


Trending Decisions

Cases we are following

By Natasha MacParland and Robert Nicholls

The following is a table of current cases of interest to the Canadian insolvency community as prepared by Natasha MacParland and Robert Nicholls of Davies Ward Phillips & Vineberg LLP. This chart is current to December 31, 2021 and any changes in the below proceedings since that date may not be reflected.

 The blue shading of the boxes denotes updates in the cases from the previous issue.

INSOLVENCY CASES UNDER APPEAL		
CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
<i>Canada v. Toronto-Dominion Bank</i> (Federal/Quebec)	Is a secured creditor required to reimburse payments made to it by a borrower who failed to remit GST source deductions, or do the deemed trust provisions require a “triggering event”; i.e. bankruptcy of the debtor, realization of security or requirement to pay?	The Federal Court of Appeal dismissed the appeal on April 29, 2020, confirming that a secured creditor is required to reimburse payments made to it by a borrower who failed to remit sales tax source deductions, under the sales tax deemed trust provisions. A “triggering event” is not required. Leave to Appeal to the Supreme Court of Canada was dismissed on October 14, 2021. The Canadian Bankers’ Association was an intervener in this matter at the Federal Court of Appeal.
<i>Yukon (Government of) v Yukon Zinc Corporation</i> (Yukon)	Does a Court-Appointed Receiver have the authority to partially disclaim a lease for equipment; continuing to lease certain equipment it deems to be essential and disclaiming the lease with respect to the rest? To what extent is an obligation to post security for potential future remediation costs a provable claim in bankruptcy and secured against the property of the debtor?	On March 5, 2021, the Yukon Court of Appeal allowed the appeal of certain decisions of the lower court in part, confirming: <ul style="list-style-type: none"> • That the government does not have a claim provable in bankruptcy for the potential future costs of remediation, but that such costs would be secured against the real property affected by such damage and any contiguous property related thereto, but excluding the mineral claims associated therewith. • That a receiver does not have the ability to partially disclaim an equipment lease, and in the present case the receiver had affirmed the lease in its entirety. Leave to appeal to the Supreme Court of Canada was dismissed on November 4, 2021.
<i>Petrowest Corporation v Peace River Hydro Partners</i> (British Columbia)	Is a court-appointed receiver bound to arbitrate disputes under contracts that include mandatory arbitration clauses?	The British Columbia Court of Appeal dismissed the appeal on November 30, 2020, confirming that, due to the doctrine of separability, which recognizes that arbitration clauses are independent agreements within the impugned agreement, the receiver effectively disclaimed the arbitration clause/agreement by bringing the contractual claim in court. As a result, the arbitration clause was of no force or effect. Leave to appeal to the Supreme Court of Canada was granted on June 10, 2021. The hearing on the appeal is scheduled to be heard on January 19, 2022. The Insolvency Institute of Canada, the Canadian Federation of Independent Business, the Canadian Commercial Arbitration Centre, the Chartered Institute of Arbitrators (Canada) Inc. and the Arbitration Place are each interveners in this matter.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
<i>Wiebe v Weinrich Contracting Ltd</i> (Alberta)	Does a supervising judge in a CCAA proceeding have the jurisdiction and authority to retroactively expand the scope of the initial stay of proceedings regarding third party claims?	<p>The Court of Appeal of Alberta allowed the appeal on November 9, 2020, holding that while a court may have the jurisdiction to retroactively expand the scope of an initial stay, procedural fairness considerations overrode the necessity to perform this analysis and the impugned paragraphs of the vesting order were struck. Specifically in this case, the appellants were not provided with a reasonable opportunity to respond to the impugned provisions included in the approval and vesting order.</p> <p>Following the issuance of the above noted order of the Court of Appeal of Alberta, the scope of the initial stay was reconsidered by the case management judge who issued an order that arguably had the effect of retroactively expanding the scope of the initial stay regarding certain third party claims.</p> <p>Leave to appeal this decision was granted by the Alberta Court of Appeal on July 2, 2021. No steps in these proceedings have been taken since such date.</p>
<i>DGDP-BC Holdings Ltd. v Third Eye Capital Corporation, PricewaterhouseCoopers</i> (Alberta)	<p>Can an order made in proceedings under the BIA legally alter the validity or priority of, or extinguish the charges contained in an earlier order granted under the CCAA in the same insolvency proceedings, without the consent of the affected creditor?</p> <p>Can gross overriding royalties be used as payment in full of outstanding DIP loans?</p>	<p>On June 17, 2021, the Alberta Court of Appeal dismissed the two appeals in this matter, confirming that:</p> <ul style="list-style-type: none"> • A supervising judge can issue an order approving a receiver's borrowing charge which primes a DIP lender's charge granted in the debtor's CCAA proceedings. The court held that despite the existence of this discretion to prime DIP charges, doesn't mean that it should routinely be done. • An approval and vesting order can extinguish a DIP lender's security interest in the assets of one of the debtor entities sold even though such charge was not paid in full. • On August 10, 2021, the Alberta Court of Appeal dismissed the application for leave to appeal a separate decision of the lower court approving the sale of the remaining assets of the debtor. This decision confirms that gross overriding royalties can be used as payment in full of outstanding DIP loans. <p>On September 3, 2021, the Alberta Court of Appeal dismissed an application for a stay pending leave to appeal to the Supreme Court of Canada. As of December 23, 2021, leave to appeal to the Supreme Court of Canada had not been filed.</p>
<i>Arrangement relatif a Consultants SM inc.</i> (Quebec)	Can a public entity use compensation (the Quebec form of set-off) to set-off pre-filing amounts owing to it by a debtor in CCAA proceedings against post-filing amounts for services actually provided? Also of importance was that the pre-filing amounts arose due to the alleged fraudulent acts of the debtor.	<p>On December 10, 2021, the Supreme Court of Canada dismissed the appeal, confirming that compensation used to set-off a debt arising prior to a CCAA filing against a debt arising after such filing may be prohibited or stayed by the initial order in such proceedings, but the CCAA court may exercise its discretion not to stay such rights to compensation in rare circumstances.</p> <p>In coming to its decision, the Supreme Court of Canada held that the claim at issue was not a claim that relates to a debt arising from fraud pursuant to s. 19(2)(d) of the CCAA.</p>
<i>Nolet v AG</i> (Quebec)	Can tax credits be pro-rated such that the pre-insolvency filing portion is set off against pre-insolvency filing debt?	<p>This matter has yet to be heard, but a pre-hearing conference is expected to take place in December 2021 or January 2022.</p> <p>The Canadian Association of Insolvency and Restructuring Professionals filed an intervention in this matter which was granted on June 25, 2021.</p>

