that person

(a) was an approval or registration holder who carried on an activity on or in respect of specified land pursuant to an approval or registration,

(b) carried on an activity on or in respect of specified land other than pursuant to an approval or registration,

(c) was the holder of a licence, approval or permit issued by the Alberta Energy Regulator for purposes related to the carrying on of an activity on or in respect of specified land,

(d) was a working interest participant in a well or other energy development on, in or under specified land, or

(e) was the holder of a **surface** lease or **right** of entry order for purposes related to the carrying on of an activity on or in respect of specified land,

and includes a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in clause (a), (b), (c), (d) or (e) who was so liable and any person acting as principal or agent of any person referred to in or after clauses (a) to (e).

**36(2)** Words and expressions used in subsection (1)(a) to (e) that are defined in the *Environmental Protection and Enhancement Act* shall be construed in accordance with that Act.

**36(3)** Where any money payable by an operator under a compensation order or **surface** lease has not been paid and the due date for its payment has passed, the person entitled to receive the money may submit to the Tribunal written evidence of the non-payment.

**36(4)** On receiving the evidence, if the Tribunal considers that it satisfactorily proves the non-payment, the Tribunal shall send a written notice to the operator demanding full payment.

**36(5)** If the notice under subsection (4) is not complied with, the Tribunal may, by written order served on the operator,

(a) suspend the operator's **right** to enter the site affected by the compensation order or lease, and

(b) after giving the operator written notice of its intention to do so, terminate all the operator's **rights** under the **right** of entry order or lease relating to the site that is subject to the claim under this section, without affecting any of the operator's obligations in regard to the site, including those under this section, or any other person's rights as against the operator, and on the basis that the lease or compensation order remains in place for purposes of shutting-in, suspension, abandonment and reclamation of the site.

**36(6)** If, within 30 days of the Tribunal sending a written notice to an operator under subsection (4), the operator has not proven to the Tribunal's satisfaction that full payment has been made, the Tribunal may direct the Minister to pay out of the General Revenue Fund the amount of money to which the person referred to in subsection (3) is entitled.

**36(7)**If the Minister has made a payment under subsection (6) and the person who received the payment provides evidence of a subsequent non-payment of compensation by the operator in relation to the same site, the Tribunal may direct the Minister to make any further payments due to the person, without any further application of subsection (4), until the transfer or reclamation of the site is complete.

**36(8)** The Tribunal may direct the Minister not to make any further payments due to the person if it considers that the person entitled to receive them is refusing access for operations, abandonment or reclamation allowed by law.

**36(9)** Where the Minister pays money under subsection (6) or (7),

(a) the amount paid and any expenses incurred, whether by the Crown or by a private agency, in collecting or attempting to collect the money owing, constitute a debt owing by the operator to the Crown, and

(b) a written certificate issued by or on behalf of the Minister certifying the payment of the amounts referred to in clause (a), including expenses, may be entered as a judgment of the Court of King's Bench for those amounts and enforced according to the ordinary procedure for enforcement of a judgment of that Court.

**Amendment History**
2006, c. 23, s. 75; 2012, c. R-17.3, s. 108(2); 2020, c. 25, s. 17(6); 2020, c. L-2.3, s. 26(8); Alta. Reg. 217/2022, s. 238(2)

**Currency**
Alberta Current to Gazette Vol. 121:7 (April 15, 2025)

**Orphan Well Association and Alberta Energy Regulator** *Appellants*

*v.*

**Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches)** *Respondents*

and

**Attorney General of Ontario,**
**Attorney General of British Columbia,**
**Attorney General of Saskatchewan,**
**Attorney General of Alberta,**
**Ecojustice Canada Society,**
**Canadian Association of Petroleum Producers,**
**Greenpeace Canada,**
**Action Surface Rights Association,**
**Canadian Association of Insolvency and Restructuring Professionals and**
**Canadian Bankers' Association** *Interveners*

**Indexed as: Orphan Well Association *v.* Grant Thornton Ltd.**

**2019 SCC 5**

File No.: 37627.

2018: February 15; 2019: January 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

*Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities*

**Orphan Well Association et Alberta Energy Regulator** *Appelants*

*c.*

**Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches)** *Intimées*

et

**Procureure générale de l'Ontario,**
**procureur général de la Colombie-Britannique,**
**procureur général de la Saskatchewan,**
**procureur général de l'Alberta,**
**Ecojustice Canada Society,**
**Association canadienne des producteurs pétroliers, Greenpeace Canada,**
**Action Surface Rights Association,**
**Association canadienne des professionnels de l'insolvabilité et de la réorganisation et**
**Association des banquiers canadiens**
*Intervenants*

**Répertorié : Orphan Well Association *c.* Grant Thornton Ltd.**

**2019 CSC 5**

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

*Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la*

## III. Analysis

### A. *The Doctrine of Paramountcy*

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

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

## III. Analyse

### A. *La doctrine de la prépondérance fédérale*

[63] Comme je l'ai expliqué, la législation albertaine accorde à l'organisme de réglementation des pouvoirs étendus pour s'assurer que les sociétés qui ont obtenu des permis d'exploitation dans l'industrie pétrolière et gazière de l'Alberta abandonneront, de façon appropriée et sécuritaire, les puits de pétrole, installations et pipelines à la fin de leur vie productive, et remettront en état leurs sites. GTL cherche à éviter d'être assujetti à deux de ces pouvoirs : celui d'ordonner à Redwater d'abandonner les biens faisant l'objet de la renonciation et celui de refuser de permettre le transfert des permis relatifs aux biens conservés à cause du non-respect des exigences relatives à la CGR. Il s'agit là sans aucun doute de pouvoirs réglementaires valables accordés à l'organisme de réglementation par une loi albertaine valide. GTL cherche à éviter leur application au cours de la faillite en invoquant la doctrine de la prépondérance fédérale, selon laquelle la loi de l'Alberta habilitant l'organisme de réglementation à utiliser les pouvoirs qui sont en litige dans le cadre du présent pourvoi est inopérante dans la mesure où son exercice de ces pouvoirs pendant la faillite entre en conflit avec la *LFI*.

