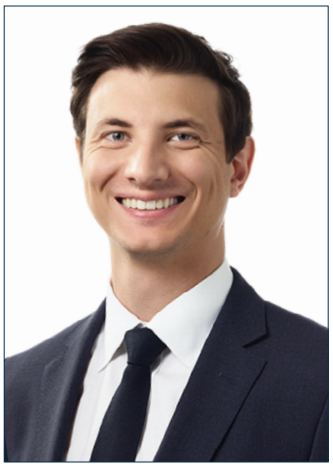

Trending Decisions

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 August 1, 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
Canada v. Canada North Group Inc. (Alberta)	Do "super priority" charges granted in a *Companies' Creditors Arrangement Act* initial order (including debtor in possession and administrative charges) have priority over a statutory deemed trust for unremitted source deductions?	The Court of Appeal of Alberta, on August 29, 2019, confirmed the power of the Court to grant charges pursuant to the *Companies' Creditors Arrangement Act* in favour of interim lenders, restructuring professionals and directors with such charges having priority over the company's assets ahead of the deemed trust claims of the Crown arising from the *Income Tax Act,* the *Canada Pension Plan* and the *Employment Insurance Act.* In a 5-4 split decision, on July 28, 2021, the Supreme Court of Canada dismissed the appeal, confirming that a supervising CCAA judge may grant super priority charges which have priority over statutory deemed trusts when necessary. The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals were ultimately successful (together with the respondents) in their intervention of this matter.
Third Eye Capital Corporation v B.E.S.T. Active 365 Fund, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership and ACCEL Energy Canada Limited and ACCEL Canada Holdings Limited (Alberta)	Whether gross overriding royalties ("GORs") attaching to mining claims are interests in land or security interests? Whether knowledge is irrelevant to a determination of priority under section 95 of the Mines and Minerals Act?	The Court of Queen's Bench of Alberta held that the GORs held by B.E.S.T. were security interests in land and that knowledge of another secured party's pre-existing security interest is irrelevant to a determination of priority under the *Mines and Minerals Act.* Leave to appeal the trial level decision was heard on April 16, 2020 and the Court of Appeal of Alberta released its decision on leave on April 27, 2020. In its decision, the Court of Appeal of Alberta (i) denied leave to appeal with respect to the first issue, confirming that GORs attaching to mining claims are interests in land; and (ii) granted leave to appeal with respect to the second issue. Notice of Appeal was filed on May 1, 2020; no further steps have been taken since such date.
Re Manitok Energy Inc (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.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
Canada v. Toronto-Dominion Bank (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 filed on June 29, 2020. Responding materials were filed on August 28, 2020. The Canadian Bankers' Association was an intervener in this matter at the Federal Court of Appeal.
United Food and Commercial Workers International Union, Local 175 v. Rose of Sharon (Ontario) Community (Ontario)	Is a receiver a successor employer and required to respond to a notice to bargain?	The decision of the Ontario Superior Court of Justice was released on March 31, 2021, dismissing the application and confirming the decision of the Ontario Labour Relations Board. This decision confirms that receivers which operate an insolvent debtor's business may be found to be successor employers and thereby subject to the collective bargaining rights of employees.
PricewaterhouseCoopers Inc., as trustee in bankruptcy of Sequoia Resources Corp. v. Perpetual Energy Inc., et al. (Alberta)	Can a trustee in bankruptcy, in reliance on the transfer at undervalue provisions of the BIA unwind an oil and gas transfer between related companies? Can a bankruptcy trustee void a transaction on grounds of public policy and statutory illegality?	The Court of Appeal of Alberta released its decision on January 25, 2021, allowing the appeal of the trustee of Sequoia Resources Corp. (previously Perpetual Energy Operating Corp.) ("Sequoia") of the decisions of the lower court to (i) strike various pleadings of the trustee as against Perpetual Energy Inc. (the parent of Sequoia, "Perpetual") and the previous sole director of Sequoia (also the CEO of Perpetual) (the "CEO"); and (ii) to award costs in favour of the CEO. For further discussion of this decision please see the article titled: "Alberta Appeal Court Exculpates Sequoia Trustee and Provides Important Guidance on Environmental Liabilities" elsewhere in this issue. Leave to appeal the decision of the Court of Appeal of Alberta was dismissed by the Supreme Court of Canada on July 8, 2021.