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
<i>Re In the Matter of the Bankruptcy of Sanaa Ismail Abed Ali</i> (British Columbia)	Who bears the responsibility of paying for an interpreter in a summary administration bankruptcy?	The Supreme Court of British Columbia held on March 12, 2021 that a trustee was not responsible to pay the cost of translation services as the cost of an interpreter is not an administrative disbursement which would ordinarily be paid by the trustee, up to a maximum of \$100. Rather, the cost of an interpreter is an external disbursement. While a trustee has a duty to arrange for interpretative services, it is not responsible for the cost of such services within a summary administration. The Canadian Association of Insolvency and Restructuring Professionals was granted leave to intervene in the appeal on July 30, 2021. The hearing on the appeal took place on December 15, 2021. The judgment was reserved and has yet to be released.
<i>Re Manitok Energy Inc</i> (Alberta)	Whether end-of-life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the receiver in preference to satisfying otherwise first-ranking liens over the assets actually sold.	The Alberta Court of Queen's Bench held on March 24, 2021 that the first-ranking lien holders had priority to the funds held in trust from the sale of the specific properties improved by such lien holders, as the claims for end-of-life obligations associated with the abandonment and reclamation of other oil and gas properties of the debtor did not relate to the actual properties sold. The Court of Appeal of Alberta granted leave to appeal this decision on June 17, 2021. The hearing on the appeal has yet to be held.
<i>Johansen v Wallgren</i> (Alberta)	Whether unadjudicated claims of fraud may be used to satisfy the requirements of section 178 of the BIA to exempt such unadjudicated claims and a related partial summary judgment for liquidated damages from any discharge that may be granted in the bankruptcy.	On June 22, 2021 the Court of Appeal of Alberta dismissed the appeal, confirming that: <ul style="list-style-type: none"> • unadjudicated claims of fraud must be determined before a decision can be made on their survival following the bankrupt's discharge; and • such unadjudicated claims of fraud cannot be used to satisfy section 178 and exempt the partial summary judgment for liquidated damages from a potential discharge of the bankrupt. As of December 23, 2021, leave to appeal to the Supreme Court of Canada had not been filed.
<i>Re Marleau</i> (Ontario)	After the date of an assignment in bankruptcy, can a secured party, with a perfected security interest over an asset in one province perfect its security interest in that same asset in another province to which it has been moved without its knowledge?	On May 10, 2021, the Ontario Superior Court of Justice dismissed the appeal from the notice of disallowance issued by the trustee in bankruptcy. The Court held that after the date of bankruptcy, a secured creditor cannot seek to perfect its interest in collateral that has been moved to another province. Its unperfected security interest remains subordinate to the interest of the trustee in bankruptcy. As of December 23, 2021, leave to appeal to the Court of Appeal for Ontario had not been filed.
<i>Cosa Nova Fashions Ltd v The Midas Investment Corporation</i> (Ontario)	Should receivers seek general orders approving interim activities?	On June 2, 2021, the Ontario Superior Court of Justice (Commercial List), <i>inter alia</i> , denied the request of a receiver seeking a generic order approving of its activities thus far. The Court held that absent a specific matter requiring approval, a generic order of this kind was not necessary or useful. As of December 23, 2021, leave to appeal to the Court of Appeal for Ontario had not been filed.
<i>Carillion Canada Holdings Inc (Re)</i> (Ontario)	Can tracing in equity be used to enforce a <i>Construction Lien Act</i> trust in insolvency proceedings?	On June 28, 2021, the Court of Appeal for Ontario dismissed the motion for leave to appeal, confirming that tracing in equity cannot be used to enforce a <i>Construction Lien Act</i> trust where the funds at issue have been comingled and are thus impossible to identify as being the specific trust property. However, the Court left open the possibility for such equitable tracing to be used in other insolvency proceedings. As of December 23, 2021, leave to appeal to the Supreme Court of Canada had not been filed.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
