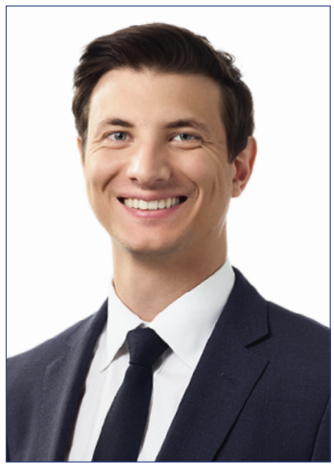

Trending Decisions

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

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*. Leave to appeal to the Supreme Court of Canada was granted on March 26, 2020. The hearing was held on December 1, 2020. The decision was reserved and has yet to be released. The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals are interveners in this matter.
Callidus Capital Corporation v. 9354-9186 Quebec Inc. [Bluberi Gaming Technologies Inc.] (Quebec)	Can a debtor whose sole remaining asset is a litigation claim seek court approval to obtain litigation financing to pursue the litigation, or does such course of action itself constitute a plan which should be submitted to and subject to the vote of creditors? Can a court bar a creditor from voting on a plan of arrangement?	The Supreme Court of Canada heard the appeal on January 23, 2020. On the same day, in a unanimous decision, the Supreme Court of Canada allowed the appeal, overturning the decision of the Court of Appeal of Quebec. Written reasons were released on May 8, 2020. The Supreme Court of Canada held that pursuant to section 11 of the CCAA, the supervising judge in CCAA proceedings has broad discretionary authority that will only be interfered with if the supervising judge erred in principle or exercised their discretion unreasonably. As a result of the broad discretion granted to the supervising judge, he or she has jurisdiction to: • bar a creditor from voting on a plan of arrangement if that creditor is acting for an improper purpose (in this case, a secured creditor attempting to strategically value its security to acquire control over the outcome of the vote on the plan of arrangement was held to be an improper purpose); and

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
(continued from previous page)		• to approve third party litigation funding as interim financing in insolvency proceedings. Such litigation financings do not, by definition, constitute a plan of arrangement (the Supreme Court of Canada did not find that the specific financing agreement in this case constituted a plan). As of December 22, 2020, while this case has been cited on numerous occasions in relation to the discretion to be afforded to supervising judges, the above-noted creditor voting principle has received favourable judicial commentary on one occasion and the other principle has yet to receive judicial commentary. The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals were interveners in 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. The date for the appeal of the substantive issues has not been set.
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 judicial review hearing took place on November 18, 2019. The decision was reserved and has yet to be released.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
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 Queen's Bench of Alberta, on August 15, 2019, found that PwC, as trustee, could pursue its claim as against Perpetual Energy Inc., but dismissed PwC's claim against the CEO of Perpetual Energy Inc. In a decision released on September 24, 2020, the Court of Queen's Bench of Alberta granted costs in favour of the CEO at 85%. The trustee in bankruptcy was directly liable for such cost award. Notice of appeal of the decision to allow PwC to pursue its claim against Perpetual Energy Inc. was filed by Perpetual Energy Inc. as of right to the Court of Appeal of Alberta on August 23, 2019. The hearing was held on December 10, 2020. There have been multiple ancillary decisions released in these proceedings, but as of December 22, 2020, a decision on the substantive issues has yet to be released.
Capital Steel Inc v Chandos Construction Ltd (Alberta)	Is a provision in a construction contract which imposes monetary consequences on a subcontractor's insolvency enforceable in bankruptcy?	On January 29, 2019, the Court of Appeal of Alberta reversed a chambers decision, finding the provision unenforceable in bankruptcy, as it acts to deprive creditors of value otherwise available to them and effectively directs value to an unsecured creditor. On October 2, 2020, in an eight-to-one decision, the Supreme Court of Canada dismissed the appeal, confirming the decision of the Court of Appeal of Alberta. The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals were interveners in this matter.
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 Ontario Superior Court of Justice held that a landlord may only draw down on a letter of credit in an amount equal to three months' accelerated rent following disclaimer of the lease by a trustee in bankruptcy. Notice of appeal was filed with the Court of Appeal for Ontario on November 1, 2019.
1732427 Ontario Inc. v 1787930 Ontario Inc. (Ontario)	Is a pre-authorized debit payment paid to a supplier after a debtor has filed a notice of intention to file a proposal under the BIA an exercise of a creditor's remedy and thus prohibited by the statutorily mandated stay of proceedings?	The Court of Appeal for Ontario allowed the appeal on December 3, 2019, finding that the motion judge erred in not considering whether the payment was related to a bona fide agreement with a key supplier to pay past debts, which are permitted payments under the BIA. The Court of Appeal for Ontario sent the case back down to the motion judge to make a finding of fact on this issue. As of December 22, 2020, no decision has been released on the substantive issues, as returned to the motion