7636156 Canada Inc. v OMERS Realty Corporation (Ontario)	How much may a landlord draw down on a letter of credit provided by the bankrupt as security for the bankrupt's obligations under a lease?	The Court of Appeal for Ontario, on October 28, 2020, allowed the appeal, confirming that following a trustee's disclaimer of a landlord's lease, such landlord is not restricted to drawing down only the amount of its preferred claim for three months' accelerated rent on a letter of credit provided by the bankrupt as security for its obligations under the lease. Instead, as letters of credit are independent obligations on the issuing bank to make payment to the beneficiary thereto, such landlord may draw down the full amount of a letter of credit provided by the bankrupt. In coming to its decision, the Court of Appeal for Ontario cited *Curriculum Services Canada*, a case that we have included previously, for the principle that a trustee's disclaimer of a bankrupt tenant's lease ends the rights and remedies of the landlord against the bankrupt tenant's estate, but not as against third parties. Leave to appeal to the Supreme Court of Canada was dismissed on April 22, 2021.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
Re Media5 Corporation and Acquisitions Essagal Inc. and Pricewaterhousecoopers Inc., the proposed receiver (Quebec)	What is the scope of section 243(1) of the Bankruptcy and Insolvency Act (the provision allowing for the appointment of a national receiver) in relation to the provisions of the Civil Code of Quebec? Can a secured creditor resort to the appointment of an interim receiver in order to sell the insolvent business as a going concern?	The Court of Appeal of Quebec allowed the appeal in part on July 20, 2020, confirming that the appointment of a national receiver under section 243(1) of the Bankruptcy and Insolvency Act was possible in Quebec, but that the provincial notice requirements and time limits must be respected. The court stated in dicta that the implication of this decision is that when a secured creditor is seeking the appointment of a national receiver where assets are located across the country, each applicable provincial notice period and time limit must also be respected. In respect of the second issue, the court held that an interim receiver could not be appointed for the purpose of selling an insolvent business as a going concern. Leave to appeal to the Supreme Court of Canada was dismissed on April 1, 2021, confirming the decision of the Court of Appeal of Quebec. The Insolvency Institute of Canada was an intervener in this matter at the Court of Appeal of Quebec.
Hutchingame Growth Capital Corporation v Independent Electricity System Operator (Ontario)	Does the automatic termination of a contract, triggered by bankruptcy, violate stays of proceedings in insolvency? Does such an automatic termination provision violate the common law "anti-deprivation rule"?	The Court of Appeal for Ontario dismissed the appeal on July 2, 2020, confirming: • that the automatic termination of a contract, triggered by the bankruptcy of a counter-party to such contract does not, by itself, violate the stay of proceedings in such counter-party's insolvency proceedings; and • that the automatic termination provision did not violate the "anti-deprivation rule" as the termination of such contract removed no value from the reach of the debtor's creditors, in part because it was an executory contract, the termination of which eliminated the debtor's opportunity to perform, but did not necessarily deprive the debtor's creditors of value. Leave to appeal to the Supreme Court of Canada was dismissed on January 21, 2021.
Yukon (Government of) v Yukon Zinc Corporation (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: • 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 filed on May 3, 2021.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
12178711 Canada Inc v Wilks Brothers, LLC (Alberta)	How is the solvency test under section 192(3) of the CBCA to be applied? Were the actions of the dissident noteholders unfairly characterized in the court's determination that the plan was fair and reasonable?	The Court of Appeal of Alberta dismissed the appeal on December 1, 2020, confirming inter alia that: • A company may satisfy the insolvency test under section 192(3) of the CBCA so long as the company will be solvent at the point in time of implementation of the arrangement and for a reasonable time thereafter; and • Although not determinative of the issue on appeal, a court may find that a shareholder is acting for an improper purpose, in which case its votes may be disregarded or discounted in the analysis of the fairness of the transaction. Leave to appeal to the Supreme Court of Canada was dismissed on May 27, 2021.
Petrowest Corporation v Peace River Hydro Partners (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 an 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.
Arrangement relatif a Nemaska Lithium Inc. (Quebec)	Does a court have the jurisdiction to issue a reverse vesting order (a vesting order pursuant to which the shares of an insolvent entity are sold to a purchaser free and clear of creditor claims and unwanted assets) in contested proceedings?	On November 11, 2020, the Court of Appeal of Quebec dismissed the application for leave to appeal, confirming that a court has the jurisdiction to issue a contested reverse vesting order. Leave to appeal to the Supreme Court of Canada was dismissed on April 29, 2021.
Great North Data Ltd. (Re) (Newfoundland and Labrador)	May counsel to a receiver of a bankrupt estate include in its taxed accounts a non-itemized administration charge calculated as a percentage of the total legal fees billed where such fee was included in the contract between the law firm and the receiver?	On December 8, 2020, the Supreme Court of Newfoundland and Labrador dismissed the appeal of a taxing master's decision to disallow the administration charge. As the charge reflected an arbitrary percentage, it was not a properly chargeable disbursement, confirming that such percentage based fees for legal services will likely be disallowed by taxing masters in bankruptcy proceedings. As of August 1, 2021, leave to appeal to the Court of Appeal of Newfoundland and Labrador had not been filed.