<i>O'Reilly v ClearMRI Solutions Ltd.</i> (Ontario)	Can a Court issue an order against a director of a company for unpaid wages prior to (i) the liquidation, wind-up or formal bankruptcy, or (ii) an execution against the company being returned unsatisfied, as required by section 131 of the OBCA?	On June 7, 2021, the Court of Appeal for Ontario held that a Court can issue an order for unpaid wages against a director prior to (i) formal insolvency or liquidation proceedings or (ii) the return of an unsatisfied execution against the company, where the liability imposed by such order is conditional on the occurrence of such events referred to in section 131 of the OBCA. Leave to appeal to the Supreme Court of Canada was filed on September 3, 2021.
<i>Business Development Bank of Canada v Quattro Exploration & Production Ltd</i> (Alberta)	Should a Court lift a stay of proceedings in a receivership to allow a party without provable claims against the debtor's estate to pursue claims against third parties (specifically predecessors in interest to the debtor) tied to certain of the property subject to the receivership?	On August 12, 2021, the Alberta Court of Queen's Bench ordered the receiver to disclaim its interest in the relevant property in thirty days, failing which the stay of proceedings would be lifted after such date to allow the applicants to pursue the relevant third parties. As of December 23, 2021, leave to appeal to the Court of Appeal of Alberta had not been filed.
<i>Port Capital Development (EV) Inc. v 1296371 B.C. Ltd.</i> (British Columbia)	Is the absence of a plan of compromise or arrangement a "crucial" factor on the exercise of a judge's discretion in determining appropriateness under section 11 of the CCAA?	On October 8, 2021, the British Columbia Court of Appeal released its reasons for allowing the appeal of the decision of the lower court, confirming that the absence of a plan is a relevant, but not "prerequisite" factor in the determination of appropriateness to issue a discretionary order under section 11. As of December 23, 2021, leave to appeal to the Supreme Court of Canada had not been filed.
<i>Banque de Nouvelle-Ecosse v Davidovitch</i> (Quebec)	Can a lender recover legal fees of enforcement on a personal guarantee in Quebec?	On April 6, 2021, the Court of Appeal of Quebec allowed the appeal in part, confirming that legal fee reimbursement clauses, even in contracts of adhesion, are not necessarily abusive (and thus invalid). The Court maintains the jurisdiction to control the amount claimed for legal fees, which must be reasonable. As of December 23, 2021, leave to appeal to the Supreme Court of Canada had not been filed.
<i>Arrangement relatif a Bloom Lake</i> (Quebec)	Do input tax credits (eg. HST/GST credits) resulting from the payment of damages for the disclaimer of agreements constitute pre or post-filing claims under the CCAA for the purposes of set-off or compensation? Does a court seized of a CCAA matter have the jurisdiction to hear a CBCA motion?	In two separate decisions, issued on November 8, 2021 and August 12, 2021 respectively, the Superior Court of Quebec held: <ul style="list-style-type: none"> • Input tax credits resulting from the payment of damages for the disclaimer of agreements constitute post-filing claims under the CCAA that may not be set-off or compensated with pre-filing claims; and • As a "national court", the CCAA court has the jurisdiction to hear and dispose of a CBCA motion even where the relevant corporate entity's head office is outside of the CCAA court's province. Leave to appeal both decisions to the Court of Appeal of Quebec was sought on November 26, 2021 and September 2, 2021 respectively.
<i>2056706 Ontario Inc. v Pure Global Cannabis Inc.</i> (Ontario)	Can a receiver claim its professional but non-legal costs after the issuance of a costs award in its favour?	On September 22, 2021, the Ontario Superior Court of Justice held that the professional but non-legal costs of the receiver could not be charged to the unsuccessful moving party. The remainder of the claimed costs are subject to considerations of proportionality and reasonableness. As of December 23, 2021, leave to appeal to the Court of Appeal for Ontario had not been filed.