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 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 filed on November 12, 2020. The Insolvency Institute of Canada was an intervener in this matter at the Court of Appeal of Quebec.
Forjay Management Ltd. v 625536 B.C. Ltd. (British Columbia)	Are advances made by priority mortgage holders in excess of the face amount of such mortgages secured? If secured, do such advances enjoy the same priority as the face amounts where a second-ranking mortgage has been registered prior to the advances being made? How much latitude does a judge have to alter the commercial terms of a loan agreement which has been found to charge a criminal rate of interest?	The Court of Appeal for British Columbia allowed the appeal in part on February 27, 2020, finding that: • advances in excess of the principal of a mortgage are secured where the underlying mortgage document contemplates the securitization of such advances; • where a subordinated mortgagee has not provided written notice of the registration of its mortgage to the prior mortgagee, additional amounts advanced by the prior mortgagee in excess of the face value of the mortgage enjoy the same priority as the face amount (the written notice requirement is specific to a British Columbia statute); and • where a criminal rate of interest has been found a judge may void the contract, strike out a term or terms, or read down the interest rate to 60%, but not some combination thereof. Leave to appeal to the Supreme Court of Canada was dismissed on October 1, 2020.
Urbancorp Cumberland 2 GP Inc. (Re) (Ontario)	Is subsection 9(1) of the *Construction Lien Act*, which provides for a trust over sale proceeds of property in favour of unpaid contractors, effective in a CCAA proceeding?	The Court of Appeal for Ontario allowed the appeal on March 11, 2020, finding that a trust created by subsection 9(1) of the CLA is effective in a CCAA sales process, unless it is displaced due to conflict with a specific priority created under the CCAA. As no specific CCAA priority displaced the contractor's trust claim, it was found to be effective in establishing a trust over the sale proceeds received by the monitor on behalf of the owners of the real property sold. As of December 22, 2020, no application for leave to appeal to the Supreme Court of Canada has been filed.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
9323-7055 Quebec Inc. (Aquadis International Inc.) (Quebec)	Can a plan of arrangement authorize a monitor to exercise the rights of creditors to initiate legal proceedings against third parties on behalf of creditors of the debtor?	The Court of Appeal of Quebec dismissed the appeal on May 21, 2020, confirming that a plan of arrangement can authorize a monitor to exercise the rights of creditors to initiate legal proceedings against third parties on behalf of creditors of the debtor. Important to the decision was that the creditors voted unanimously in favour of allowing the monitor to exercise their rights on their behalf and that the creditors' rights against the third parties in the supply chain could not be exercised otherwise as they were stayed by the stay of proceedings. As of December 22, 2020, no application for leave to appeal to the Supreme Court of Canada has been filed.
Curriculum Services Canada (Re) (Ontario)	Can a landlord claim as an unsecured creditor for the disclaimer of its lease, calculated in accordance with its contractual rights under the lease?	The Court of Appeal for Ontario allowed the appeal in part on April 27, 2020, confirming that a landlord is only authorized to claim the unrecovered balance of its preferred claim for three months' accelerated rent as an unsecured creditor in the bankruptcy of its tenant and is not entitled to claim as an unsecured creditor for other contractual damages relating to the unexpired term of the lease. As of December 22, 2020, no application for leave to appeal to the Supreme Court of Canada has been filed.
Toronto-Dominion Bank v Young (Quebec)	Does a motion for forced surrender and taking in payment – a purely hypothecary remedy - brought against a debtor who is not the original debtor constitute a separate and independent remedy, or does it depend on the continued existence of the proceeding against the original debtor?	The Supreme Court of Canada dismissed the appeal on November 7, 2019 with reasons to follow. The Supreme Court of Canada's reasons were released on June 19, 2020 and in one line confirmed the decision of the Court of Appeal of Quebec, that a motion for a hypothecary remedy brought against a debtor who is not the original debtor depends on the continued existence of the proceeding against the original debtor. Upon the extinguishment of the claim against the original debtor, by expiration of limitation period or otherwise, the hypothecary remedy sought against the subsequent party is similarly extinguished.
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. An application for leave to appeal to the Supreme Court of Canada was filed on September 30, 2020 and responding materials were filed on November 13, 2020.

CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
Yukon (Government of) v Yukon Zinc Corporation (Yukon)	Is a notice of intention to make a proposal in bankruptcy filed extra-jurisdictionally the day before the hearing to appoint a receiver effective in staying the in-province receivership proceedings? 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?	In three separate decisions, the Supreme Court of Yukon held the following: • In a decision released on August 7, 2019, that the stay of proceedings in the extra-provincial proceedings was to be lifted and the bankruptcy proceedings initiated by the debtor moved in-province. The receiver was subsequently appointed. • In a decision released on May 26, 2020, that a Court-Appointed Receiver does, in the context of an urgent continuation of care and maintenance and environmental remediation, have the authority to partially disclaim an equipment lease. • In a decision released on May 26, 2020, that the obligation to post security for potential future remediation costs is not a provable claim in bankruptcy and that the government claim associated with remediating environmental damage is provable in bankruptcy only after the government entity has actually incurred costs of remediation. Such claim is secured, on a first priority basis, against the real property affected by the environmental damage and any contiguous property related thereto, including the mineral claims associated therewith. Notice of appeal to the Court of Appeal of Yukon was filed in respect of all of the above-noted cases on June 5, 2020. The hearing occurred on November 17 and 18, 2020. A decision has yet to be released.
Teliphone Corp. v Ernst & Young (British Columbia)	What is the standard of review in appeals of monitors' decisions with respect to determining proofs of claim?	The Court of Appeal for British Columbia dismissed the appeal on December 27, 2019 confirming that the standard of appeal of monitors' decisions with respect to determining proofs of claim is correctness for issues of extricable questions of law and the lesser, deferential standard of "palpable and overriding error" for matters of fact or mixed fact and law. Leave to appeal to the Supreme Court of Canada was dismissed on November 5, 2020.
All Canadian Investment Corporation (Re) (British Columbia)	Can a plan of arrangement under the CCAA include a provision that all creditors shall be paid post-filing interest at the 5% interest rate provided for under the BIA?	The Supreme Court of British Columbia held, on November 3, 2020, that CCAA plans of arrangement can include post-filing interest in exceptional circumstances, which can include where the creditors will be paid in full under the plan and would receive such post-filing interest in a bankruptcy of the debtor. As of December 22, 2020, leave to appeal to the British Columbia Court of Appeal has not been filed.

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 creditor 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. We understand leave to appeal to the Supreme Court of Canada will be filed in this matter, but as of December 22, 2020, a leave application has yet to be reported.
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 clauses are of no force or effect. As of December 22, 2020, leave to appeal to the Supreme Court of Canada has not been filed.
Arrangement relatif à 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. An application for leave to appeal the decision of the Court of Appeal of Quebec was filed with the Supreme Court of Canada on December 11, 2020.