Wiebe v Weinrich Contracting Ltd (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?	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. 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. Leave to appeal this decision was granted by the Alberta Court of Appeal on June 23, 2021.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
Bellatrix Exploration Ltd (Re) (Alberta)	Does the exception to the debtor's right to disclaim an eligible financial contract under the CCAA create an obligation for the debtor to continue to perform the eligible financial contract throughout the insolvency proceeding? Does non performance of an uneconomic contract by a CCAA debtor constitute bad faith under section 18.6 of the CCAA?	The Court of Queen's Bench of Alberta held on December 22, 2020, the following: • The exception to the debtor's right to disclaim an eligible financial contract does not require a debtor to continue to perform the eligible financial contract while under CCAA protection and the net termination values resulting from the termination of such contract are subject to the stay of proceedings; and • Non performance of an uneconomic contract by a CCAA debtor does not constitute bad faith. An application for leave to appeal this decision was dismissed by the Court of Appeal of Alberta on March 5, 2021. As of August 1, 2021, leave to appeal to the Supreme Court of Canada had not been filed.
DGDP-BC Holdings Ltd. v Third Eye Capital Corporation, PricewaterhouseCoopers (Alberta)	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?	On June 17, 2021, the Alberta Court of Appeal dismissed the two appeals in this matter, confirming that: • 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.
Re Laurentian University of Sudbury (Ontario)	Should a sealing order granted in a CCAA proceeding be overturned where questions about the sealed information filed in support of the application and interests under s. 2(d) of the *Charter* are at play?	On March 31, 2021, the Court of Appeal for Ontario dismissed the application for leave to appeal. The dismissal was based, *inter alia*, on the Court finding that the CCAA judge weighed the deleterious effect of the sealing order and properly exercised his discretion in granting the sealing order. While the matters raised presented some novel and interesting questions, the urgency of the matter also weighed against granting leave to appeal. As of August 1, 2021, leave to appeal to the Supreme Court of Canada had not been filed.
Re Laurentian University of Sudbury (Ontario)	Should a court uphold the disclaimer of a contract under the CCAA where such disclaimer will result in the insolvency of the counterparty thereto?	On June 23, 2021, the Court of Appeal for Ontario dismissed the application for leave to appeal, confirming that a court may allow the disclaimer of a contract despite such disclaimer causing the insolvency of the counterparty thereto where such disclaimer is, inter alia, central to the debtor's restructuring. While the proposed appeal was of significance to the action, this factor alone was not a sufficient basis upon which to grant leave as the proposed appeal was not prima facie meritorious, not of significance to the practice, and would unduly hinder the progress of the action. In addition, the court held that the DIP lender was entitled to include the relevant disclaimer as a condition to the provision of additional DIP financing. The DIP lender was not required to be cross-examined before the court in respect of the terms of the DIP financing.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
Arrangement relatif a Consultants SM inc. (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 arising due to the fraudulent acts of the debtor against post-filing amounts owing from the public entity to the debtor for services actually provided?	On March 17, 2020 the Court of Appeal of Quebec allowed the appeal in part, but largely upheld the decision of the lower court, confirming that compensation cannot be used to set-off a debt arising prior to the insolvency filing against a debt arising after such filing, even if the pre-filing debt is a result of fraudulent actions of the debtor. The Supreme Court of Canada granted leave to appeal the decision of the Court of Appeal of Quebec on October 29, 2020. The hearing at the Supreme Court of Canada was held on May 20, 2021. Judgment was reserved and has yet to be released.
Nolet v AG (Quebec)	Can tax credits be pro-rated such that the pre-insolvency filing portion is set off against pre-insolvency filing debt?	This matter has yet to be heard. The Canadian Association of Insolvency and Restructuring Professionals filed an intervention in this matter which was granted on June 25, 2021.
Re In the Matter of the Bankruptcy of Sanaa Ismail Abed Ali (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 timing of the appeal has not been set.
Re John Trevor Eyton (Ontario)	Whether a claim that is statute barred under the *Limitations Act* can be a provable claim in bankruptcy?	On May 19, 2021 the Ontario Superior Court of Justice dismissed the appeal of a master's decision, confirming that while a statute-barred claim continues to exist, it is not a provable claim in bankruptcy as it is not a claim to which the bankrupt is subject. The Canadian Association of Insolvency and Restructuring Professionals was denied intervener status in this proceeding.
Servites de Marie, Les Servites de Marie de Quebec and Collège Servite (Quebec)	When will a first-day initial order under the *Companies' Creditors Arrangement Act* on an *ex parte* basis be granted?	The Superior Court of Quebec refused to allow an application for an initial order to proceed on an ex parte basis, inter alia, as there was no urgency, and the only significant debts appeared to relate to an ongoing class action against the applicants related to persons who are alleged to have been sexually abused by members of the applicant's congregation. As a result, the court required counsel to the class action plaintiffs be served with the application. On May 13, 2021, the Superior Court of Quebec dismissed the application for an initial order in part because the applicants had little chance of successfully restructuring as the class action plaintiffs contested the application and their support of any eventual plan was required pursuant to section 19(2)(b)(i) of the CCAA. Such section requires plans to be voted for by creditors with claims that relate to awards of damages in respect of sexual assault before they can be effective against them. As of August 1, 2021, leave to appeal to the Court of Appeal of Quebec had not been filed.