[64] Les questions en litige dans le présent pourvoi découlent de ce qu'on a appelé [TRADUCTION] l'« intersection désordonnée » de la législation provinciale sur l'environnement et de la législation fédérale sur l'insolvabilité (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, par. 8). Les questions de prépondérance se posent souvent dans le contexte de l'insolvabilité. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales. Toutefois, le par. 72(1) de la *LFI* confirme qu'en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte (voir *Moloney*, par. 40). En d'autres termes, la faillite est issue de la propriété et des droits civils, mais elle en fait toujours partie conceptuellement. Les lois provinciales valides d'application générale continuent de s'appliquer dans le domaine de la faillite jusqu'à ce

the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 3).

[65] Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).

[66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the

que le Parlement légifère en vertu de sa compétence exclusive en matière de faillite et d'insolvabilité. La loi provinciale devient alors inopérante dans la mesure du conflit (voir *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 3).

[65] Au fil du temps, deux formes distinctes de conflit ont été reconnues. La première est le *conflit d'application*, qui survient lorsqu'il est impossible de se conformer en même temps à une loi fédérale valide et à une loi provinciale valide. Il y a conflit d'application lorsqu'« une loi dit "oui" et l'autre dit "non", de sorte que "l'observance de l'une entraîne l'inobservance de l'autre" » (*Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 18, citant *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191). La seconde est l'*entrave à la réalisation d'un objet fédéral*, qui se produit lorsque l'application d'une loi provinciale valide est incompatible avec l'objet d'une loi fédérale. L'effet d'une loi provinciale peut contrecarrer la réalisation de l'objet de la loi fédérale, « sans toutefois entraîner une violation directe de ses dispositions » (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 73). La partie qui invoque l'entrave à la réalisation d'un objet fédéral « doit d'abord établir l'objet de la loi fédérale pertinente et ensuite prouver que la loi provinciale est incompatible avec cet objet » (*Lemare*, par. 26, citant *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536, par. 66).

[66] Aux deux volets de la prépondérance, la charge de la preuve incombe à la partie qui allègue l'existence du conflit. Il n'est pas facile de s'en acquitter, puisque la doctrine de la prépondérance doit être appliquée avec retenue. Le conflit doit être défini de façon étroite pour que chaque ordre de gouvernement puisse agir aussi librement que possible dans sa sphère de compétence constitutionnelle respective. « [L]es tribunaux doivent donner aux lois provinciale et fédérale une interprétation harmonieuse plutôt qu'une interprétation qui donne lieu à une incompatibilité [. . .] [e]n l'absence d'un texte législatif "clair" à cet effet » (*Lemare*, par. 21 et 27). « On présume que le Parlement a l'intention de faire coexister ses lois avec les lois provinciales » (*Moloney*, par. 27).

doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

Comme le conclut notre Cour aux par. 22 et 23 de l'arrêt *Lemare*, l'application de la doctrine de la prépondérance devrait également tenir dûment compte du principe du fédéralisme coopératif. Ce principe permet l'interaction ainsi que le chevauchement entre les lois fédérales et provinciales. Bien que le fédéralisme coopératif n'impose pas de limites à l'exercice par ailleurs valide du pouvoir législatif, cela signifie que les tribunaux devraient éviter de donner à l'objet de la loi fédérale une interprétation large qui le mettrait en conflit avec la loi provinciale.

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

[67] La jurisprudence a établi que la *LFI* dans son ensemble est censée favoriser l'atteinte de « deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli » (*Moloney*, par. 32, citant *Husky Oil*, par. 7). En l'espèce, la faillie est une société qui ne s'extirpera jamais de la faillite. Donc, seul le premier objectif est pertinent. Comme je vais l'expliquer ci-dessous, le juge siégeant en cabinet a également affirmé que l'objet de l'art. 14.06 se distinguait des objets plus larges de la *LFI*. Notre Cour a analysé l'objet de certaines dispositions de la *LFI* dans des décisions antérieures (voir, par exemple, *Lemare*, par. 45).

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

[68] GTL a relevé deux conflits entre la législation albertaine établissant les pouvoirs contestés de l'organisme de réglementation pendant la faillite et la *LFI*, et l'un ou l'autre aurait constitué, selon lui, un fondement suffisant pour l'ordonnance rendue par le juge siégeant en cabinet.

[69] The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt

[69] Le premier conflit avancé par GTL découle de l'ajout des syndics à la définition de « titulaire de permis » qui figure dans l'*OGCA* et la *Pipeline Act*. GTL affirme que le par. 14.06(4) le soustrait à tout engagement environnemental associé aux biens faisant l'objet d'une « renonciation » valide. Toutefois, comme il est « titulaire de permis », l'organisme de réglementation peut l'obliger à s'acquitter de toutes les obligations et de tous les engagements légaux de Redwater, faisant ainsi abstraction de la « renonciation » aux biens en cause. GTL souligne en outre la possibilité qu'il soit tenu personnellement responsable en tant que « titulaire de permis ». L'organisme de réglementation réplique que le par. 14.06(4) a pour objectif premier de mettre les syndics à l'abri de toute